



Order F19-42

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Ian C. Davis
Adjudicator

November 14, 2019

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Summary: The applicant requested documents from BC Hydro relating to contractors who bid for a construction project. BC Hydro withheld some information from two pages under s. 22 of FIPPA (unreasonable invasion of third party personal privacy). The adjudicator confirmed BC Hydro's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(d), 22(3)(g), 22(4)(e), 22(4)(f).

INTRODUCTION

[1] The applicant requested records from the British Columbia Hydro and Power Authority (BC Hydro) relating to BC Hydro's Site C Clean Energy Project (the Site C Project). Specifically, the applicant requested:

The reference checks, media and litigation scan reports for the following Site C contractors:
Peace River Hydro Partners (Acciona, Petrowest, Samsung)
Voith Hydro
SNC-Lavalin[.]¹

[2] BC Hydro responded to the applicant that reference checks were not conducted for Voith Hydro and SNC-Lavalin.² As for reference checks for the Peace River Hydro Partners, BC Hydro informed the applicant that it had searched its files and identified two pages of records responsive to the applicant's request. BC Hydro withheld those two pages in their entirety under

¹ Email from the applicant to BC Hydro dated June 15, 2017.

² Letter from BC Hydro to the applicant dated July 31, 2017.

ss. 21 (harm to third party business interests) and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). BC Hydro also said that s. 3(1)(j) of FIPPA applied to any media and litigation scan records. That section states that FIPPA does not apply to “a record that is available for purchase by the public”.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BC Hydro’s decision. During mediation, BC Hydro disclosed some parts of the two pages. However, the parties’ dispute was not completely resolved and the applicant requested that it proceed to inquiry. The OIPC determined that only the ss. 21 and 22 issues would proceed to inquiry.

[4] In its initial submission, BC Hydro said that it was no longer relying on s. 21 to refuse access and now relies only on s. 22.³

PRELIMINARY MATTER

[5] The applicant did not file submissions in this inquiry. In response to a communication from the OIPC’s Registrar of Inquiries, the applicant stated: “I have decided against filing a response, on a matter of principle, after the OIPC removed my section 3 complaint from this file without my consent. I trust that you will inform the adjudicator.”⁴

[6] The s. 3 issue is not stated as an issue in the Fact Report or the Notice of Written Inquiry. This is because the review of that issue was discontinued prior to this inquiry by an OIPC investigator acting pursuant to delegated authority under ss. 49, 55 and 56 of *FIPPA* and *OIPC Policy, Procedures and Criteria for Discontinuing Investigations or Reviews*.⁵ Accordingly, I will not consider whether s. 3(1)(j) applies to any media and litigation scan records.

ISSUE

[7] There is only one issue in this inquiry:

- Is BC Hydro required by s. 22 of FIPPA to refuse to disclose to the applicant the disputed information because disclosure would be an unreasonable invasion of a third party’s personal privacy?

³ BC Hydro’s written submissions at para. 4.

⁴ Email from the applicant to BC Hydro dated June 7, 2019.

⁵ See online: <https://www.oipc.bc.ca/media/16800/discontinuing-policy-for-website.pdf>.

BACKGROUND

The Site C Project and the Reference Check Process

[8] BC Hydro undertook the Site C Project to construct a dam and hydroelectric generating station on the Peace River in northeastern British Columbia. The records in dispute are reference checks for two contractors on the Site C Project, Acciona and Petrowest (the contractors).

[9] In an affidavit filed in this inquiry, the Director of Procurement for BC Hydro explained the role of reference checks in BC Hydro's procurement process.⁶ For certain projects, BC Hydro may ask proponents to provide a list of references. BC Hydro may then interview the references seeking to verify information provided by a proponent or to assess a proponent's suitability for a project based on past performance.

[10] For the Site C Project, Acciona and Petrowest were required to submit a list of references. BC Hydro arranged for telephone calls with the references.

The Records and Information in Dispute

[11] The records in dispute in this inquiry are two pages of typed notes recording the references' answers to the questions BC Hydro asked about Acciona and Petrowest. The interview questions have been fully disclosed to the applicant, so they are not in dispute. BC Hydro has refused to disclose the following information in the two pages:

- the names of the references;
- the names of key personnel for the contractors;
- the names of past projects on which the references and the contractors worked together;
- the current positions of the references;
- the past and current relationship between the references and the contractors;
- the nature of the roles of the references and contractors on past joint projects; and
- the references' comments about the contractors and their key personnel, including comments about the personality and past performance of the key personnel.

⁶ Affidavit of Director of Procurement for BC Hydro at paras. 7-17.

DISCUSSION

[12] BC Hydro submits that s. 22(1) applies to the disputed information.

Section 22 – Legal Framework

[13] Section 22(1) of FIPPA provides that “[t]he head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.” The analysis under s. 22 has four steps⁷:

1. Is the disputed information “personal information” as required by s. 22(1) of FIPPA?
2. If so, do any of the circumstances under s. 22(4) apply, such that disclosure of the personal information is deemed not to be an unreasonable invasion of a third party’s personal privacy?
3. If not, do any of the circumstances under s. 22(3) apply, such that disclosure of the personal information is presumed to be an unreasonable invasion of a third party’s personal privacy?
4. Having regard to all the relevant circumstances, including those set out in s. 22(2), is disclosure of the personal information an unreasonable invasion of a third party’s personal privacy?

[14] The burden of proof is on BC Hydro to establish that the disputed information is personal information.⁸ However, based on s. 57(2) of FIPPA, the burden of proof is on the applicant to show that disclosure of any personal information would not be an unreasonable invasion of a third party’s personal privacy.

Personal Information

[15] The term “personal information” is defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information”. Information is “about an identifiable individual” when it is “reasonably capable of identifying an individual, either alone or when combined with other available sources of information.”⁹

⁷ See e.g. Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.

⁸ See Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

⁹ Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.

[16] The term “contact information”, also defined in Schedule 1 of FIPPA, means “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”

[17] BC Hydro submits that the disputed information is personal information because it is recorded, “belongs” to third parties, identifies specific individuals, includes personal details, and is not contact information.¹⁰

[18] I find that the disputed information is personal information. It is recorded and does not include any contact information, such as work addresses or phone numbers. The names of the references and the key personnel on the past joint projects are clearly personal information. So are the current positions of the references. All of this information relates to specific identifiable individuals.

[19] The respective roles and performance of the contractors and references on past joint projects is also personal information. The reference check questions invite the references to comment on either the “firm” (i.e., Acciona or Petrowest) or the “individual” (i.e., key personnel for Acciona or Petrowest). BC Hydro has properly disclosed the aspects of the references’ answers that comment only on the firm, which is not an “individual”. However, where the reference makes comments specifically about himself or herself, or about the key personnel for the contractors, this is information about identifiable individuals.

[20] Finally, I find that the names of the past joint projects are personal information in the sense that they constitute information which is reasonably capable of identifying an individual when combined with other available sources of information. Knowing the names of the past joint projects, one would be reasonably capable of identifying the main firms involved and their key personnel, and therefore the identities of the third parties.

Section 22(4) – No Unreasonable Invasion of Privacy

[21] BC Hydro says that none of the circumstances under s. 22(4) of FIPPA apply. The only subsections that might be relevant are subsections (e) and (f), which state:

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

¹⁰ BC Hydro's written submissions at para. 14.

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body[.]

[22] I agree with BC Hydro that these subsections do not apply. Subsection (e) does not apply because the third party personal information is not about “an officer, employee or member of a public body” or “a member of a minister’s staff”. Subsection (f) does not apply because none of the disputed information reveals anything “financial” about the past joint projects or the Site C Project.

Section 22(3) – Presumed Unreasonable Invasion of Privacy

[23] BC Hydro submits that the disputed information falls under either s. 22(3)(d) or s. 22(3)(g) of *FIPPA*. Those subsections state:

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party[.]

[24] I conclude these two subsections apply, for the following reasons.

[25] The disputed information relates to the employment or occupational history of the key personnel for the contractors and the references. It is about their work roles on past joint construction projects. Therefore, s. 22(3)(d) of *FIPPA* applies.

[26] Section 22(3)(g) of *FIPPA* also applies to some of the personal information because it is evaluations or recommendations about the personal attributes and past performance of the key personnel for the contractors. Commissioner Loukidelis made a similar finding regarding reference checks in Order 00-48,¹¹ albeit in the personal employment context rather than the procurement process. He found that “reference check information is covered by s. 22(3)(g)”.¹² I find that the disputed information is clearly reference check information.

¹¹ 2000 CanLII 14413 (BC IPC) at p. 7.

¹² *Ibid.*

Section 22(2) – All Relevant Circumstances

[27] The final step of the s. 22 analysis is to consider all of the relevant circumstances, including those listed in s. 22(2).

[28] I find s. 22(2)(f) — whether the personal information “has been supplied in confidence” — applies. In my view, this factor weighs strongly in favour of refusing to disclose the disputed information.

[29] Firstly, I am satisfied by BC Hydro’s evidence that the disputed information was supplied in confidence. BC Hydro’s Director of Procurement deposed that the interviewees were advised by email “that the reference checks would be treated confidentially and kept on file.”¹³ The reference checks were then “stored confidentially” and only accessible to “a restricted group of BC Hydro employees and consultants.”¹⁴

[30] Secondly, I accept BC Hydro’s evidence that confidentiality is vital to the procurement process and I find this weighs in favour of refusing to disclose the disputed information. BC Hydro’s Director of Procurement explains that “[t]he value of the reference provided is affected by whether the interviewee perceives the process as being confidential or not.”¹⁵ If the references are not guaranteed confidentiality, they are less likely to provide candid opinions and information about the proponents. This in turn undermines BC Hydro’s ability to evaluate the suitability of proponents.¹⁶

[31] BC Hydro also argues that disclosure of the disputed information may unfairly expose the third parties to harm, reputational or otherwise, and thus ss. 22(2)(e) and (h) weigh against disclosure.¹⁷

[32] Sections 22(2)(e) and (h) of FIPPA set out the following factors:

(e) the third party will be exposed unfairly to financial or other harm,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant[.]

[33] BC Hydro relies on Order F06-21 in relation to these factors.¹⁸ There the adjudicator found that disclosing the names of reviewers of forest research proposals would unfairly expose the reviewers to harm under ss. 22(2)(e) and

¹³ Affidavit of Director of Procurement for BC Hydro at para. 14.

¹⁴ *Ibid* at para. 17.

¹⁵ *Ibid* at para. 11.

¹⁶ *Ibid* at para. 12.

¹⁷ BC Hydro’s written submissions at paras. 25-26.

¹⁸ 2006 CanLII 42693 (BC IPC) at paras. 55-58 and 63.

22(2)(h) of FIPPA. The adjudicator reasoned that the risk arose because of the “relatively small”¹⁹ nature of the research community and the possibility that the proponents may “attempt to seek retribution.”²⁰ BC Hydro argues that the “relatively small” research community discussed in Order F06-21 is analogous to the “small industry community”²¹ in which the contractors and references work.

[34] I cannot accept this argument. The only evidence before me as to the size of the community in which the contractors and references work is an indirect assertion to that effect in the affidavit of BC Hydro’s Director of Procurement. The Director deposed that the contractors and references “may know each other given the small size and specialization of this type of major capital construction work.”²² Without more, I find this insufficient to establish that the nature of the community in which the contractors and references work is such that disclosing reference check information may unfairly expose them to reputational or financial harm.

[35] In any event, after having reviewed the disputed information, I am satisfied that it does not include information of the sort that would unfairly expose the key personnel for the contractors or references to reputational or financial harm.

[36] Finally, I also find that s. 22(2)(a) of FIPPA is a relevant circumstance to consider. That section refers to whether “disclosure is desirable for the purpose of subjecting the activities of...a public body to public scrutiny”.

[37] I conclude that s. 22(2)(a) of FIPPA does not rebut the presumption against disclosure because the reference check information already disclosed serves the purpose of subjecting BC Hydro to public scrutiny. BC Hydro has disclosed that, according to the references, Petrowest at one time “lacked project controls”²³ and, on a different project, had “[i]ssues with product supply”.²⁴ Yet both references said that they would hire Petrowest again, and that was disclosed.²⁵ This is the kind of information that would assist in holding BC Hydro accountable for its procurement decisions. I am not satisfied, and the applicant has provided no argument on this point, that disclosing the third party personal information in the reference checks is required under s. 22(2)(a).

[38] Having regard to all relevant circumstances, I conclude that the ss. 22(3)(d) and (g) presumptions have not been rebutted and disclosure of the disputed information would be an unreasonable invasion of the third parties’

¹⁹ *Ibid* at para. 58.

²⁰ *Ibid* at para. 57.

²¹ BC Hydro’s written submissions at para. 26.

²² Affidavit of BC Hydro’s Director of Procurement at para. 18.

²³ Page 1 of the records.

²⁴ Page 2 of the records.

²⁵ Pages 1-2 of the records.

personal privacy. BC Hydro must refuse to disclose this information under s. 22(1).

CONCLUSION

[39] For the reasons given above, pursuant to s. 58 of FIPPA, I require BC Hydro to refuse under s. 22(1) of FIPPA to disclose the disputed information.

November 14, 2019

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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