

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 206-1997
December 18, 1997**

INQUIRY RE: A decision of BC Hydro to refuse access to the Key Principles Agreement between Island Cogeneration Project Inc. and BC Hydro

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on November 14, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the decision of BC Hydro not to disclose the Key Principles Agreement (KPA) between Island Cogeneration Project Inc. (ICPI) and BC Hydro. The Applicant is the BC Public Interest Advocacy Centre.

2. Documentation of the inquiry process

On July 4, 1997 the applicant requested copies of the KPA between BC Hydro and the ICPI partners who are planning to build the Island Cogeneration Plant at Elk Falls. On August 11, 1997 BC Hydro wrote to the applicant informing it that the records would not be disclosed.

The applicant requested a review of this decision on September 8, 1997.

3. Issue under review and the burden of proof

The primary issue under review is BC Hydro's application of sections 17 and 21 of the Act to the disclosure of the KPA.

Section 57 of the Act establishes the burden of proof in this matter. Section 57(1) of the Act states that at an inquiry into a decision to refuse an applicant access to all or part of the record, it is up the head of the public body to prove that the applicant has no right of access to the record or part.

To the extent the applicant relies on section 25 of the Act to say that BC Hydro is required to disclose the information in the public interest, the burden of proof is on the applicant to demonstrate that section 25 applies to the information. (See Order No. 165-1997, May 20, 1997; and Order No. 182-1997, August 13, 1997)

The sections of the Act referred to by the parties to this inquiry are:

Disclosure harmful to the financial or economic interests of a public body

- 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:
- (a) trade secrets of a public body or the government of British Columbia;
 - (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
 - ...
 - (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.
 -

Disclosure harmful to business interests of a third party

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
 - (i) trade secrets of a third party, or

- (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
-
- (3) Subsections (1) and (2) do not apply if
 - (a) the third party consents to the disclosure, or
 -

Information must be disclosed if in the public interest

- 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.

The definition of “trade secret” in Schedule 1 of the Act is also relevant to this inquiry.

“trade secret” means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that:

- (a) is used, or may be used, in business or for any commercial advantage,
- (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
- (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
- (d) the disclosure of which would result in harm or improper benefit.

4. The records in dispute

The Key Principles Agreement is between BC Hydro and the Island Cogeneration Project Inc. to develop electricity at Elk Falls. BC Hydro and ICPI have not yet entered into a formal Electricity Purchase Agreement, which is currently being negotiated in accordance with the principles set out in the KPA.

5. Procedural Objections

The applicant has objected to B.C. Hydro's inclusion in its reply submission of an additional affidavit by a particular individual and a document concerning the *Environmental Assessment Act*, claiming that this is in violation of my procedural rules for an inquiry, which discourage including new facts or raising new issues at that stage of proceedings. I accept BC Hydro's response that its reply submission "addressed only matters in the argument and evidence of the Applicant which could not reasonably have been anticipated by the Public Body when it filed its initial submission." That seems to me to be a reasonable practice in order to place all relevant facts and issues before me for any inquiry.

6. BC Public Interest Advocacy Centre's case

The BC Public Interest Advocacy Centre (PIAC) is a public interest law office, which represents the interests in particular of low-income residential consumers on behalf of a coalition of client groups. (Affidavit of Richard J. Gathercole, paragraph 2) In particular, it represents clients before the British Columbia Utilities Commission, which has certain oversight of BC Hydro: "The reason for this participation is that decisions made concerning the policies of energy utilities and the rates charged by those utilities have a real and substantial impact on ratepayers, both in monetary terms and also with respect to the quality of their lives." (Affidavit of Richard J. Gathercole, paragraph 3)

The Public Interest Advocacy Centre is seeking a copy of the KPA between BC Hydro and the private sector partners building a natural gas-fired electrical generating plant near Campbell River on Vancouver Island.

I have reviewed below the detailed submissions of the Public Interest Advocacy Centre on the application of specific provisions of the Act.

7. BC Hydro's case

BC Hydro emphasizes that ICPI and itself have had “a mutual interest in preserving the confidentiality” of the KPA, because disclosure “could reasonably be expected to cause serious financial and economic harm to each of them, and / or could reasonably be expected to give their respective competitors or others (including potential contracting parties) an undue financial gain.” (Submission of BC Hydro, paragraphs 2.1 and 2.2)

I have reviewed below BC Hydro's submissions on the detailed application of sections 17 and 21 to the records in dispute. BC Hydro essentially asks me to confirm its decision to withhold the KPA from the applicant. (Submission of BC Hydro, paragraph 7)

8. Island Cogeneration Project Inc.'s Case

ICPI's position is that no portion of the KPA should be disclosed. It relies on section 21 of the Act to prevent disclosure, in particular subsections 21(1)(a)(i) and (ii); 21(1)(b); and 21(1)(c)(i) and (iii). In each instance, ICPI provided me with sufficient detail to establish the relevance of the subsections it is relying on with respect to the detailed contents of the KPA. Since I find the arguments persuasive, and they very much reflect similar arguments by BC Hydro that I have presented below, I have not reproduced the detailed submissions of ICPI in the text of this Order. (See Submission of ICPI, pp. 1-4, and the *in camera* affidavit of Kenneth W. Spinner)

9. Discussion

Section 17: Disclosure harmful to the financial or economic interests of a public body

The Public Interest Advocacy Centre submits that BC Hydro's monopoly of the wholesale purchase, transmission, and retail sale of electricity within its service area in this province “makes it difficult to see how its financial or economic interests could be harmed.” (Submission of the Public Interest Advocacy Centre, paragraph 7; see also paragraph 9) The Public Interest Advocacy Centre further suggests that the decision for BC Hydro to purchase electricity directly from the Island Cogeneration project was made by the government, not BC Hydro, and for political considerations rather than financial or economic ones: “If so, then this further suggests that financial and economic interests are simply peripheral to BC Hydro's decisions concerning the Island Cogeneration Project and are therefore unlikely to be affected.” (Submission of the Public Interest Advocacy Centre, paragraph 11)

I have also reviewed detailed submissions from the Public Interest Advocacy Centre to the effect that sections 17(1)(a), (d), and (e), and probably (b) as well, are not applicable in this inquiry. (Reply submission of the Public Interest Advocacy Centre, paragraphs 4 to 16) I respectfully disagree with these submissions, based largely on the interpretations of section 17 that I have set out in previous Orders and on the submissions of BC Hydro and ICPI that I have discussed in this Order. (See for example Order No. 15-1994, July 7, 1994; Order No. 26-1994, October 3, 1994)

BC Hydro relies on sections 17(1)(a), (b), (d), and (e) to prevent the disclosure of the KPA. (Submission of BC Hydro, paragraph 2.3) Its supporting evidence is in the form of open and *in camera* affidavits from its Manager, Power Acquisition Department, and its Special Engineer in the same department. The *in camera* affidavits “provide further sensitive details of harm to BC Hydro that cannot be revealed publicly without harming BC Hydro.” (Submission of BC Hydro, paragraphs 3.1 and 3.2, and tabs 1, 2, 0, and 00) BC Hydro emphasizes that section 17 only requires it to meet a standard of a “reasonable expectation of harm to its interests, or to the government’s interests....” (See submission of BC Hydro, paragraphs 5.2 to 5.5) I agree with this standard.

BC Hydro submits that the KPA contains sensitive pricing information and other sensitive information of a financial, economic, and commercial nature. This information was disclosed by the parties to the KPA on the understanding that it would be kept confidential. (Submission of BC Hydro, paragraphs 5.7 and 5.8) Hydro argues, among other things, that disclosure of the KPA could have the following negative consequences for it:

- Prejudice Hydro’s existing relationship with ICPI and seriously harm its ongoing negotiations with other third parties for either the sale or purchase of electricity. (Submission of BC Hydro, paragraph 5.8)
- Result in undue financial loss to BC Hydro and undue financial gain to its potential contracting parties and competitors. (Submission of BC Hydro, paragraph 5.9, 5.24, and 5.25)
- Disclose to competitors the gas/electric conversion involved on this particular project and thus allow them to undercut BC Hydro’s bids for the sale of electricity. (Submission of BC Hydro, paragraph 5.11)
- Disclose inferentially the contents of the negotiations carried on by or for BC Hydro. (Submission of BC Hydro, paragraph 5.15)
- Disclose “trade secrets” of BC Hydro as defined in Schedule 1 of the Act. (Submission of BC Hydro, paragraph 5.18)
- Disclose “financial,” “commercial,” and “technical” information of BC Hydro that has “monetary value.” (Submission of BC Hydro, paragraph 5.20)
- Disclose the key terms of the ongoing negotiations between BC Hydro and ICPI concerning the KPA. (Submission of BC Hydro, paragraphs 5.26 to 5.30)

Based on my careful review of the submissions of all parties to this inquiry, I find that BC Hydro has met its burden of proof with respect to the application of section 17 to

the contents of the KPA. In particular, I am satisfied that Hydro was justified in refusing to disclose the KPA to the Public Interest Advocacy Centre on the basis that such disclosure could reasonably be expected to harm its financial or economic interests. I am also satisfied that the KPA contains information described in section 17(1)(a), (b), (d), and (e) of the Act.

Section 21: Disclosure harmful to business interests of a third party

The Public Interest Advocacy Centre submits that “since it is impossible to see how Island Cogeneration’s proposed sale to BC Hydro could be seen as putting it in a situation where it is competing with other companies, it is difficult to understand how its business interests could be harmed by disclosure of the KPA.” (Submission of the Public Interest Advocacy Centre, paragraph 8)

In order to meet the three-part test set out in section 21(1) of the Act, BC Hydro submits that:

- The KPA is a trade secret of BC Hydro and ICPI. (Submission of BC Hydro, paragraphs 6.5 and 6.6)
- The KPA “unquestionably” contains commercial, financial, or technical information shared by BC Hydro and ICPI under conditions of confidentiality. (Submission of BC Hydro, paragraph 6.7)
- BC Hydro and ICPI explicitly agreed that all negotiations and the terms of the KPA would be kept confidential. (Submission of BC Hydro, paragraph 6.11 to 6.19)
- Disclosure of the KPA could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of ICPI. (Submission of BC Hydro, paragraphs 6.20 to 6.27)
- Disclosure of the KPA could reasonably be expected to result in similar information no longer being supplied to BC Hydro, when it is in the public interest that similar information continue to be supplied. (Submission of BC Hydro, paragraphs 6.28 to 6.31)
- Disclosure of the KPA could reasonably be expected to result in undue financial loss or gain to ICPI and the competitors of ICPI and BC Hydro. (Submission of BC Hydro, paragraphs 6.32 to 6.36)

As I noted above, the arguments of ICPI on the basis of section 21 mirror the positions taken by BC Hydro.

Having carefully reviewed the submissions of the applicant, BC Hydro, ICPI, as well as all of the detailed and comprehensive Affidavit evidence, I find that BC Hydro has also met its burden of proof under section 21(1) of the Act. I find that BC Hydro was required to refuse to disclose the KPA to the applicant because it constitutes information that: (1) would reveal both the trade secrets of a third party (ICPI) and commercial, financial or technical information of ICPI; (2) was explicitly supplied in confidence; and (3) if disclosed could reasonably be expected to both significantly harm ICPI’s

competitive position or interfere with its negotiating position, and result in undue financial loss or gain to ICPI or its competitors.

Section 25: Information must be disclosed if in the public interest

The Public Interest Advocacy Centre submits that BC Hydro should have disclosed the records in dispute on the basis of section 25(1)(b) of the Act.

The Public Interest Advocacy Centre submits that BC Hydro was obliged to consider the applicability of section 25(1)(b). Since it has allegedly failed to do so, the Public Interest Advocacy Centre invites me to exercise my supervisory authority under section 42(2)(a) of the Act. (Submission of the Public Interest Advocacy Centre, paragraphs 14 and 15)

The Public Interest Advocacy Centre’s detailed submission is that the Island Cogeneration project “will affect the substantive public interests in quality of life, local air quality, respiratory health, global climate change, employment levels, economic benefits and security.”

Since the choice between the Island Cogeneration Project and alternative resources has ramifications for the environment, health, employment, electricity rates and economic development, this scrutiny is of the greatest importance. (Submission of the Public Interest Advocacy Centre, paragraphs 18 and 21)

Furthermore, the project will “significantly affect the rates paid by energy consumers in British Columbia.” (Submission of the Public Interest Advocacy Centre, paragraph 19)

The Public Interest Advocacy Centre emphasizes the urgency of disclosure in this case because 1) initial submissions to the proceedings under the *Environmental Assessment Act* are due no later than January 2, 1998; 2) the current hearings into the Southern Crossing natural gas pipeline, “given that the need for that pipeline might be obviated if the operation of the island Cogeneration Plant were to facilitate certain efficiencies;” and 3) “the risk that BC Hydro may enter into a final agreement without any opportunity for public scrutiny of the Key Principles Agreement.” (Submission of the Public Interest Advocacy Centre, paragraph 22)

BC Hydro argues that the burden of proof is on the applicant with respect to the application of section 25 and that the Public Interest Advocacy Centre has not satisfied this burden. (Reply submission of BC Hydro, paragraphs 3.2 and 3.3) I agree. The pressure for disclosure in this inquiry does not meet the test of being “clearly (i.e. unmistakably) in the public interest” that I set out in Order No. 165-1997. (Reply Submission of BC Hydro, paragraphs 3.4 and 3.5) I find that the facts in this inquiry do not meet the test of urgency and vital communication required by section 25.

Review of the Records in Dispute

For purposes of my review of the KPA, I have benefited from the very detailed explanations set out in the affidavits of BC Hydro in particular. (See affidavit of Kelly Lail, paragraphs 2.15 to 2.17; and especially the *in camera* affidavit of Kelly Lail, paragraphs, 2.14 to 2.67

The affidavits of Mr. Lail in particular have persuaded me that sections 17 and 21 of the Act justify and / or require, as the case may be, non-disclosure of the KPA to the applicant. The *in camera* affidavit of Gregg Moe contains additional persuasive reasons for non-disclosure of the record.

The applicant has recognized that my role is to scrutinize the various affidavits that it has not had access to, and to safeguard its interests. (Reply submission of the Public Interest Advocacy Centre, paragraph 1) I can assure it that I have done so in the course of balancing competing interests between the need for public scrutiny and the protection of legitimate corporate secrets. For example, BC Hydro and ICPI have “adequately” particularized the “undue” financial losses or gains that would result from disclosure of the KPA. (Reply submission of the Public Interest Advocacy Centre, paragraph 37)

10. Order

I find that BC Hydro is authorized by section 17 of the Act to withhold all of the information contained in the KPA. Under section 58(2)(b) of the Act, I confirm the decision of BC Hydro to refuse access to this information.

I also find that BC Hydro is required by section 21 of the Act to withhold all of the information contained in the KPA. Under section 58(2)(c) of the Act, I confirm the decision of BC Hydro to refuse access to this information.

I also find that BC Hydro has acted properly in refusing to apply section 25 of the Act pursuant to the applicant’s request. I make no order in this respect other than to note that the applicant has not satisfied me that the application of section 25 to the KPA is warranted under the Act.

David H. Flaherty
Commissioner

December 18, 1997