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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 26-1994
October 3, 1994**

INQUIRY RE: A Request for Access to a Record of the British Columbia Hydro and Power Authority

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written and oral inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on September 27, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arises out of a request by the applicant, the Office & Technical Employees' Union (OTEU), Local 378, for access to selected portions (that the public body withheld) from a contract between the public body (British Columbia Hydro and Power Authority -- B.C. Hydro) and the third party (Westech Information Systems Inc.).

2. Documentation of the inquiry process

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a two-page statement of facts (the Portfolio Officer's fact report), which was accepted by all parties.

On March 1, 1994 the applicant requested a copy of a September 30, 1991 contract entered into between B.C. Hydro and Westech. The public body received this request on March 2, 1994. On March 8, 1994 the public body sent a notice to the third party pursuant to section 23 of the Act asking for its views regarding the disclosure of the contract. On March 16, 1994, the third party advised the public body that it objected to the release of the contract in its entirety. The public body then disclosed a severed version of the contract to the applicant on May 4, 1994. The public body applied section 21(1) of the Act to justify withholding portions of the contract from the applicant.

On May 16, 1994 the Office of the Information and Privacy Commissioner received a request from the applicant for a review of the public body's decision to sever the contract. The 90-day investigation period under section 56(6) of the Act ran from May 16, 1994 to August 15, 1994. However, all three parties agreed in writing prior to the close of business on August 15, 1994 to "stop the clock" to permit preparation of written arguments and to prepare for the oral hearing on September 27, 1994. The clock was "restarted" on September 27, 1994.

During the 90-day investigation period, the public body brought forth arguments in support of applying section 17(1) of the Act to some of the withheld portions of the contract. Negotiations between the parties during mediation resulted in all-party agreement to submit only some of the severed portions from the contract to me for review.

The following severed portions are under review in this inquiry. Where possible, I have provided a general description of the subject of each severance to make the list more meaningful to outside readers of this order:

Page 2, article 1.01(d) (definition of "average rate")

Page 5, article 1.01(n) to (q) inclusive (four definitions)

Page 8, article 2.03(b) (re. "transition")

Page 10, article 3.06(b)(i) (re. "office space and furniture")

Page 11, article 3.06(b)(ii) (re. "office space and furniture")

Page 12, article 4.01 (opening words) and article 4.01(a) (re. "rates")

Page 13, articles 4.02 and 4.04 (re. "effective date" and "unit costing")

Page 16, article 6.03 (re. "productivity billing adjustment")

Pages 17 and 18, articles 6.04(a), 6.04(b) and 7.01(a) to 7.01(d) inclusive (re. "shortage of work" and "minimum hours")

Page 19, articles 7.02 and 7.03 (re. "minimum revenue" and "revenue deficiency")

Page 20, article 7.03 (re. "revenue deficiency" and "actual hours includes others")

Pages 21 and 22, article 7.06 (re. "monthly adjustment")

Page 25, article 9.08 (re. "insurance")

Schedule C: the deleted information after “Effective _____” on three pages (but not the “Resource Rates” in columns)

Schedule D: 17 December 1990 letter (all deleted information)

On August 24, 1994 the Office of the Information and Privacy Commissioner gave notice to the parties of the oral and written hearing to be held on September 27, 1994. The hearing focused on the public body’s application of sections 17(1) and 21(1) of the Act to the contract. On September 15, 1994 the parties submitted their initial written arguments to the Office of the Information and Privacy Commissioner. The third party submitted a written affidavit from its President and Chief Executive Officer. The Office of the Commissioner then exchanged the submissions and the affidavit amongst the parties. On September 21, 1994 two of the parties submitted rebuttal arguments in response to the initial submissions. The rebuttal submissions were also exchanged by the Office of the Commissioner amongst the parties. The OTEU did not submit a rebuttal argument.

The applicant was represented by Mick Maguire, Executive Director of the OTEU, Local 378. Mr. Maguire could not appear at the hearing in person because of travel difficulties, so arrangements were made for him to participate via long-distance telephone and speaker-phone. The public body was represented by David Avren, a Barrister and Solicitor with B.C. Hydro, Karen McDonald, Freedom of Information Administrator at B.C. Hydro, and John Ashurst, the Manager of Corporate Information Systems at B.C. Hydro at the time the contract was negotiated. The third party was represented by Geoffrey Plant, a Barrister and Solicitor with the Vancouver law firm of Russell & DuMoulin, and Bob Steele, President and Chief Executive Officer of Westech.

During the hearing, an in camera session was held to permit close scrutiny of some of the severed portions of the contract. The applicant’s telephone connection to the hearing room was disconnected, and then the President and Chief Executive Officer of the third party gave testimony under oath. After the conclusion of the in camera session, the applicant’s telephone connection was re-established, and I provided the applicant with a general description of the brief session from which he had been excluded.

3. The record in dispute

The record in dispute is a September 30, 1991 contract between B.C. Hydro and Westech for the sale of certain services to B.C. Hydro, including the provision of computer system development functions, client user support functions, system maintenance and information system consulting services. The agreement includes the rates that Westech is obliged to charge B.C. Hydro for the entire ten-year period of the agreement.

4. Issue under review in the inquiry

The issue to be decided in this inquiry is whether the applicant is entitled to receive the information in the severed portions of the contract.

Under section 57(1) of the Act, where an applicant is refused access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the severed information.

5. The Freedom of Information and Protection of Privacy Act

All three parties discussed the applicability of sections 17(1) and 21(1) of the Act to the information in dispute. The relevant portions of sections 17(1) and 21(1) read:

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.

....

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

6. The applicant's case

The OTEU is of the opinion that neither section 17(1) nor 21(1) of the Act applies to the severed information, since it is neither of a proprietary nor a confidential nature. Given the size and importance of B.C. Hydro as a Crown corporation, the size of its labour force, its economic importance, and its virtual monopoly position over the generation and distribution of electricity in this province, the OTEU argues that “it would seem implausible that some scrutiny of its non-tendered activities would be inappropriate ... we believe that all contracts and financial transactions should be a matter of public record particularly where the tendering process has not occurred.” The applicant believes that only disclosure of Westech’s resources rates, which it is not seeking, might jeopardize the ability of Westech to compete in the market.

7. The public body's case

B.C. Hydro argued with respect to section 21(1) of the Act that the severances in dispute meet all parts of the three-part test in that section. According to B.C. Hydro, their release would reveal commercial and financial information of Westech, since they include “billing rates, insurance coverage, productivity measurements, minimum hours and other information that would allow Westech’s competitors to calculate its financial status and prepare the type of offer necessary to underbid Westech.” The information in dispute was also explicitly supplied in confidence by Westech, which negotiated a confidentiality clause that restrains B.C. Hydro from disclosing information it obtains from Westech.

With respect to the third part of the test under section 21(1)(c), B.C. Hydro argued that disclosure “can reasonably be expected to harm Westech’s competitive and negotiating position and result in undue financial loss to it.” Its competitors would acquire the knowledge to under-bid Westech on contracts put out for tender by B.C. Hydro or by other third parties; “other competitors of Westech will attempt to extract similar productivity requirements from Westech once they discover the terms supplied by Westech to B.C. Hydro under the Agreement[;]” and the release of the information on minimum hours would affect Westech’s competitive position and allow competitors to calculate the basis of its financial statements.

B.C. Hydro further argued that it would be harmed by the disclosure of the severed information, since there is a reasonable expectation that similar information would not be disclosed to it in future by similar service providers.

Under sections 17(1)(d) and (e) of the Act, B.C. Hydro argued that disclosure of the information could reasonably be expected to harm its financial or economic interests and result in undue financial loss to Westech. Disclosure would also reveal information about

negotiations carried on by B.C. Hydro; this is especially relevant in the highly competitive software maintenance and development business trades.

8. The third party's case

B.C. Hydro and Westech agreed with the statements and assertions in their respective submissions and adopted and relied on each other's submissions with respect to the harm that would occur if the severed portions of the contract were to be released.

Westech made essentially the same arguments as B.C. Hydro with respect to its meeting the tests in section 21(1) of the Act. In particular, "[m]uch of the Severed Information was developed and provided by Westech and was not negotiated." Westech quoted the two reciprocal confidentiality clauses affecting the parties to the agreement. Moreover, "[a]ny information obtained by Westech's competitors of Westech's financial position, overhead, business practices or cost structure can give Westech's competitors the edge they need to freeze Westech out of the software maintenance development market place."

According to the third party, disclosure of the severed information could "reasonably be expected to interfere significantly with the negotiating position of Westech, both in negotiations with prospective customers and in negotiations with the applicant, the O.T.E.U." Westech is currently negotiating with this union, which represents a high proportion of its employees.

Westech submitted in oral argument that its admittedly peculiar, unique agreement with B.C. Hydro "effectively determines its pricing structure for its major customer on an ongoing basis." Because it cannot change the rules in the agreement, Westech argues that confidentiality about the details is "essential to the viability of the enterprise."

9. Discussion

The affidavit of the President of Westech provides background information on the establishment of Westech. Prior to 1989, the business now conducted by Westech was an internal division of B.C. Hydro. In March 1989 the business was transferred to Westech, which was a separate company from B.C. Hydro although still owned by B.C. Hydro. Westech continued to provide B.C. Hydro with its current software information systems. In connection with the transfer of this business to Westech, Westech purchased or leased certain assets from B.C. Hydro.

In August 1990 B.C. Hydro put Westech up for sale. In September 1991 after unsuccessful attempts to find a buyer on the open market, the management and employees of Westech purchased B.C. Hydro's interest in the company. In oral testimony, the President of Westech testified that many of the unique concepts in the present contract were found in earlier documents between B.C. Hydro and Westech.

Because of my unequivocal support for the original decision of the public body and what I perceive as the weakness of the applicant's case, I have given only a brief summary of the cases presented by the various parties. I fully agree with the submissions of B.C. Hydro and Westech that the severed information meets the three-part test in sections 21(1)(a), (b) and (c) of the Act: it is financial and commercial information; it was explicitly supplied to the public body by the third party in confidence; and its disclosure would harm the interests of both Westech and B.C. Hydro. Under sections 17(1)(d) and (e) of the Act, I further accept B.C. Hydro's argument that disclosure of the information could reasonably be expected to harm its financial or economic interests and result in undue financial loss to Westech. Disclosure would also reveal information about negotiations carried on by it.

The definition of "supplied in confidence"

The public body and the third party raised the issue of the definition of "supplied in confidence," a phrase found in section 21(1)(b) of the Act. This phrase forms the second part of the three-part test for the protection of third-party business information. Their concern arises from the restrictive scope applied by the Ontario Information and Privacy Commissioner based on a similar provision in the Ontario *Freedom of Information and Protection of Privacy Act*, section 17(1).

In a series of orders, the Ontario Information and Privacy Commissioner reviewed the applicability of the third-party business information exception (section 21(1) in the British Columbia legislation):

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution [public body in B.C.], the information must be the same as that originally provided by the affected person. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been 'supplied' for the purposes of section 17(1) of the Act. [Ministry of Environment and Energy, Ontario Order P-609, page 2, January 12, 1994]

...the information contained in these records was the result of negotiations between the institution and the affected parties and does not consist of information 'supplied' by the affected parties to the institution. In addition, I cannot conclude that disclosure of the records would permit the drawing of accurate inferences about information actually supplied to the institution by the affected parties, and, therefore, the institution and affected parties have failed to satisfy the second part of the section 17(1) test. [Re:

Stadium Corporation of Ontario Limited, Ontario Order P-263, page 17, January 24, 1992]

It has been established that information which is the result of contractual negotiations between a governmental institution and an affected person, does not qualify as information which has been ‘supplied’, regardless of whether this information may have been treated confidentially.... [Ministry of Natural Resources, Ontario Order P-385, page 3, December 18, 1992]

In general, I find the Ontario interpretation of “supplied in confidence” provides a reasonable basis for application in British Columbia. However, I also agree with B.C. Hydro and Westech that a strict application of this interpretation could produce results that were not intended by the legislators. Information in a negotiated contract may in fact have been “supplied in confidence” by a third party in some cases. I cite two examples, although this is not an exhaustive list:

1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and
2. Where disclosure of the information in the contract would permit an applicant to make an “accurate inference” of sensitive third-party business information that would not in itself be disclosed under the Act.

The “accurate inference” test extends the definition of “supplied” to include information where disclosure of the seemingly innocuous information would allow the OTEU to see into the financial and commercial affairs of Westech in ways that are precluded by the wording of section 21(1) of the Act. See Order No. 8-1994 at page 10 (Ministry of Employment and Investment and the Office of the Premier, May 26, 1994); Order No. 9-1994 at page 5 (Ministry of Finance and Corporate Relations, May 26, 1994); and Order No. 22-1994 at pages 5 and 13 (Workers’ Compensation Board of British Columbia, September 1, 1994) for my previous discussions of “accurate inferences.”

I accept the submissions of B.C. Hydro and Westech in the present instance and find that the information severed under section 21(1) has been “supplied in confidence.” The written contract records the terms on which Westech agreed to supply services to B.C. Hydro. There was ample evidence introduced at the inquiry to show that the severed information was supplied by Westech to B.C. Hydro in confidence, both because the information remains relatively unchanged from that originally provided by Westech, and because disclosure of the information would allow the applicant to draw accurate inferences about sensitive third-party business information and business concepts that fall within the protection of section 21(1).

Evidence on the implications of disclosure

The witness for B.C. Hydro testified at the inquiry that although the corporation was not required by law to accept the lowest bid in tendered work on consulting services,

the disclosure of the severed information would make it easier for other suppliers to underbid Westech by just enough to win a contract. The survival of Westech as a viable entity is especially important for B.C. Hydro, since the third party maintains B.C. Hydro's older computer systems.

Various pieces of information presented to the inquiry have persuaded me to make the order that appears below. I found the affidavit and testimony of the President of Westech especially persuasive because he explained, for each piece of information in dispute (and listed above in section 2), the implications of disclosure.

1. The President of Westech testified that 90 percent of the contract with B.C. Hydro is unique. Counsel for Westech suggested that only clause 14 in the contract could be described as "boiler-plate." It is thus a very unusual contract in almost every way, including provisions that: require Westech to continue to bid on B.C. Hydro business; guarantee it a minimum number of hours of B.C. Hydro work; and include a detailed productivity arrangement. As well, the contract is not project specific.
2. The President of Westech testified that the OTEU represents between 180 and 190 of the 240 employees of Westech. The severed information would reveal the planned annual rate increases of categories of Westech employees. Labour negotiations between B.C. Hydro and Westech are ongoing. Mr. Maguire testified that he was acting under instructions of the President of the OTEU, not his membership.
3. The President of Westech testified that competitors of Westech have won B.C. Hydro business in recent years. However, servicing B.C. Hydro comprises a very high percentage of Westech's business. (Affidavit, page 3, paragraph 7)
4. The President of Westech testified that the company is owned by 112 shareholders, all but one of whom are employees of Westech.
5. The President of Westech testified that "...the purchasers of Westech sought and received confidential assurances from B.C. Hydro that any contract between the two parties would be built around a conceptual framework of guaranteed minimum revenues in order to permit Westech to compete in the information systems industry." (Affidavit, page 2, paragraph 5)
6. The President of Westech testified that "[m]uch of the financial and costing structure of the Agreement was developed and supplied by Westech to B.C. Hydro. This financial and costing structure included the concepts of Minimum Revenue, Minimum Hours, Average Rates, Productivity Billing Adjustments and Revenue Deficiency." (Affidavit, page 2, paragraph 6)
7. Despite its agreement with B.C. Hydro on predetermined rate structures, Westech has no guarantee of work on particular B.C. Hydro projects and is thus not fully insulated from market pressures in a highly competitive environment. Although Westech does have

a guarantee of minimum hours of work from B.C. Hydro, these are not compensated at normal rates and there are penalty provisions which affect both parties.

In Order No. 1-1994 at page 8 (Ministry of Finance and Corporate Relations and the Public Service Employee Relations Commission, January 11, 1994) and Order No. 19-1994 at page 5 (BC Transit, July 26, 1994), I set forth my views that there must be a “reasonable expectation” or reasonable probability of the harm specified in section 17 arising from the disclosure of the severed information. As well, public bodies must provide “detailed and convincing evidence” of a clear and direct connection to the reasonable probability of the occurrence of that harm. I have applied this threshold of harm to the information in the current case and find that the severed information excepted under section 17 meets this test. This threshold also applies to sections 21(1)(c)(i) and (iii).

I note in passing that the OTEU has already received most of the 1991 agreement as a result of B.C. Hydro’s initial disclosure and the additional disclosures that occurred during mediation.

The “public interest” argument

During the hearing, I raised the issue of whether the public interest would benefit from the disclosure of the information severed from the contract. Counsel for Westech made an effective counter-reply to this argument by noting that the public interest in disclosure of the information is more than offset by the public interest in the protection of sensitive third-party business information. I agree with Westech’s submission and find that the interests protected by section 21(1) of the Act override any argument in favour of disclosure in the public interest in this case.

10. Order

Under section 58(2)(b) of the Act, I confirm the decision of B.C. Hydro not to disclose the severed information in dispute to the applicant.

David H. Flaherty
Commissioner

October 3, 1994