



OFFICE OF THE
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Order F18-51

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Chelsea Lott
Adjudicator

December 11, 2018

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Summary: A journalist requested access to records about the Site C project. BC Hydro disclosed some records but refused to disclose information under ss. 14 (solicitor client privilege), 17 (harm to financial or economic interests), 19(1)(a) (threat to health or safety) and 22 (harm to personal privacy). The adjudicator found that ss. 17 applied to some of the information, but ss. 19(1)(a) and 22 did not apply to any information. It was not necessary to consider whether s. 14 applied. BC Hydro was ordered to give the applicant access to some of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 17(1)(d), 17(1)(e), 17(1)(f), 19(1)(a), 22 and 22(4)(e).

INTRODUCTION

[1] A journalist (applicant) made five access requests for records relating to the Site C Clean Energy Project (Site C) from the British Columbia Hydro and Power Authority (BC Hydro).¹ Three of those access requests are the subject of this inquiry.² In response to the three requests, BC Hydro disclosed all of some records but refused to disclose information in others, relying on ss. 14 (solicitor client privilege), 17 (harm to financial or economic interests), 21(1) (harm to business interests of third party) and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

¹ OIPC files F17-71518, F17-71520, F17-71524, F17-71525, and F17-71526.

² OIPC files F17-71518, F17-71520, and F17-71526. Files F17-71524 and F17-71525 are on hold pending the outcome of this order.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review BC Hydro's refusal to disclose information. During mediation, BC Hydro disclosed further information previously withheld under s. 17, and withdrew its reliance on s. 21. The rest of the issues did not settle and the applicant requested an inquiry. After the registrar issued the notice of inquiry, BC Hydro released further information to the applicant.

Procedural issue – late addition of exception

[3] In its initial submission, BC Hydro argued for the first time that s. 19(1)(a) (harm to individual or public safety) applies to employee names. Section 19(1)(a) was not listed in the notice of inquiry or any of the three investigator's fact reports. Parties are required to obtain the Commissioner's consent to add new issues at the inquiry stage.³ However, BC Hydro did not explain in its submissions why it waited until its initial inquiry submission to raise s. 19(1)(a), or why it should be permitted to do so. In such circumstances, BC Hydro would not ordinarily be permitted to rely on a new discretionary exception at this late stage.

[4] I provided BC Hydro the opportunity to apply to add s. 19(1)(a) as an issue for inquiry.⁴ I did so because, as mentioned in the introduction, the applicant and BC Hydro have five files with the OIPC related to the Site C project. In one of those files, which is in abeyance pending the outcome of this order, the investigator's fact report states that s. 19(1)(a) is in issue in relation to the names of all personnel involved in the Site C project.⁵ BC Hydro explains that it was an oversight on its behalf that it did not also apply s. 19(1)(a) to the same information as it appears in the records before me. The applicant says that I should not consider BC Hydro's submissions on the addition of s. 19(1)(a).

[5] Recognizing that public bodies cannot be held to a standard of perfection, BC Hydro is permitted in this instance to argue that s. 19(1)(a) applies to the names of BC Hydro personnel. This is primarily because s. 19(1)(a) was raised at the mediation stage, in the context of several related files. BC Hydro has applied s. 19(1)(a) to the same information in different records and I accept its explanation that it was merely an oversight that it was not applied to the records at issue in this inquiry. In addition, the applicant has provided fulsome submissions and evidence in response to BC Hydro's s. 19(1)(a) argument. Lastly, I am hopeful that my decision on s. 19(1)(a) will lead the parties to a resolution on the same issues in the outstanding inquiries.

³ Order F18-31, 2018 BCIPC 34 at para. 3.

⁴ Letter dated September 18, 2018.

⁵ OIPC file F17-71525.

ISSUES

[6] The issues to be decided are as follows:

1. Is BC Hydro authorized to refuse access to the disputed information under ss. 14, 17 and 19(1)(a) of FIPPA?
2. Is BC Hydro required to refuse to disclose the disputed information under s. 22 of FIPPA?

[7] Section 57 governs the burden of proof. BC Hydro has the burden of proving that ss. 14, 17 and 19(1)(a) apply. The applicant has the burden of proving that disclosure of third party personal information in the records would not be an unreasonable invasion of personal privacy under s. 22.

DISCUSSION

Background

[8] BC Hydro is a provincial crown corporation continued under the *Hydro and Power Authority Act*.⁶ BC Hydro is responsible for generating, purchasing, distributing and selling electricity in the province.⁷ Site C will be the third dam and hydroelectric generating station on the Peace River in northeast British Columbia.⁸

The records

[9] BC Hydro is withholding portions of the following records:

- Board of directors meeting materials for the period December 15, 2016 to May 29, 2017 (Board Materials).
- Two emails between BC Hydro and a contractor, the Peace River Hydro Partners, dated May 15, 2017 (Correspondence).
- Change order log from January 1, 2017 to June 22, 2017 (Change Order Log).

Section 17 – harm to financial or economic interests

[10] BC Hydro is refusing to disclose some information under s. 17(1), (d), (e) and (f). Section 17(1) requires BC Hydro to establish that disclosure of the

⁶ RSBC 1996, c 212.

⁷ Project Director Affidavit at para. 2.

⁸ *Ibid* at para. 6.

information could reasonably be expected to harm its financial or economic interests. Section 17(1) states:

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:

[11] Subsections 17(1)(a) to (f) are examples of information which may result in harm under s. 17(1). BC Hydro relies on subsections (d), (e) and (f) which include:

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia;

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[12] Past orders have held that even if information fits within subsections (a) to (f), a public body must also prove the harm described in the opening words of s. 17(1) i.e. harm to the financial or economic interests of the public body or the ability of the government to manage the economy.⁹ Therefore, the overriding question is whether disclosure of the information could reasonably be expected to harm the financial or economic interests of BC Hydro.

[13] The standard of proof under s. 17 is whether disclosure of the information could reasonably be expected to result in the specific harm. In order to meet this test, BC Hydro must provide evidence to prove that the likelihood of a particular harm resulting from disclosure of the disputed information is “well beyond” or “considerably above” a mere possibility. The test is contextual and depends on the seriousness of the possible consequences and the probability of the harm occurring.¹⁰ BC Hydro has claimed s. 17 over information in the Board Materials, Correspondence and the Change Log Order.

⁹ Order F08-22, 2008 CanLII 70316 at paras. 43–44; Order F10-39, 2010 CanLII 77325 at paras. 32–33., upheld on judicial review, but s. 17 not in issue: *British Columbia (Minister of Citizens’ Services) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

¹⁰ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para 94 citing *F.H. v. McDougall*, 2008 SCC 53, at para. 40.

Board Materials

[14] The Board Materials relate to four meetings between BC Hydro's management and its board of directors about the project status, procurement, and a request for contingency funds. The Board Materials consist of meeting agendas, minutes, briefing notes and power point slides. BC Hydro has produced 84 pages and withheld a small amount of information in 16 of those pages. I have grouped the withheld information in the Board Materials into four categories: (a) contingency figures (b) negotiations regarding tension crack (c) consultation with a First Nation and (d) evaluation of request for qualification responses.

a) Board Materials – contingency figures

[15] I will first consider the application of s. 17 to contingency figures in the Board Materials. Contingencies are financial reserves which may be drawn upon to deal with project delays and cost overruns. BC Hydro's board of directors controls a contingency fund for the Site C project, which as of December 2016 was \$1.0445 billion.¹¹ BC Hydro's management must request release of contingency funds from the board of directors in order to fund changes to the scope of the Site C project.

[16] The contingency fund is budgeted to different "work packages." Work packages represent one component of the bigger project. For example, the main civil works contract and construction of the generating station spillway are work packages. Contingencies are shifted between work packages for budgeting purposes from time to time.

[17] Information about the amount of the project's contingencies is withheld from a briefing note on the status of the Site C project as well as from meeting minutes, power point slides and a briefing note regarding a tension crack on the river bank.

[18] BC Hydro argues that disclosing contingency figures could harm its negotiations. It says the contingencies reveal how much BC Hydro could spend to resolve project related issues. BC Hydro submits that if its contingencies are disclosed, contractors would attempt to obtain the full amount of the contingency although the full amount may not be needed to resolve the changes to the project scope. BC Hydro says this would cause financial harm to BC Hydro as they may have otherwise been able to resolve changes to the project by spending less of the contingency.

[19] BC Hydro explains that it has a number of disputes with one contractor, Peace River Hydro Partners (Peace River), who was awarded the main civil works contract. BC Hydro says that it is currently negotiating a global settlement

¹¹ This information is disclosed at p. 52 of the records.

with Peace River. BC Hydro is concerned that Peace River might change its negotiation position if it learns the amount of contingency BC Hydro has set aside to address such disputes and that this could jeopardize the entire settlement process.

[20] BC Hydro draws parallels between this case and Order F10-34 in which the former Commissioner found information about how a public body quantified risk for a hospital construction project fell under s. 17.¹²

[21] The applicant says that BC Hydro has already settled its disputes with Peace River. The applicant cites a letter from BC Hydro to the BC Utilities Commissioner.¹³ According to the letter, BC Hydro has reached a memorandum of understanding with Peace River including scheduling changes, incentive payments and a settlement of past issues that arose prior to the May 31, 2018. The letter also states that the total potential cost of the agreement is \$325 million. The applicant reasons that as BC Hydro has resolved past disputes, there is no harm in the public knowing how the costs evolved to date. In reply, BC Hydro says that the settlement referred to by the applicant has not yet “closed.”¹⁴

[22] The applicant also makes a number of general arguments in relation to all of the information in dispute. He emphasizes the importance of transparency and accountability in large scale public/private contracts. He also cites a report on corruption in public procurement for the proposition that transparency in the procurement process helps to generate competition and increase public confidence in the government.¹⁵ The applicant also relies on *Toronto Star v AG Ontario*, a case concerning the constitutionality of sections of Ontario’s access to information legislation.¹⁶ In that case, the court commented that, “freedom of the press is only operational when the press has timely enough access to information to publish to an audience. Untimely disclosure that loses the audience is akin to no disclosure at all.”¹⁷

[23] I am satisfied that disclosure of most of the contingency figures could reasonably be expected to harm BC Hydro’s financial interests. In my view, contingency figures are comparable to an insurance company’s claims reserves. Insurance companies maintain financial reserves to cover potential liability for claims against an insurance policy.¹⁸ Past orders have found that insurance reserves for claims which have not settled, are subject to s. 17 because they

¹² 2010 BCIPC 50.

¹³ The applicant has not provided a copy of the letter, but BC Hydro does not dispute that it exists or the applicant’s characterization of its content.

¹⁴ BC Hydro reply submission at para. 4.

¹⁵ The applicant did not provide a copy of the article. His citation is ‘Corruption in Public Procurement: A Perennial Challenge’ by Glenn T Ware et al.

¹⁶ 2018 ONSC 2586.

¹⁷ *Ibid* at para. 96

¹⁸ Order 01-46, 2001 CanLII 21600 at para. 14.

reveal the insurance company's views on risk and disclosing them puts the insurer at a disadvantage in negotiations.¹⁹ In the same vein, BC Hydro would be at a disadvantage during negotiations if contractors knew how much BC Hydro had set aside to address unforeseen changes to the scope of the Site C project. I find that BC Hydro may rely on s. 17 to withhold most of its contingency figures in the Board Materials.

[24] However, s. 17 does not apply to the contingency figures in the Board Materials that reflect the amounts already spent. I am referring specifically to the figures for the amount of contingency used for the main civil works contract since the contract was awarded up to March 31, 2017.²⁰ These figures do not represent available contingency funds. BC Hydro provided no persuasive evidence or argument that the figures could be leveraged in any ongoing or future negotiations. As a result, I am not satisfied that their disclosure could reasonably be expected to harm BC Hydro financially or economically within the meaning of s. 17.

[25] Lastly, there is one instance in which BC Hydro has withheld the total remaining contingency balance for the project but disclosed it elsewhere in the same record.²¹ BC Hydro provides no explanation for the discrepancy. Regardless of the reason, I am not satisfied that disclosing the figure could reasonably be expected to cause any harm contemplated within s. 17 given it has already been disclosed.

b) Board Materials – negotiations regarding tension crack

[26] BC Hydro has withheld three passages in a briefing note about a tension crack in the left river bank that developed during construction of a road.²² The withheld information relates to Peace River and the status of a dispute regarding the tension crack, details of claims submitted for the tension crack and information which would reveal BC Hydro's internal position on the possible liability and cost of the tension crack.

[27] As discussed above, BC Hydro is negotiating a global settlement with Peace River. The applicant says that BC Hydro has in fact already settled its disputes with Peace River. The applicant cites a letter from BC Hydro to the BC Utilities Commissioner, which says that BC Hydro has reached a memorandum of understanding with Peace River. He reasons that therefore, disclosing information related to the negotiations would not jeopardize a settlement.

¹⁹ Order F18-04, 2018 BCIPC 4 at paras. 98–101; Order F06-19(1)(a), 2006 CanLII 37939 at para. 130.

²⁰ Page 83 of the records.

²¹ Page 80 of the records.

²² Page 79 of the records. BC Hydro has also applied s. 14 to some of this information. See p. 78 re cause of the crack.

[28] The applicant's argument mischaracterizes the nature of a memorandum of understanding, which is not usually a binding contract. *Black's Law Dictionary* defines a memorandum of understanding as, "A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract."²³ BC Hydro's assertion that it has not finalized a settlement with Peace River is consistent with this definition. The applicant has not provided a copy of the memorandum of understanding, and without further evidence, I am unable to conclude simply based on his assertion that it is a binding agreement resolving the dispute between BC Hydro and Peace River.

[29] I am satisfied that information which would reveal BC Hydro's internal views of liability may be withheld under s. 17. Disclosure of such information may jeopardize a settlement with Peace River if it is inconsistent with the position BC Hydro has been taking in negotiations. It may also result in Peace River changing its settlement demands. If the settlement falls apart, then BC Hydro may end up with a worse deal, which I accept is a financial harm within the meaning of s. 17.

[30] On the other hand, I am not persuaded that disclosing the status of a dispute, or details of claims submitted for the tension crack could reasonably be expected to cause financial or economic harm to BC Hydro. BC Hydro's argument about harm is premised on the opposing party gaining an advantage in negotiations to the financial detriment of BC Hydro. Peace River is obviously aware of this sort of information. It is not the type of information which Peace River could use in negotiations to the detriment of BC Hydro. BC Hydro has not adequately explained how disclosing such information could reasonably be expected to cause financial or economic harm to BC Hydro. Without further argument or evidence, I am not satisfied that s. 17 applies to this type of information.

c) Board Materials – consultation with First Nations

[31] BC Hydro has withheld the name of a First Nation and the status of negotiations with that First Nation.²⁴ BC Hydro's evidence is that it conducts negotiations with First Nations in confidence and does not release details to the public. BC Hydro advises that several First Nation owned business are contractors on Site C. It asserts that competition between First Nations for such work is highly competitive. BC Hydro is concerned that revealing aspects of the negotiations, "undermines the trust BC Hydro has built with First Nations and risks upsetting the negotiations themselves."²⁵ More generally, BC Hydro says

²³ *Black's Law Dictionary*, 10th ed. B Bryan a Gardner. St Paul Minn: Thompson Reuters, 2009, "memorandum of understanding". The definition refers to the definition of "letter of intent" which is another name for the same document.

²⁴ Page 48 of the records.

²⁵ Project Director Affidavit at para. 34.

that it views its discussions with First Nations as more profound than simply a negotiation as they are about relationship building.

[32] BC Hydro also argues that revealing the name of the First Nation it has withheld, and the status of its negotiations, may harm its relationships with other First Nations. It is concerned that other First Nations may object to the particular First Nation's involvement with BC Hydro.

[33] The applicant does not make any argument specific to this information.

[34] I accept that the withheld information is "about negotiations" within s. 17(1)(e), but I am not satisfied that its disclosure could reasonably be expected to cause financial or economic harm to BC Hydro. BC Hydro has not satisfactorily explained how merely disclosing that it is in negotiations with a particular First Nation could result in BC Hydro "paying more" for contracts with the other First Nations. The withheld information contains no details about the terms being negotiated, so this is not an instance where a different First Nation could insist on the same or better terms.

[35] I accept that BC Hydro is interested in maintaining good relations with First Nations. BC Hydro, as a crown agent, has constitutional duties towards First Nations and must frequently work with them. However, BC Hydro's general assertion that information must be kept confidential to foster business relationships does not satisfy the evidentiary requirements of s. 17. BC Hydro has not persuaded me that disclosing this particular information about negotiations with a First Nation could reasonably be expected to cause economic or financial harm within s. 17.

d) Board Materials – evaluation of request for qualification responses

[36] BC Hydro has withheld information about its evaluation of nine proponent's responses to a request for qualifications.

[37] BC Hydro commenced procurement of hydro-mechanical equipment for the Site C generating station and spillways by issuing a request for qualifications on October 19, 2016 (RFQ).²⁶ BC Hydro used a "technical credit" evaluation model to assess responses to the RFQ.²⁷ Technical credits were awarded for five categories: project management, design, fabrication, installation, and commissioning as well as a pass/fail for financial capacity.²⁸ BC Hydro withheld the names and rankings of the proponents, the total technical credits they earned and a breakdown of credits by category.²⁹

²⁶ Page 10 of the records.

²⁷ Project Director Affidavit at para. 8(c).

²⁸ Page 15 of the records.

²⁹ Page 15, 29 of the records.

[38] BC Hydro says that it never reveals the amount of technical credits awarded to proponents. BC Hydro's argues that if proponents became aware of the number of technical credits granted in the RFQ, or in any procurement process, "BC Hydro's ability to procure and negotiate future Site C and unrelated contracts will be compromised...."³⁰ BC Hydro "anticipates that it may use the same model for future highly complex projects."³¹ BC Hydro suggests that disclosing information pertaining to its evaluation processes would result in increased expense and undermine the quality of procured contracts.³²

[39] More specifically, BC Hydro argues that disclosing its evaluation would negatively impact the rigour of evaluation committees in future procurements. The evaluation committee was composed of a number of BC Hydro employees.³³ BC Hydro's Procurement Director says that members of evaluation committees do not want their evaluations disclosed because they "may negatively impact their career and relationships."³⁴ As a result, she suggests, evaluators may be less frank and the procurement process would become "longer, more expensive, and less valuable to BC Hydro."³⁵

[40] BC Hydro's argument does not persuade me that disclosing evaluations would impact any professional relationships or result in less candour in future evaluation committees. I can see from the records that the evaluations were based on a number of opinions and could not be attributed to any one evaluator. Moreover, the committee members were acting in their professional capacity and I assume they evaluated the responses objectively and in good faith. There is no indication otherwise. The proponents are themselves large sophisticated corporations. It is difficult to conceive that in such circumstances, the proponents would let a low score impact any professional relationships with committee members, especially given BC Hydro's monopoly over the electricity sector in British Columbia.

[41] BC Hydro argues that disclosure of bid evaluation information would cause some of the proponents to decide that it is not worthwhile to try and improve their scores for future BC Hydro competitions. BC Hydro suggests that proponents may also tailor future bids based on past scores. BC Hydro says that it benefits from proponents striving to obtain technical credits rather than merely tailoring or manipulating their bids to improve their scores. BC Hydro says that disclosing the technical credits would therefore result in lower quality bids which would be a financial or economic harm to BC Hydro.

³⁰ Project Director Affidavit at para. 37(a).

³¹ *Ibid* at para. 8(d).

³² *Ibid* at para. 37(d).

³³ Pages 14 and 26 of the records.

³⁴ *Ibid* at para. 37(b).

³⁵ *Ibid*.

[42] I am not satisfied that if a proponent knew how it scored and ranked in the RFQ that it could reasonably be expected to submit inferior future bids. The evaluation criteria for the RFQ was based on the past demonstrated capability and experience of the respondents in the different technical credit categories.³⁶ Past experience is not the type of criteria which companies can manipulate or tailor in response to an RFQ. They either have the demonstrated experience or they do not. Even assuming they could, if a proponent were to learn that it received low scores in a particular category, it is equally likely that the proponent would believe it is worthwhile strengthening that area for future procurement processes. This would only benefit BC Hydro by giving it a more qualified pool of proponents.

[43] More generally, the RFQ relates to a unique scope of work.³⁷ I accept that BC Hydro has ongoing procurement processes related to Site C, and it may in the future use the technical credit model, but I am not persuaded that the actual scope of work will be the same. As a result, the number of credits a proponent earned in response to the procurement in this case would not be a reliable predictor of the number of credits the same proponent would earn in response to procurement involving a different scope of work.

[44] In addition, BC Hydro's decision to award contracts is based on more than just a proponent's technical credit score. Obviously, bid prices would play a significant role in the overall assessment of future procurements. BC Hydro evidence demonstrates that it also makes other adjustments to the price and retains discretion to not accept the lowest bid. Thus, if a proponent learned its own or its competitor's technical credit scores it would not reveal how BC Hydro ultimately decided to award a contract.

[45] BC Hydro also asserts that disclosing information pertaining to its evaluation processes would result in increased expense and undermine the quality of procured contracts. However, the information in issue does not disclose BC Hydro's evaluation processes, i.e. how it awards technical credits. Rather, the information just reveals the number of technical credits each proponent earned. I am not persuaded that disclosing such information would increase the cost or quality of future contracts.

[46] BC Hydro refers to Order F17-10, in which a school district obtained a consultant's report before it commenced procurement for construction of a new school. The consultant's report was about the options, cost considerations, and risks for replacing the school. The adjudicator accepted that proponents might use the report to tailor their bids which would result in harm under s. 17.³⁸

³⁶ Page 15 and 32–35 of the records

³⁷ The scope of the Hydro-Mechanical Equipment contract is described at pp. 10–11 of the contract.

³⁸ 2017 BCIPC 11 at para. 21.

[47] A consultant's report is quite different than what is at issue here. An analogous case is Order F15-37, in which the adjudicator held that the scores awarded to proposals in response to a procurement were not subject to s. 17.³⁹ The adjudicator specifically rejected the same argument being made here by BC Hydro, namely that proponents could use their evaluations to tailor their bids in a way that could meaningfully impact future procurements.⁴⁰

[48] For these reasons, I find that BC Hydro has failed to establish that disclosing the RFQ evaluations could reasonably be expected to harm BC Hydro as contemplated by s. 17.

Change Order Log

[49] BC Hydro has withheld information in its Change Order Log, which it explains is a record of documents related to project changes and how each was resolved. For example, a "claim for change" document sets out changes requested by a contractor whereas a "contemplated change" document sets out changes requested by BC Hydro.⁴¹ BC Hydro explains that all such change related documents are recorded in the Change Order Log, which is its internal tracking document that shows the status of the various change documents.

[50] BC Hydro says that the Change Order Log summarizes its negotiating position on particular changes to the project. BC Hydro also says that the Change Order Log includes its internal commentary about "risks, positions, internal assessments, or information relating to third parties."⁴² BC Hydro further says that the Change Order Log contains financial contingencies with respect to possible changes. BC Hydro's evidence is that where negotiations have concluded, the information in the Change Order Log has been released to the applicant.⁴³

[51] BC Hydro argues that the comments and financial information contained in the Change Order Log, "reveal the flexibility that BC Hydro may have with respect to negotiating any resolution."⁴⁴ BC Hydro suggests that disclosure of the commentary would reveal aspects of its negotiation positions, and that if the contractor learned this information, it may "disrupt negotiations or cause the contractor to take a different position."⁴⁵ BC Hydro asserts that disclosure of the severed information may cause significant harm to its current negotiations and also future contract negotiations.

³⁹ 2015 BCIPC 40.

⁴⁰ *Ibid* at para. 101.

⁴¹ Project Director Affidavit at para. 9.

⁴² *Ibid* at para. 28.

⁴³ *Ibid* at para. 24.

⁴⁴ *Ibid* at para. 25.

⁴⁵ *Ibid* at para. 28.

[52] The applicant argues that disclosure of the Change Order Log would not cause any harm to BC Hydro “other than uncomfortable questions from the public about how public money is being spent or misspent on this project.”⁴⁶ The applicant relies on Order F17-45, which considered information, withheld under s. 21(1) (harm to business of third party) of FIPPA, in a change order log for construction of the SkyTrain.⁴⁷ The adjudicator held that disclosing the change log would not cause a reasonable expectation of harm to the contractor’s negotiating position, or undue financial loss or gain. Significantly in that case, construction had already been completed so there were no outstanding negotiations.

Analysis

[53] The Change Order Log is comprised of two tables. The first table is a single page with seven columns and 35 rows. For illustration, I have reproduced the header and the first row (which have been disclosed):

ID	Title	Change Level	Change Status	Decision Date	Work Package Adjustment (\$)	Modified
115	CN-00132 Moberly River Clearing Season 1	Work Package	Approved	2017-01- 06	5,6000,000.00	2017-02- 07 12:17

BC Hydro has disclosed the entirety of the table, except for the “Work Package Adjustment (\$)” amount in four instances.

[54] The second table is nine pages with 18 columns.⁴⁸ BC Hydro has withheld information on over 100 project changes in this table.

[55] I accept that some of the withheld information in these two tables would reveal BC Hydro’s internal position and/or commentary related to ongoing disputes, and that disclosure of such information could put BC Hydro at a disadvantage in negotiations.⁴⁹ In addition, the entries which would reveal BC Hydro’s assessment of the potential financial cost of project changes are, in effect, contingencies and so fall within s. 17 for the reasons discussed above. Lastly, some of the entries relate to claims BC Hydro anticipates that a contractor may make in the future. The disclosure of anticipated changes may encourage

⁴⁶ Applicant submissions at para. 16.

⁴⁷ 2017 BCIPC 50.

⁴⁸ The columns are: ID, Change Type, Status, Description, Proposed Value, Forecast Value, Contract Contingency Draw, Project Budget Draw, Project Contingency Draw, Committed Value, Change Directive Value, Notes, CC, Change Category, Framework Agreement, CO, CD and CFD.

⁴⁹ For example ID 803.

contractors to make a claim for a change they otherwise might not have made.⁵⁰ I accept that all of this information is properly withheld under s. 17.

[56] The remaining information in the Change Log Order may not be withheld under s. 17.

[57] Although BC Hydro says it only withheld information related to disputes still under negotiation, entries in the Change Order Log clearly show otherwise. Two changes are described in the record as being “approved,” which means that all necessary approvals have been obtained to effect the change.⁵¹ A number of the changes are described as having been “executed,” which means that both BC Hydro and the contractor have signed the change order.⁵² BC Hydro does not explain the discrepancy in the evidence. In the circumstances, I find that the project change information marked as “approved” or “executed” is not subject to further negotiation.⁵³ Therefore, BC Hydro’s argument about harm from disclosing information about this type of finalized change is not persuasive and I find that s. 17 does not apply to it.

[58] I also find that disclosing the following information in the Change Order Log could not reasonably be expected to cause financial or economic harm:

- Descriptions of the proposed or agreed upon changes to the project scope.⁵⁴
- Whether a “framework agreement” with the contractor exists.
- The numbers assigned to change orders, change directives or claims for changes.
- Information about BC Hydro’s internal operations.⁵⁵
- Notes that track what has happened or what needs to happen to finalize the change.
- Status of invoices.

[59] The above bullet list is information about changes to the project scope as well as the status of the changes. It is not about negotiations, financial risk or BC Hydro’s internal positions on disputes. BC Hydro provided no evidence that the

⁵⁰ Entries: 655, 684, 723, 734, 752, 753, 762, 802, 803, and 830.

⁵¹ October 3, 2018 letter from BC Hydro.

⁵² *Ibid.*

⁵³ My finding does not include the two changes on p. 88 described as “approved” relating to transferring contingency budget, changes described as ID numbers 131 and 140 as well as “executed” changes to move contingencies (ID 788, 796, 797).

⁵⁴ Excluding descriptions relating to contingency issues.

⁵⁵ Change described as ID number 886.

information would have value to a contractor involved in a dispute with BC Hydro. I am not persuaded that disclosure of such information could reasonably be expected to cause financial or economic harm under s. 17.

[60] Lastly, some of the notes in the Change Order Log record the parties' actual negotiations for changes which have not been finalized. For example, a contractor's offer to BC Hydro. This is information which is known to each negotiating party. As a result, BC Hydro's argument that its disclosure could be leveraged in its negotiations with this party has no merit. In addition, BC Hydro has not argued, nor is it apparent, how disclosing this particular information to contractors, other than the negotiating parties, would harm BC Hydro. I am not satisfied that this information may be withheld under s. 17.

Correspondence

[61] BC Hydro withheld information in its emails with Peace River, about a letter authored by Peace River's project director.⁵⁶ BC Hydro withheld some of what BC Hydro and Peace River said to each other about changes to the letter. BC Hydro's argument is that disclosure would reveal its internal position and harm negotiations with Peace River. The emails are communications between the parties. Obviously, both parties to the negotiations are aware of what they said to each other and the other's views about changes to the letter. I am not satisfied that disclosure of the information in the emails could reasonably be expected to cause harm as contemplated by s. 17.

Section 14 – solicitor client privilege

[62] BC Hydro applied s. 14 (solicitor client privilege) to one passage in the Board Materials. I have found that this information may be withheld under s. 17, therefore will not consider whether s. 14 also applies to it.

Section 19(1)(a) – harm to health or safety

[63] BC Hydro is using s. 19(1)(a) to withhold the names of employees who evaluated the RFQ responses.⁵⁷ Section 19(1)(a) authorizes public bodies to refuse to disclose information which could reasonably be expected to threaten anyone's safety or mental or physical health. The standard of proof for s. 19(1)(a) is the same as for s. 17. BC Hydro must prove that the likelihood of threat to anyone's safety or mental or physical health resulting from disclosure of the disputed information is "well beyond" or "considerably above" a mere possibility.

⁵⁶ Page 86 of the records.

⁵⁷ Pages 14, 19 and 26 of the records.

The test is contextual and depends on the seriousness of the possible consequences and the probability of the harm occurring.⁵⁸

[64] BC Hydro submitted evidence from its Security Project Manager and Security Lead for Site C (Security Manager). He describes the Site C Project as contentious, with peaceful protests but also “alarming displays of physical and threatened violence.”⁵⁹ The Security Manager provided evidence of specific incidents.

[65] The Security Manager says that at one public meeting in July 2015, a protestor ripped down maps, overturned two tables and screamed obscenities at staff. The RCMP attended and while there shot and killed a different protestor who was masked and wielding a knife. The masked protestor was allegedly a member of the hacking group Anonymous, which has threatened to avenge his death.⁶⁰ A rally shortly after was cancelled due to organizers’ fear that the event would become violent.

[66] In another instance, the Security Manager says that BC Hydro Site C employees were physically threatened by a speedboat circling an excavator. The occupants of the boat shouted obscenities at contractors. The Security Manager provided photographs of the incident.

[67] The Security Manager says that at a number of public meetings, the public has made threats of violence such as “watch your back” and “blow them up.” BC Hydro employees have been told if they enter private land, the landowners will be there with “guns waiting.” Protestors have also yelled at employees, and blocked vehicles and construction equipment.

[68] In October 2017, employees discovered that one of the stop signs located within the construction zone, which is not publicly accessible, had been shot at and two bullet holes could be observed. The sign was located in a very active work area. The Security Manager said that his office determined that the shots came from a high-powered weapon. Around the same time, employees discovered another one of its signs posted along the river shoreline to indicate the entrance to the construction zone was shot at several times. Photographs of the shot up signs were provided.

[69] The Security Manager states that these incidents as a whole have made Site C employees feel “vulnerable, apprehensive, and threatened in the public

⁵⁸ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, *supra* note 10; *Merck Frosst Canada Ltd. v. Canada (Health)*, *supra* note 10 citing *F.H. v. McDougall*.

⁵⁹ Security Manager Affidavit at para. 8.

⁶⁰ *Police ‘begged’ Site C activist to put down knife before shooting him, witness says*. CBC. Nov 16, 2016.

arena.”⁶¹ He says that in this respect, Site C is different from every other BC Hydro project he has worked on.

[70] BC Hydro has taken the step of not publishing the Site C office information on its employees’ business cards. BC Hydro has also previously refused to release names of Site C employees who are not part of the “public face” of the project, i.e., those that comment in the media or present at public meetings.⁶² BC Hydro advises that it is extremely concerned that release of employee names will put those individuals at risk for targeted violence by extreme opponents of Site C and increase the risk of mental distress of the employees who would be publicly associated with the project.

[71] The applicant argues that there is no rational connection between disclosing the employee names and potential harm. The applicant submits that the protestors who attended the meeting where a man was killed were there to complain about the project and were not there to harass any particular BC Hydro employee. He argues further that none of the incidents described by BC Hydro can be attributed to the public knowing the name of anyone working on the project.

[72] The applicant submits that the shooting incidents mentioned by BC Hydro were not independently investigated and therefore the Security Manager’s conclusions are speculative. The applicant specifically questions how the Security Manager could make conclusions about the motive of the sign shooter(s) or the speedboat operators.

[73] The applicant also points out that BC Hydro is required to publish its employees names pursuant to the *Financial Information Act*, and there is no evidence that publication has ever lead to a problems for BC Hydro employees. The applicant has also provided the LinkedIn pages for a number of Site C workers. He also says that, in fact, the Security Manager has identified himself as associated with Site C on social media. The applicant argues that because numerous BC Hydro employees have been comfortable putting their faces, names and titles, along with their Site C job title in the public domain, that Site C employees do not feel “vulnerable, apprehensive, and threatened in the public arena” as suggested by the Security Manager.

[74] The applicant argues that the public has a right to access the names, titles and payments of employees and contractors in the public service and disclosing that kind of information promotes accountability. He says that there is no principled distinction under FIPPA between public facing and other employees. He asserts that the public has a right to know who a public body employs, and how much they are paid regardless of their department.

⁶¹ Security Manager Affidavit at para. 14.

⁶² *Ibid* at para. 19(1)(a).

Analysis

[75] I am not satisfied that there is a sufficient connection between disclosure of the withheld employee names and threat to those employees' safety, or mental or physical health to satisfy the burden under s. 19(1)(a).

[76] There is no suggestion that particular employees have been targeted because of their association with Site C. The incidents described by the Security Manager were directed generally at the Site C project. There is nothing to suggest that the names and identities of the employees present at the time were relevant to the incidents. Rather, it was the employees' physical proximity to the project which caused them to be in harms-way.

[77] In addition, the incidents occurred at the work site and at a public forum in Dawson Creek on Site C. It is understandable that those locations might be lightning rods for opponents of the project as those are the locations directly impacted by the dam. No evidence was provided, however, that anything remotely similar has occurred at BC Hydro's offices where the procurement assessment presumably takes place and records of the type at issue here are dealt with.

[78] Further, the employees whose names are withheld were responsible for procurement of one aspect of the project and they are not near the top of BC Hydro's corporate structure. It seems more likely that if anyone were to be the target of animosity related to Site C, it would be the board directors or senior management, yet BC Hydro has not kept their names from the public and there is no evidence that they have been harassed.⁶³

[79] Lastly, I have no evidence from the employees whose names are in issue about how disclosure might threaten their mental health, which might support the application of s. 19(1)(a).

[80] I do not mean to diminish the seriousness of the incidents which have occurred. I have no doubt that frontline workers have concern for their safety. However, I am not satisfied that disclosing the names of the employees involved in the administration processes related to the RFQ, could reasonably be expected to threaten their safety, or physical or mental health under s. 19(1)(a).

Section 22 – third party personal privacy

[81] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy. BC Hydro is using s. 22 to withhold the employee names

⁶³ See page 1 of the records.

discussed above. BC Hydro also applied s. 22 to the signature of a lawyer who was the “fairness monitor” for the RFQ.⁶⁴ The signature is in a letter from the lawyer to BC Hydro. His name below the signature was disclosed.

[82] Numerous orders have considered the application of s. 22 and I have applied those principles in my analysis.⁶⁵

[83] The employee names are clearly personal information.

[84] The lawyer’s signature is also “personal information” because the lawyer’s name appears below the signature, thus identifying the signature as belonging to that lawyer. It is also clearly not “contact information” under FIPPA, which is excluded from the definition of “personal information.”⁶⁶

[85] The applicant argues in essence, although not explicitly, that s. 22(4)(d), (e) and (f) apply. If they do, information is deemed to not be an unreasonable invasion of privacy. In my view subsections (d) and (f) plainly do not apply.

[86] Section 22(4)(e) applies to personal information about a public body employee’s position, functions or remuneration. Information that relates to job duties in the normal course of work related activities falls into s. 22(4)(e).⁶⁷

[87] The employee names appear in a briefing note, a letter and power point slide related to the RFQ. Their names simply identify them as evaluation committee members and their position within BC Hydro. The records are normal operational documents. I find that s. 22(4)(e) applies to the names. As s. 22(4)(e) applies to the employee names, BC Hydro is not required or authorized to withhold the names under s. 22(1) and I will not consider the remainder of the s. 22 analysis.

[88] With regards to the lawyer’s signature, s. 22(4)(e) was found to apply to signatures of ICBC employees in Order F18-04.⁶⁸ However, I do not have sufficient evidence to determine if the lawyer, who works for a law firm and not BC Hydro, was an “employee” as defined by FIPPA.⁶⁹ I find that the lawyer is not an employee of BC Hydro so s. 22(4)(e) does not apply. However, even if I am wrong, it does not matter given my ultimate conclusion below that s. 22 does not apply to the signature.

⁶⁴ Page 20 of records.

⁶⁵ Order 01-53, 2001 CanLII 21607 at p. 7.

⁶⁶ See Schedule 1 for the definition of personal information and contact information.

⁶⁷ Order 01-53, 2001 CanLII 21607 at para. 40.

⁶⁸ 2018 BCIPC 4 at para. 121.

⁶⁹ The definition of “employee” includes “service providers”. See Schedule 1 of FIPPA.

[89] Neither party addressed whether any of the presumptions against disclosure contained s. 22(3) apply. In my view, the signature does not fit within any of the presumptions created under s. 22(3).

[90] Neither party raises any circumstances under s. 22(2) weighing for or against disclosure.

[91] A lawyer's professional signature is not sensitive information. Lawyers sign documents routinely, including publicly available records like court filings, or land title documents. For this reason and in light of the fact that the applicant already knows the lawyer's identify, I cannot see how disclosure of the signature could unreasonably invade the lawyer's personal privacy. Therefore, BC Hydro is not required to withhold the signature in addition to the employee names under s. 22(1).

CONCLUSION

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

1. BC Hydro is not authorized and/or required under s. 22(1) to refuse access to the information.
2. BC Hydro is not authorized under s. 19(1)(a) to refuse access to the information.
3. BC Hydro is authorized under s. 17 to refuse access to the information, except for the information I have highlighted in yellow in a copy of the records that has been sent to BC Hydro with this order.
4. I require BC Hydro to give the applicant access to the highlighted information by January 25, 2019. BC Hydro must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 11, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator