



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 03-25

BRITISH COLUMBIA HYDRO & POWER AUTHORITY

David Loukidelis, Information and Privacy Commissioner
June 19, 2003

Quicklaw Cite: [2003] B.C.I.P.C.D. No. 25
Document URL: <http://www.oipc.bc.ca/orders/Order03-25.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: The applicant requested records relating to BC Hydro's commitment to offset 50% of increased greenhouse gas emissions from new Vancouver Island gas-fired electricity generating plants. Sections 13 and 17 of the Act authorize BC Hydro to refuse to disclose information in the records.

Key Words: advice or recommendations – developed by or for a public body – financial or economic interests – reasonable expectation of harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1) & 17(1).

Authorities Considered: B.C.: Order No. 00-10, [2000] B.C.I.P.C.D. No. 11; Order No. 02-50, [2002] B.C.I.P.C.D. No. 51.

1.0 INTRODUCTION

[1] Sierra Legal Defence Fund (“Sierra”) requested access, under the *Freedom of Information and Protection of Privacy Act* (“Act”), to British Columbia Hydro & Power Authority (“BC Hydro”) records relating to BC Hydro's commitment to offset 50% of the increased greenhouse gas emissions from two new gas-fired electricity generating plants on Vancouver Island through the year 2010. Sierra's request was for all records regarding BC Hydro's “internal assessment and discussion of the commitment” to offset emissions and its “discussions, negotiations and/or communications with any third party, including private and public sector parties, regarding the same commitment.”

[2] BC Hydro disclosed a number of records in response, but refused to disclose information in some records, relying on ss. 13, 17 and 21 of the Act. BC Hydro also removed some information from records on the basis that the information fell outside the scope of Sierra's request.

[3] Sierra requested a review, under Part 5 of the Act, of BC Hydro's refusal to disclose information under ss. 13, 17 and 21. During mediation by this Office, BC Hydro disclosed further information but, because the matter did not settle, I held a written inquiry under Part 5 of the Act.

[4] During mediation, Sierra said it was no longer seeking access to information that BC Hydro had withheld under ss. 17 or 21, or both, found in pp. 9, 11-36, 40, 43 and 50-51. In addition, BC Hydro disclosed, as part of its initial submission, pp. 8, 37, 39, 44, 45, 46, 56, 57, 59, 61 and 64. As a result, relatively little information remains in dispute.

2.0 ISSUES

[5] The issue here is whether BC Hydro is authorized by s. 13 or s. 17 of the Act to refuse to disclose information. Section 57(1) of the Act provides that BC Hydro has the burden of proof.

[6] Although BC Hydro applied s. 21 in refusing to disclose information, it later withdrew its reliance on that section. (My review of the records in dispute did not identify any information that could be said to be information of or about a third party within the meaning of s. 21(1) of the Act.) At para. 2.5 of its initial submission, BC Hydro abandoned its reliance on s. 13(1) respecting information in pp. 44-57 and 61-64, but took the position that s. 17(1) applies to that same information. The discussion below therefore addresses BC Hydro's s. 17(1) arguments in relation to this information.

[7] Sierra's initial submission for the first time raised the adequacy of BC Hydro's search for records. This resulted in an amendment to the Portfolio Officer's Fact Report, but Sierra withdrew that issue in its reply submission. I therefore need not consider the adequacy of BC Hydro's search for records.

3.0 DISCUSSION

[8] **3.1 BC Hydro's Procedural Objection** – After the close of submissions, BC Hydro objected to Sierra's inclusion, in its reply submission, of copies of records that were disclosed to Sierra during mediation. BC Hydro referred to this Office's policies and procedures for inquiries, and the Notice of Written Inquiry, both of which indicate that parties should not include in their submissions "any records provided by any party related to the mediation process" without the written consent of the other party. BC Hydro took issue with what it described as "the procedural unfairness of introducing completely new records in the course of a reply submission" and asked that these records be removed "from consideration for the purposes of the hearing."

[9] The overall thrust of Sierra's response to BC Hydro's objection was that BC Hydro cannot define and limit the record of material before me in this inquiry, "to the point of excluding relevant and publicly released materials necessary to the applicant's case". Sierra argued that its submissions rely "in part on the context provided by the full copy of public records", including records disclosed to Sierra during mediation, and contended that the records are relevant and should be included in the material before me.

[10] More specifically, Sierra argued that, because BC Hydro had for the first time sought to apply s. 13(1) in relation to portions of a report entitled "Identification of Potential Greenhouse Gas Offset Projects", Sierra was entitled to respond to that position by arguing that those portions form part of a feasibility study or plan within the meaning of s. 13(2)(i) of the Act.

[11] Sierra further argued that BC Hydro's submission regarding the commercial sensitivity of price averages for greenhouse gas offsets could not be tested without permitting Sierra to rely on pp. 14 through 35 of the records "as demonstrating that the price average includes such a wide array of offset prices that the average itself does not disclose commercially useful information."

[12] In light of these submissions, I wrote to BC Hydro and said that its objection is not well-founded. It mischaracterizes matters to describe the records that BC Hydro disclosed during mediation as mediation-related records. The portion of this Office's policies and procedures on which BC Hydro relies is designed to prevent the non-consensual introduction of material disclosing communications among parties or this Office, or both, that are related to mediation under s. 55 of the Act. Records that respond to an access request that are disclosed during the mediation process are not mediation-related records within the meaning of this Office's policies. To ignore the records BC Hydro disclosed to Sierra simply because they were disclosed during mediation would inappropriately exclude possibly relevant material.

[13] Accordingly, I have considered the entire record of material, including as submitted by Sierra with its reply submission. Before doing so, I gave BC Hydro an opportunity to respond to Sierra's reply submissions, based on the entire record of material, and BC Hydro did so.

[14] **3.2 Background to this Case** – I do not propose to go into all of the detailed background to this case. Details are set out in the affidavit of John Duffy, BC Hydro's Senior Environmental Coordinator. It suffices to say that BC Hydro has publicly committed to offset, through 2010, 50% of the increase in greenhouse gas emissions from two new gas-fired electricity-generating plants on Vancouver Island. To meet this commitment, BC Hydro must identify and purchase offsets, *i.e.*, reductions in greenhouse gas emissions from other sources that compensate for the increased emissions from the Vancouver Island plants.

[15] As a Senior Environmental Coordinator, Duffy deposed, he is responsible for the day-to-day management of BC Hydro's offset acquisition program, for overseeing the collection and preparation of market research, for the formulation and provision of

advice, for recommendations to BC Hydro decision-makers regarding that program and for participating in procurement negotiations respecting offset acquisition (para. 2.1). He also deposed that, having directly engaged in negotiation for offset procurement agreements, he is familiar with information that BC Hydro has in the past communicated to sellers of offsets and is familiar with the positions taken by sellers in other transactions (para. 2.3). Duffy also deposed that he is familiar with the “business of the offset market in British Columbia, across Canada, and internationally – including BC Hydro’s competitors in those markets” (para. 2.5).

[16] As part of its corporate sustainability program, BC Hydro maintains a website on which it publishes information regarding greenhouse gas offsets and sustainability. This website includes information that BC Hydro says could be used, together with information Sierra still seeks, to deduce or derive information that could reasonably be expected to harm BC Hydro’s interests within the meaning of s. 17(1).

[17] **3.3 Advice or Recommendations** – Section 13(1) of the Act authorizes a public body to refuse to disclose “advice or recommendations” developed by or for the public body. BC Hydro argues that s. 13(1) applies to portions of sixteen pages of records. It submits that the information it has withheld under s. 13(1) is either itself advice or recommendations or, if disclosed, would permit accurate inferences to be drawn that would reveal advice or recommendations protected under that section. Sierra contends that the information BC Hydro seeks to withhold under s. 13(1) is not advice or recommendations because it does not express any advice or recommendation on future courses of action.

[18] I will deal with the merits of BC Hydro’s s. 13(1) case on a record-by-record basis. It has withheld a percentage figure and one phrase from p. 1 on the basis that this information would, if disclosed, reveal advice and recommendations that BC Hydro staff developed for BC Hydro’s Corporate Environmental Steering Committee (“CESC”), a committee of senior management that establishes corporate policy on environmental matters, including greenhouse gas emissions. The position taken by BC Hydro is supported by John Duffy’s *in camera* affidavit. I find that s. 13(1) applies to this information.

[19] BC Hydro argues that figures it has withheld from p. 4 constitute advice that its employees developed for the CESC. Citing John Duffy’s public and *in camera* affidavits, BC Hydro says these figures “show cost options that staff recommended to CESC” (para. 7.2, initial submission). I find that the dollar figures, percentages and other information BC Hydro has withheld from p. 4 are protected by s. 13(1).

[20] BC Hydro contends that disclosure of the one line and one word that it has withheld from p. 10 would reveal advice that was developed for BC Hydro’s greenhouse gas offset acquisition team and was also passed on to the CESC. It says the same thing about the two paragraphs it has withheld from p. 11 of the records. I am persuaded that disclosure of this information on pp. 10 and 11 would reveal advice or recommendations developed by or for BC Hydro. Similarly, I am persuaded that the figures withheld from

p. 58 consist of advice and recommendations made to BC Hydro (specifically, the CESC) by BC Hydro's outside consultants.

[21] Last, the roughly three lines that BC Hydro has withheld from p. 60, under the heading "Option – Public Panel", reveal a recommendation made by a BC Hydro employee to a member of BC Hydro's greenhouse gas emissions team. I accept that this information would, if disclosed, both reveal that recommendation directly and, in the case of the accompanying information respecting the background for the recommendation, would indirectly reveal that same recommendation.

[22] For the above reasons, I find that s. 13(1) authorizes BC Hydro to refuse to disclose the information it has withheld under that section in the pages noted above. I am satisfied on the material before me that BC Hydro considered the exercise of its discretion under s. 13(1).

[23] **3.4 Harm to BC Hydro's Financial Interests** – BC Hydro has, in a number of instances, withheld information under s. 17(1) of the Act, the relevant portions of which read as follows:

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: ...

(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.

[24] A number of previous decisions have set out the principles to be applied in s. 17(1) cases. I have in this case applied the principles discussed in Order No. 02-50, [2002] B.C.I.P.C.D No. 51, including as to the standard of proof that BC Hydro must meet. I have also, as in previous similar cases, approached the evidence on the basis that, for the purposes of s. 17(1), disclosure of information to Sierra must be treated as disclosure to the world.

[25] BC Hydro argues that disclosure of the information to which it has applied s. 17(1)(d) could reasonably be expected to confer an undue financial gain on its competitors. By competitors, BC Hydro means third parties from which it purchases greenhouse gas offset agreements and also third parties with which BC Hydro competes for the acquisition of such offsets (para. 9.6, initial submission). BC Hydro also refers to the prospect of undue financial gain to third parties with which it negotiates offset-related service agreements, although it does not really elaborate on this category of feared harm.

[26] BC Hydro contends that offset sellers could reasonably be expected to derive a financial benefit because disclosure would give them information about BC Hydro's negotiating criteria and objectives (para. 9.8, initial submission). Although BC Hydro acknowledges that it has the ability to walk away from any negotiations where offers are unfavourable, it says the difference between a price resulting from a negotiation not tainted by disclosure of the disputed information and the price that would result from a negotiation after such disclosure would nonetheless be a monetary gain to the seller (para. 9.9, initial submission). As an example, BC Hydro contends, supported by John Duffy's *in camera* affidavit, a seller who knows BC Hydro is "motivated to acquire offsets with a certain profile" will know that BC Hydro "may be vulnerable to pressure for a higher price" (para. 9.8, initial submission).

[27] As for third parties competing with BC Hydro for offset purchases, BC Hydro submits that another offset buyer in possession of the disputed information could be expected to tailor its own offers to offset-sellers in order to beat BC Hydro's offer. The result would be, BC Hydro contends, a resulting monetary gain for BC Hydro's competitor in the form of "acquisition of assets that are more attractive economically/financially than the offsets that remain available for purchase" (para. 9.1, initial submission).

[28] These gains to sellers or competitors for offset acquisitions would, BC Hydro contends, be "undue" within the meaning of s. 17(1)(d). BC Hydro refers to the discussion in Order 00-10, [2000] B.C.I.P.C.D. No. 11, of what is meant by the word "undue" and argues as follows, at para. 9.15 of its initial submission:

B.C. Hydro submits that, in a market situation (i.e. in the circumstances at hand) it would be unfair for market players to have access to valuable, carefully-developed confidential business information belonging to another market player – particularly negotiating criteria and forward price analysis. In this sense, the gain of offset sellers or B.C. Hydro's competitors would be undue.

[29] In its reply submission, BC Hydro reiterates that, if an offset seller knows whether or not its product is "priced under the average", it will "bargain accordingly with resultant harm to B.C. Hydro and gain to vendors, service providers, and/or Hydro's competitors" (para. 4.2, reply submission). In an *in camera* reply submission, BC Hydro advances grounds to rebut Sierra's submission that the withheld figures are only averages and therefore cannot reasonably be expected to harm BC Hydro's financial interests under s. 17(1)(d) or (e).

[30] Sierra argues that s. 17(1) does not apply because the disputed information would provide no advantage to BC Hydro competitors in the offset market, whether they are sellers or purchasers of offsets. It says the disputed information is "too general to create a reasonable apprehension of harm from disclosure" (para. 22, initial submission) and is not sufficiently specific as to how much BC Hydro may be willing "to allocate to any given offset transaction" over the contemplated 10 year period. In its reply submission,

Sierra repeats its contention that BC Hydro's evidence, and the grounds it advances under s. 17(1), are speculative and do not meet the required evidentiary threshold.

[31] I have carefully considered both Sierra's arguments respecting what it says is the general nature of the information to which BC Hydro has applied s. 17(1) and Sierra's arguments as to why BC Hydro has not met its burden of proof. In light of both the public and *in camera* evidence and submissions before me, however, I am persuaded, in relation to each item of information withheld under s. 17(1), that BC Hydro is authorized to withhold the specific figures and associated information under s. 17(1).

[32] As BC Hydro argues in its initial submission, it has acquired valuable market intelligence in the form of "cost and value projections, portfolio profiling, selection criteria and negotiating criteria". The disclosure of this information would, in my view, confer an undue gain on other market participants within the meaning of s. 17(1)(e). I have, in deciding that the resulting gain would be "undue", considered the relevant discussion in Order 00-10.

[33] I am similarly persuaded – having considered the specific items of information in issue, the evidence as to BC Hydro's activities in this area and the information that is already publicly available – that disclosure of the disputed information could reasonably be expected to harm BC Hydro's interests in negotiations respecting its possible acquisition of offsets. I am persuaded that s. 17(1)(e) applies to the information to which BC Hydro has applied that exception. I am satisfied on the material before me that BC Hydro considered the exercise of its discretion under s. 17(1).

4.0 CONCLUSION

[34] For the above reasons, under s. 58 of the Act, I confirm that s. 13(1) and s. 17(1) authorize BC Hydro to refuse to disclose the information it has withheld under those sections.

June 19, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia