



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F25-15

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

David S. Adams
Adjudicator

March 5, 2025

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Summary: An applicant requested access to a contract between BC Hydro and Power Authority (BC Hydro) and a third party. BC Hydro disclosed the contract to the applicant, but withheld some information in it under ss. 17 (harm to financial or economic interests of a public body), 21 (harm to business interests of a third party), and 22 (harm to third-party privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that ss. 17 and 21 applied to some of the withheld information, but that s. 22 did not apply to any of the information. The adjudicator ordered BC Hydro to disclose to the applicant the information it was not required or authorized to withhold.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 17(1), 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii), 22(1), 22(4)(e), 22(4)(f)

INTRODUCTION

[1] The applicant, a journalist, requested a contract (the Agreement) executed in March 2016 between British Columbia Hydro and Power Authority (BC Hydro) and a third-party contractor (the Contractor) for the supply of turbines and generators to BC Hydro's Site C Clean Energy Project (Site C).

[2] BC Hydro provided the applicant with a link to an online redacted version of the Agreement. However, it did not identify the sections of the *Freedom of Information and Protection of Privacy Act* (FIPPA) it relied on to withhold information from the Agreement. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BC Hydro's decision to withhold information.

[3] During mediation by the OIPC, it became apparent that the applicant had not been provided with a copy of the Agreement, but only a link to the redacted online version. The OIPC asked BC Hydro to provide the applicant with a copy

and to indicate which provisions of FIPPA it relied on to withhold information.¹ BC Hydro provided the applicant with a copy of the Agreement marked to indicate that information was withheld under ss. 15(1) (harm to law enforcement), 17(1) (harm to financial or economic interests of a public body), 21(1) (harm to business interests of a third party), and 22(1) (harm to third-party privacy) of FIPPA. Mediation by the OIPC was not successful in resolving the dispute between the parties, and the matter proceeded to inquiry.

[4] At the inquiry submission stage, BC Hydro withdrew its reliance on s. 15(1).² However, because the information withheld under s. 15(1) was also withheld under ss. 17(1) and/or 21(1), no new information was disclosed. The OIPC also invited the Contractor to participate in the inquiry.³ The Contractor accepted this invitation and provided submissions and evidence.

[5] The OIPC permitted BC Hydro and the Contractor to provide some of their affidavit evidence and submissions *in camera*.⁴

ISSUES AND BURDEN OF PROOF

[6] The issues I must decide in this inquiry are:

1. Whether BC Hydro is authorized to withhold information under s. 17(1) of FIPPA;
2. Whether BC Hydro is required to withhold information under s. 21(1) of FIPPA; and
3. Whether BC Hydro is required to withhold information under s. 22(1) of FIPPA.

[7] Under s. 57(1) of FIPPA, BC Hydro has the burden of establishing that ss. 17(1) and 21(1) apply. Under s. 57(2), the applicant has the burden of proving that disclosure of personal information withheld under s. 22(1) would not be an unreasonable invasion of third-party personal privacy. However, it is up to BC Hydro to establish that the information it withheld under s. 22(1) is personal information.⁵

¹ Investigator's Fact Report.

² BC Hydro's initial submission at para 4.

³ OIPC's letter of August 8, 2024.

⁴ That means only the OIPC can see the information, not the other parties.

⁵ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

DISCUSSION

Background⁶

[8] BC Hydro is a crown corporation formed pursuant to the *Hydro and Power Authority Act*.⁷ It is responsible for generating, purchasing, distributing, and selling electricity. It is developing Site C, which is a dam and hydroelectric generating station on the Peace River. The Contractor is a manufacturer and supplier of hydroelectric power station equipment.

[9] The bidding process that led to the execution of the Agreement began in 2010, and was lengthy and complex. The Contractor and BC Hydro exchanged many requests for information and other communications. BC Hydro ultimately chose the Contractor to supply and install turbines and generators and other related systems to Site C from among three competitors. Construction on Site C began in 2015.

[10] On March 11, 2016, the Contractor and BC Hydro entered into the Agreement. The Agreement sets out, among other things, the scope of work the Contractor must deliver and the payment due to it.

Record at issue

[11] The record at issue is the Agreement and its 17 schedules. There are 1138 pages in total, and BC Hydro has withheld information on approximately 220 of those pages.

Standard of proof for harm-based exceptions

[12] Both ss. 17(1) and 21(1) are about harm that “could reasonably be expected to” result if the information in dispute were disclosed. The Supreme Court of Canada has addressed the standard that must be met where this language is used:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground...This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will

⁶ The information in this section is drawn from the parties’ submissions and evidence.

⁷ RSBC 1996 c 212.

ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...⁸

[13] There must be a clear and direct connection between the disclosure of the withheld information and the anticipated harm.⁹ General speculative or subjective evidence will not suffice.¹⁰

[14] Consistent with past OIPC orders dealing with ss. 17(1) and 21(1),¹¹ I have applied the above principles in considering the parties’ arguments about anticipated harm under ss. 17(1) and 21(1)(c). In assessing the anticipated harm flowing from disclosure, my analysis has also proceeded on the basis that disclosure to an applicant should be treated as disclosure to the world.¹²

Harm to financial or economic interests of a public body – s. 17(1)

[15] Section 17(1) allows a public body to refuse to disclose information whose disclosure could reasonably be expected to harm the public body’s financial or economic interests. It provides, in relevant part:

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:

...

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

...

(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.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras 94 and 195-206.

⁹ Order 02-50, 2002 CanLII 42486 (BC IPC) at para 137; Order F13-06, 2013 BCIPC 6 (CanLII) at para 24.

¹⁰ Order F08-03, 2008 CanLII 13321 (BC IPC) at para 27.

¹¹ See, e.g., Order F24-40, 2024 BCIPC 48 (CanLII) at paras 42-44; Order F24-55, 2024 BCIPC 65 (CanLII) at paras 41-42.

¹² See, e.g., Order 03-33, 2003 CanLII 49212 (BC IPC) at para 44.

[16] In considering the meaning and application of s. 17(1) and its subsections, I adopt the reasoning in Order F24-51, where the adjudicator said:

Subsections 17(1)(a) to (f) are examples of information that, if disclosed, could reasonably be expected to result in harm under s. 17(1). The subsections listed under s. 17(1) do not represent an exhaustive list, meaning there may be other types of information that fall under the opening words of s. 17(1) despite not being listed in subsections 17(1)(a) to (f).

Subsections 17(1)(a) to (f) are not stand-alone provisions and even if information fits within those subsections, a public body must also prove disclosure of the information in dispute could reasonably be expected to result in one or more of the harms described in the opening words of s. 17. Therefore, regardless of the type of information, *the overriding question is always whether disclosure of the information 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.¹³ (emphasis added)

[17] Former Commissioner Loukidelis said the following about the threshold that must be met under s. 17(1):

The threshold for harm under s. 17(1) is not a low one met by any impact. Nature and magnitude of outcome are factors to be considered. If it were otherwise, in the context of s. 17(1) any burden, of any level, on a financial or economic interest of a public body could meet the test. This would offend the purpose of FIPPA to make public bodies more accountable to the public by giving the public a right of access to records, subject to specified, limited exceptions. It would also disregard the contextual variety of the harms-based disclosure exceptions in FIPPA.¹⁴

Information withheld under s. 17(1)

[18] BC Hydro has withheld various kinds of information under s. 17(1). It divides this withheld information into financial information and technical information. It says the financial s. 17(1) information consists of:

- (a) calculation of labour cost escalation (pp. 14-15);
- (b) amounts of the letter of credit provided by [the Contractor] (p. 970);
- (c) amounts of third party guarantee provided by [the Contractor] (p. 971);
- (d) maximum aggregate amount of all advance payments outstanding at any time (p. 974);

¹³ Order F24-51, 2024 BCIPC 60 (CanLII) at paras 15-16 and the orders cited therein.

¹⁴ Order F08-22, 2008 CanLII 70316 (BC IPC) at para 50.

(e) amount of the advance payment letter of credit provided by [the Contractor] (p. 974);

(f) maximum cost of work required for completion or correction for determination of whether substantial completion is obtained (p. 977);

(g) maximum amount payable for the low-end range performance bonus payable to the contractor for additional prototype low-end operating range (p. 988);

(h) the cost store of each generator used for calculating liquidated damages resulting from failure to achieve core buckling performance (p. 992);

(i) liquidated damages payable under the [Agreement] (pp. 65, [248]-256, 992, 993, 1027);

(j) milestone payment amounts (pp. 1000-1003, 1010-1014);

(k) calculation of guarantor's aggregate liability (p. 1018); and

(l) insurance specifications to be obtained under the [Agreement] (pp. 1100-1101, 1103, 1106, 1107, 1110-1111).¹⁵

[19] BC Hydro says the technical s. 17(1) information it withheld consists of the following:

(a) data relating to historic inflows (p. 242);

(b) calculation of the low-end range performance bonus, which is based on generator power output (p. 988);

(c) the value for generator power output to be used in calculating liquidated damages resulting from a unit's failure to achieve prescribed power outputs (pp. 989 and 990);

(d) the value for plant annual energy to be used for calculating liquidated damages resulting from a shortfall in achieved plant annual energy (p. 991);

(e) technical data relating to the supply and installation of turbine and generator equipment and systems (pp. 1028-1073);

(f) data for calculating guaranteed plant annual energy (p. 1039); and

(g) data for calculating generator losses (pp. 1050-1053).¹⁶

¹⁵ BC Hydro's initial submission at para 16; Affidavit of Project Manager at para 26.

¹⁶ BC Hydro's initial submission at para 25; affidavit of Director at para 16.

[20] Having reviewed the information in dispute, I accept that BC Hydro's categorization accurately reflects the character of the information.

Parties' submissions on s. 17(1)

[21] BC Hydro says that disclosure of the information it withheld under s. 17(1) could reasonably be expected to harm its financial or economic interests. It makes separate submissions and provides separate evidence on the financial information and the technical information, so I will deal with each of those categories in turn.

[22] In support of its submissions, BC Hydro provided an affidavit from a project manager (Project Manager), who deposes that he is "personally responsible for contract ownership of the [Agreement], including contingency allocation, large changes, and payment authorizations".¹⁷ It also provided an affidavit from the director of its generation system operations unit (Director), who deposes that this unit is responsible for ensuring that BC Hydro has "enough generation online at any time to meet customer demand", and that she is responsible for planning the "short- to mid-term (sub-hourly up to three years) dispatch of BC Hydro's generating resources, reservoir storage management and project discharges".¹⁸

Financial information

[23] BC Hydro says that if the financial information were disclosed, its financial or economic interests would be harmed because disclosure would reveal to future suppliers the type of leverage BC Hydro has or the concessions it was willing to make when negotiating one of its supply and installation contracts, and that this would compromise its negotiating position in future contracts, affecting its ability to obtain favourable terms.¹⁹

[24] BC Hydro also says that disclosure of the financial information would negatively affect a specific ongoing contract negotiation, the details of which it gave *in camera*. It says that if the financial information were disclosed, turbine and generator suppliers in that negotiation could reasonably be expected to use the information to push for more favourable terms, to their advantage and BC Hydro's disadvantage.²⁰

[25] Further, BC Hydro says that disclosure of the financial information would affect BC Hydro's ability to resolve future disputes with existing contractors at Site C, and allow them to "strengthen their claims" because those contractors

¹⁷ Affidavit of Project Manager at paras 1 and 13.

¹⁸ Affidavit of Director at paras 1 and 11-12.

¹⁹ BC Hydro's initial submission at para 21; affidavit of Project Manager at para 31.

²⁰ BC Hydro's initial submission at paras 22-23; affidavit of Project Manager at para 32.

could point to the financial information – particularly the labour escalation clauses – in arguing for a better deal.²¹

Technical information

[26] BC Hydro explains that it participates in a competitive energy marketplace as both a buyer and seller of energy through its own power trading subsidiary, Powerex Corp. BC Hydro says that the technical information relates to the outputs from turbines and generators and reveals confidential information about Powerex Corp's operations. It says that the technical information would enable third parties who also buy and sell energy to "model BC Hydro's system and its potential import and export requirements", and discern how much power BC Hydro wants to sell or purchase at any given time. If they knew this information, it says, they would undermine BC Hydro's negotiating position in the marketplace, causing it to have to sell power at a lower price and buy it at a higher price than it otherwise would, thereby harming its financial position.²²

[27] BC Hydro says further that this contemplated harm to BC Hydro's market position would increase the rates BC Hydro's customers must pay, thus harming the BC government's ability to manage the economy.²³

Applicant's submission and BC Hydro's reply

[28] The applicant says that s. 17(1) does not apply to contracts between public bodies and private entities for goods and services. To support this proposition, he relies on Order MO-2852, a 2013 order of the Ontario Information and Privacy Commissioner, in which the adjudicator found that s. 10(1) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act* did not apply to a contract.²⁴ Section 10(1) protects against harm to third party trade secrets or scientific, technical, commercial, financial or labour relations information.²⁵

[29] The applicant also refers to various OIPC orders in which the adjudicators found that the public bodies involved had not met their burden of proving a reasonable expectation of harm. However, he does not explain how BC Hydro has failed to meet its burden in the present case. He also says that since the Site C project is nearing completion, any harms that might have existed at the time the parties entered into the Agreement do not exist now.²⁶

²¹ BC Hydro's initial submission at para 24; affidavit of Project Manager at para 33.

²² BC Hydro's initial submission at paras 26-28; affidavit of Director at paras 17-20.

²³ BC Hydro's initial submission at para 29; affidavit of Director at para 21.

²⁴ RSO 1990, c M.56.

²⁵ Order MO-2852, 2013 CanLII 11999 (ON IPC) at para 50; applicant's response submission at paras 5-7.

²⁶ Applicant's response submission at paras 8-18, citing Order 02-50, *supra* note 9 at para 137; Order F14-37, 2014 BCIPC 40 (CanLII) at para 31; Order F20-36, 2020 BCIPC 42 (CanLII) at

[30] BC Hydro says in reply that the applicant's assertion that s. 17(1) does not apply to contracts between public bodies and private entities is legally wrong, that Order MO-2852 does not stand for the proposition for which the applicant cites it, and that there is an abundance of BC cases where ss. 17 and 21 were found to apply to such contracts.²⁷

[31] BC Hydro says further that the applicant's s. 17(1) argument ignores the evidence it presented. It says that each case turns on its own facts, and the fact that s. 17(1) arguments have been rejected in other cases for insufficient evidence has no bearing on the sufficiency of the evidence in this case. It says that it has provided evidence of specific harms that it foresees will result if the information withheld under s. 17(1) is disclosed. In particular, it says that the applicant's assertion that no further harms can exist because the project is nearing completion is contrary to the evidence (including *in camera* evidence) it provided.²⁸

[32] The Contractor does not take a position on the application of s. 17(1).²⁹

Analysis and findings on s. 17(1)

[33] I am not persuaded by the applicant's argument that s. 17(1) does not apply to contracts between public bodies and private entities. There is nothing in FIPPA, or the cases decided by the OIPC, that support the applicant's contention about that. I also do not find that Ontario's Order MO-2582 supports what he says. The Ontario case was not about s. 17(1) of FIPPA, and the adjudicator did not say that the provision at issue in that case could never apply to such contracts, only that based on the facts of that case, the institution had failed to prove that it applied.

[34] Turning to the merits of BC Hydro's application of s. 17(1) to the financial information, for the most part I am persuaded that disclosure could reasonably be expected to harm BC Hydro's financial or economic interests. The withheld information whose disclosure I accept could reasonably be expected to be harmful consists of dollar amounts and percentages payable on the occurrence of various events. I accept BC Hydro's evidence and argument that this financial information reveals aspects of its negotiating position that, if disclosed, would allow parties with whom it may contract in the future to see what kind of leverage BC Hydro has and what concessions it has made. I also accept that this would allow those parties to take advantage of that information to BC Hydro's detriment.

para 57; Order F14-49, 2014 BCIPC 53 (CanLII) at paras 11-24; Order F22-47, 2022 BCIPC 53 (CanLII) at paras 29-30; and Order F07-15, 2007 CanLII 35476 (BC IPC) at paras 17-24.

²⁷ BC Hydro's reply submission at paras 2-4.

²⁸ BC Hydro's reply submission at paras 5-8.

²⁹ Contractor's initial submission at para 6.

[35] As for the impact of disclosure of the financial information on actual ongoing contract negotiations, I am limited in what I can say since much of the evidence on this point was given *in camera*. However, I can say that the ongoing contract negotiations are, like the Agreement, about the supply of turbines and generators, and I am satisfied that BC Hydro has specifically identified the harm it anticipates, and has established a clear and direct link between disclosure and the anticipated harm.

[36] However, I am not persuaded by BC Hydro's evidence and argument about the harm it anticipates if Site C contractors learn some of the financial information about the labour escalation clauses on pages 14 and 15 of the records. This information sets out the formula for an adjustment to the total contract price based on various specified labour costs. In my view, BC Hydro does not sufficiently explain how Site C contractors could use the financial information to BC Hydro's disadvantage. It says only that disclosure of the labour escalation clauses would "affect BC Hydro's ability to favourably resolve disputes" if other contractors could see and point to these clauses in "arguing for a similar deal".³⁰ In my view, this argument does not make clear how disclosure of these clauses would directly impair BC Hydro's ability to resolve disputes. BC Hydro does not specify the nature of the disputes, or how such an impairment could reasonably be expected to harm its financial interests. BC Hydro also does not link disclosure of the labour escalation clauses to any of the other harms it identified under s. 17(1). Accordingly, I conclude that BC Hydro is not authorized to withhold those clauses under s. 17(1). BC Hydro also withheld them under s. 21(1), so I will consider them again under that section.

[37] I turn now to the technical information. While several years have passed since the Agreement was written, there is nothing in the materials before me that would lead me to conclude that the technical information is no longer applicable or relevant to current conditions. I accept BC Hydro's argument that its negotiating position in the energy marketplace, and therefore its financial interests, would be damaged by disclosure of this information. I can see that the technical information consists of technical specifications for the various systems the Contractor was to deliver, and am satisfied that its disclosure would allow knowledgeable third parties to model BC Hydro's import and export requirements. The harm BC Hydro anticipates is plausible, specific, supported by the evidence, and directly connected to the disclosure of the technical information.

Conclusion on s. 17(1)

[38] I find that BC Hydro has met its burden of proving that s. 17(1) applies to most of the information in dispute. The only exception is the labour escalation clauses on pages 14 and 15 of the records, which I find BC Hydro is not

³⁰ BC Hydro's initial submission at para 24; Affidavit of Project Manager at para 38.

authorized to refuse to disclose under s. 17(1).

Harm to business interests of a third party – s. 21(1)

[39] Section 21(1) requires a public body to refuse to disclose information whose disclosure could reasonably be expected to be harmful to the business interests of a third party. In particular, it provides:

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

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of or about 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,

...

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

[40] The principles governing the application of s. 21(1) are well established. Each of the following three criteria must be met in order for s. 21(1) to apply:

- Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and
- Disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).³¹

[41] BC Hydro withheld some information under both ss. 17(1) and 21(1). Where I have found information was properly withheld under s. 17(1), I will not consider it again under s. 21(1). The information I will consider under s. 21(1)

³¹ See, e.g., Order F24-11, 2024 BCIPC 15 (CanLII) at para 34, citing Order F22-33, 2022 BCIPC 37 (CanLII) at para 25.

includes sections of the Agreement, appendices to the Agreement and references to these appendices, dollar amounts, and technical specifications.

[42] The applicant says that s. 21(1) does not apply to contracts for goods and services between public bodies and private entities.³² I have considered and rejected that argument above with respect to s. 17(1). My reasons are also applicable to s. 21(1), so I will not repeat them here.

Type of information – s. 21(1)(a)(ii)

[43] The first step in the s. 21(1) analysis is to determine whether the disputed information falls into one of the categories set out in s. 21(1)(a). BC Hydro and the Contractor both say that the withheld information is variously commercial, financial, and/or technical information.³³ The Contractor adds that some portions of the information are trade secrets and/or labour relations information.³⁴ The applicant does not make a submission on this point.

[44] FIPPA does not define “commercial information”, but previous orders have established that commercial information is associated with the buying, selling, or exchange of an entity’s goods or services. The information need not have commercial value in itself to be commercial information.³⁵

[45] The Agreement concerns the provision by the Contractor of goods and services to BC Hydro in exchange for money. The withheld information includes the total contract price, the currency fluctuation adjustment calculation, guest night rates, milestone payment amounts, technical specifications for the work to be performed by the Contractor, and some pieces of information whose description was given on an *in camera* basis. I have no difficulty concluding that all of this information is commercial information. Moreover, since the Agreement is entirely concerned with the Contractor’s provision of goods and services, I also have no difficulty concluding that the information is “of” or “about” the Contractor. It is therefore not necessary to consider whether some or all of the information falls into one or more of the other categories set out in s. 21(1)(a)(i) and/or (ii).

Supplied in confidence – s. 21(1)(b)

[46] Since I have found that all the remaining withheld information is commercial information of or about the Contractor, I must decide whether this information was supplied to BC Hydro in confidence. This step of the analysis

³² Applicant’s response submission at paras 5-7.

³³ BC Hydro’s initial submission at paras 35-40; Contractor’s initial submission at paras 25-28.

³⁴ Contractor’s initial submission at paras 29-30.

³⁵ See, e.g., Order F08-03, 2008 CanLII 13321 (BC IPC) at paras 62-63.

has two parts: first, I must decide whether the information was supplied to BC Hydro. Next, I must decide whether it was supplied in confidence.³⁶

Did the Contractor supply the information to BC Hydro?

[47] Information contained in a contract will normally be found to have been negotiated between the parties, and not supplied by a contracting party to the public body. However, there are two circumstances where information in a contract may be considered to have been supplied:

- 1) The information was immutable or not susceptible to alteration during negotiation and it was incorporated into the agreement or contract unchanged; or
- 2) The information would allow someone to draw an accurate inference about underlying confidential information which the third party supplied to the public body but that is not itself contained in the agreement or contract.³⁷

[48] Subsequent orders have consistently applied this approach,³⁸ and I will do the same here.

[49] BC Hydro says that the Contractor supplied the information in confidence to BC Hydro for the specific purposes of the Agreement under s. 21(1)(b), but it does not explain how the various portions of withheld information meet the “supplied” requirement.³⁹

[50] The Contractor submits that all the information in dispute, despite its being in a contract, was supplied and not negotiated information because of the immutability and accurate inference exceptions set out above.

[51] The Contractor says that the information in the Agreement is immutable because it refers to information that was in its proposal to BC Hydro. For instance, it says, among other things, there are references to the technical design and performance capabilities the Contractor demonstrated or disclosed in its proposal.⁴⁰

³⁶ Order F14-28, 2014 BCIPC 31 (CanLII) at para 13.

³⁷ Order 01-39, 2001 CanLII 21593 (BC IPC) at paras 43-46 and 50; upheld on judicial review: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 (CanLII) at paras 72-75.

³⁸ See, e.g., Order F18-28, 2018 BCIPC 31 (CanLII) at paras 10-11, and Order F24-87, 2024 BCIPC 99 (CanLII) at para 21.

³⁹ BC Hydro's initial submission at para 41; Affidavit of Project Manager at para 37.

⁴⁰ Contractor's initial submission at para 33.

[52] The Contractor also says that the “accurate inference” exception applies because disclosure would allow accurate inferences as to the Contractor’s “operations, philosophy, methodology and strategies for project costing and bidding strategies that were not negotiated and are confidential.” By way of example, the Contractor says that there is information in the Agreement that relates to information it presented in its proposal about the execution of cost-saving strategies. It submits that disclosing the information in the Agreement “would allow accurate inferences about the nature of the cost-saving strategies themselves.”⁴¹

[53] The applicant cites several cases where OIPC adjudicators found that the public bodies involved had failed to make out one or more of the elements of the s. 21(1) test. He does not explicitly say how those cases relate to this one, but I understand his argument to be that some or all of the information BC Hydro withheld under s. 21(1) was negotiated between the parties to the Agreement rather than supplied by the Contractor.⁴²

[54] In reply to the applicant’s submission, the Contractor says that in contrast to the cases cited by the applicant, here it has provided evidence to show that the information is either immutable or would permit the drawing of accurate inferences about underlying confidentially supplied information.⁴³

[55] I find that some of the withheld information was supplied because it is immutable information that would not have been susceptible to change through negotiation. BC Hydro withheld some information in Appendix 11-6, which contains technical data about the various systems the Contractor proposed to deliver. Most of this information was also withheld under s. 17(1), and I found above that BC Hydro was entitled to withhold it on that basis. A small amount of the information, however, was withheld under s. 21(1) alone.⁴⁴ The Contractor’s senior contract manager (Senior Contract Manager), who provided an affidavit, says that this information is immutable because it reveals the Contractor’s immutable technical performance capabilities.⁴⁵ The Contractor argues that these capabilities were disclosed to BC Hydro as part of the Contractor’s proposal. This evidence and argument, as well as the nature of the information and its context, persuade me that the information is immutable. I cannot see how BC Hydro could have negotiated for changes to this information, even if it wanted to. I therefore find this information to have been supplied. However, some of the information in

⁴¹ Contractor’s initial submission at paras 34-35.

⁴² Applicant’s response submission at paras 19-31, citing Order F21-29, 2021 BCIPC 37 (CanLII) at paras 25-31 and 38-43; Order F14-28, *supra* note 36 at para 15; *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, 2002 CanLII 45028 (ON CA) at paras 48-49 and headnote; F18-28, 2018 BCIPC 31 (CanLII) at paras 14-18; Order F23-11, 2023 BCIPC 13 (CanLII) at paras 17-20; and Order F17-14, 2017 BCIPC 15 (CanLII) at paras 14-21.

⁴³ Contractor’s reply submission at paras 6-10.

⁴⁴ At pages 1029, 1045-46, 1066-67, 1069-71, and 1073-74.

⁴⁵ Affidavit of Senior Contract Manager, Exhibit A at 11.

Appendix 11-6 on pages 1060 and 1073, and all of the information on page 1074, in my view, does not reveal anything specific about the Contractor's technical capabilities and is not immutable.

[56] However, for the reasons that follow, I find that most of the information BC Hydro withheld under s. 21(1) was not supplied. Most of the information, even if it appears in the executed Agreement in the same form in which the Contractor provided it, is the kind of information that is ordinarily subject to negotiation.

[57] To take one example, BC Hydro has withheld the Agreement's total contract price.⁴⁶ The Agreement itself expressly provides that the contract price "may be adjusted in accordance with the Contract Documents". No circumstance suggests that this price was not subject to negotiation. The Senior Contract Manager deposes that disclosure of the contract price would "permit accurate inferences with respect to the [Contractor's] confidential philosophy and methodology for estimating charge orders and price escalations".⁴⁷ I cannot see how disclosure of this total price would reveal anything about underlying information confidentially supplied to BC Hydro. I adopt the reasoning of former Commissioner Loukidelis in Order F06-20, where he said:

This case falls squarely within the many orders that have found that the contract price for services to a public body is not 'supplied' information within the meaning of s. 21(1)(b). The fact that the [public body] may have accepted a contract price that [a third party] generated through application of its business model does not make the amount that the parties agreed upon information that is proprietary to [the third party]. Not does it mean that the price bargain struck between the [public body] and [the third party] constitutes immutable or underlying confidential information supplied by [the third party]."⁴⁸

[58] For another example, BC Hydro withheld the entirety of what I will refer to generically as the Contractor's work plan.⁴⁹ The Senior Contract Manager deposes that disclosure of this information would permit accurate inferences about the Contractor's project costing, its overall bid strategy, and its ability to meet BC Hydro's tender requirements.⁵⁰ Although I can see that the work plan was prepared by the Contractor, it could have been accepted, rejected, or modified by BC Hydro before its incorporation into the Agreement. Similarly, BC

⁴⁶ On page 7 of the records package.

⁴⁷ Affidavit of Senior Contract Manager, Exhibit A at 1; the Senior Contract Manager also provided some details on an *in camera* basis.

⁴⁸ Order F06-20, 2006 CanLII 37940 (BC IPC) at para 15.

⁴⁹ At pages 140 to 235 of the records package. Its actual name was given on an *in camera* basis.

⁵⁰ Affidavit of Senior Contract Manager, Exhibit A at 14.

Hydro and the Contractor do not explain how disclosure would permit accurate inferences about underlying confidentially supplied information.⁵¹

[59] For another example, I cannot see, and the parties do not explain, how the names and numbers of certain appendices could fall into either of the exceptions noted above. Accordingly, I find that information was not supplied.

[60] The Contractor also refers to Order F18-39, where the adjudicator found that a template used by a third party to create financial models in order to create bids for a list of specified future projects was not susceptible of negotiation.⁵² The Contractor says that case stands for the proposition that portions of an agreement that reveal information a third party uses to bid on other projects is supplied information.⁵³ I do not agree that is what Order F18-39 said; that order was about a detailed, immutable financial model provided by a third party to a public body. The Contractor does not, as far as I can discern, point to a similarly immutable model in the withheld information.

[61] I also do not find that the “accurate inference” exception applies to any of the withheld information. In order for this exception to be engaged, disclosure of withheld information must permit accurate inferences about underlying confidentially supplied information which does not expressly appear in the resulting contract. The example the Contractor gives is that disclosure of portions of the Agreement that relate to its cost-saving strategies would allow accurate inferences about what it said about those strategies in the proposal it confidentially supplied to BC Hydro.⁵⁴ The Senior Contract Manager provided, in her affidavit, a table setting out why various pieces of withheld information would permit accurate inferences about cost-saving strategies and other aspects of the Contractor’s business.⁵⁵ While this table does refer to specific pieces of information in the Agreement, in my view, what it says about the inferences that could be drawn is more in the nature of assertion than explanation. It is not specific enough about what accurate inferences could be drawn from the withheld information, and how an observer could work backwards from this information to underlying confidentially supplied information. In particular, I have considered what the Contractor says (partially on an *in camera* basis) about the accurate inferences it would be possible to draw about the Contractor’s cost saving techniques from disclosure of the Contractor’s guest reservation entitlement at Site C’s worker accommodation facility.⁵⁶ While the Contractor provided some explanation for this item, in my view it falls short of what is required to establish what inferences could be drawn.

⁵¹ See, e.g., Order F15-69, 2015 BCIPC 75 (CanLII) at para 18, where the adjudicator made a similar finding with respect to a third party’s proposed work plan.

⁵² Order F18-39, 2018 BCIPC 42 (CanLII) at paras 45-46.

⁵³ Contractor’s initial submission at para 38.

⁵⁴ Contractor’s initial submission at paras 20-21 and 35.

⁵⁵ Affidavit of Senior Contract Manager, Exhibit A.

⁵⁶ *Ibid*, Exhibit A at 9.

[62] For these reasons, I find that only a small amount⁵⁷ of the information in dispute that I am considering under s. 21(1) was “supplied” information. For the most part, I am not persuaded by the Contractor’s submissions on the exceptions to the general rule that information in a contract is negotiated. Given this finding, I will only consider whether the small amount of information I found to have been supplied was supplied in confidence.

Was the information supplied in confidence?

[63] To establish confidentiality of supply, a party must show that, at the time it supplied the information, it did so under an objectively reasonable expectation of confidentiality.⁵⁸

[64] BC Hydro and the Contractor rely on the following expression of confidentiality in one of the schedules to the Agreement:

Each of BC Hydro and the Contractor will treat as confidential, and will use commercially reasonable efforts to protect and prevent the publication, disclosure or dissemination to third parties without the prior written consent of the disclosing party any business, financial, operational or technical information of the disclosing party, or of any other information expressly identified by the disclosing party in writing as proprietary or confidential, that is supplied (whether orally or in written, electronic or any other form) to, or otherwise obtained or acquired by, the receiving party as a result of or in connection with the [Agreement] (collectively the “Confidential Information”). For the purposes of this Section 19.1 Confidential Information will also include the executed copy of the [Agreement].⁵⁹

[65] In addition, the Contractor relies on a section of BC Hydro’s request for proposal, which says the following:

10.5 CONFIDENTIALITY OF INFORMATION

...

Except as expressly stated in this RFP, and subject to [FIPPA] or other applicable legislation, all documents and other records submitted in response to this RFP will be considered confidential.⁶⁰

[66] The Contractor says that these confidentiality provisions enabled it and its competitors to put their best foot forward in the bidding process without the risk that their confidential information would be shared with their competitors.⁶¹

⁵⁷ Namely, some of the withheld information in Appendix 11-6.

⁵⁸ Order 01-36, 2001 CanLII 21590 (BC IPC) at para 23.

⁵⁹ At pages 102-103 of the records package; cited in BC Hydro’s initial submission at para 41.

⁶⁰ Contractor’s initial submission at para 40.

⁶¹ *Ibid* at para 41.

[67] The applicant does not say anything about confidentiality of supply.

[68] I accept that these expressions of confidentiality apply to information supplied by the Contractor and are evidence of an objectively reasonable expectation of confidentiality. This part of the test is therefore met with respect to the information I have found was supplied, which is the technical information about the turbine and generator systems in Appendix 11-6.

Harm reasonably expected from disclosure – s. 21(1)(c)

[69] The last part of the s. 21(1) analysis is to determine whether one or more of the specified harms could reasonably be expected to result from disclosure of the information that I found was supplied in confidence. As mentioned, that information is in Appendix 11-6 and consists of technical information about the turbine and generator systems.

[70] As I said above, the standard of proof for harm-based exceptions is a middle ground between what is merely possible and what is probable. There must be a clear and direct connection between disclosure of the information and the expected harm.⁶²

[71] Mere heightening of competition for future contracts is not enough for a finding of significant harm to a third party's competitive position or significant interference with its negotiating position. Similarly, a situation where third parties must price their services competitively is not a circumstance of undue financial loss or gain.⁶³

[72] BC Hydro and the Contractor rely on ss. 21(1)(c)(i) and (iii) in their arguments about the harm they foresee flowing from disclosure of the withheld information. In particular, the Contractor's Senior Contract Manager says the following about the information in Appendix 11-6:

[A]ll technical data, including values and units, energy calculations and generator losses, reveal the [Contractor's] technical performance capabilities that are immutable to it. If such information becomes known to the [Contractor's] competitors, such parties could reasonably be expected to [use the information] in future bidding processes, which would cause harm to the [Contractor's] competitive position, interfere significantly with the [Contractor's] negotiating positions in such processes and thereby cause undue financial harm to the [Contractor] and undue gain to its competitors.⁶⁴

⁶² Order F07-15, *supra* note 26 at para 17.

⁶³ Order F06-20, *supra* note 48 at para 20.

⁶⁴ Affidavit of Senior Contract Manager, Exhibit A at 11.

[73] The Senior Contract Manager also deposes that the Contractor's business relies on the delivery of successful proposals in response to competitive procurement solicitations, and that there are only a limited number of competitors bidding for each project, for which the competition is fierce.⁶⁵ She says further about the Contractor's technical data:

Given the competitive landscape and limited nature of the types of projects [on] which the [Contractor] and its competitors bid, I believe that if the [Contractor's] confidential information is disclosed then its competitors will use it in the following ways:

a) competitors will use the [Contractor's] technical design criteria and know-how derived from the [Contractor's] significant research and development investments to achieve similar state of the art performance capabilities as the [Contractor], thereby depriving the [Contractor] of its competitive advantage;

b) competitors will reverse engineer the [Contractor's] design criteria and calibrate and adjust their equipment designs, and their subsequent bids, on what they know the [Contractor] has achieved on a technical basis rather than on their own current technological capabilities;

c) competitors will infer the [Contractor's] main cost drivers from the [Contractor's] technical data and sourcing of labour and materials to identify and undercut the [Contractor's] component costing for subsequent projects;⁶⁶

[74] The Contractor adds that while the Site C project is unique, its technical design and performance capabilities, which will make it competitive in bids for future projects, are not. It says that disclosure of the withheld information will allow the Contractor's competitors to improve their competitiveness and render the Contractor less competitive. It submits that disclosure is "certain" to hurt the Contractor.⁶⁷

[75] The applicant does not say anything about harm under s. 21(1), although he does draw attention to the eight years that have passed since the execution of the Agreement.⁶⁸

[76] Previous orders have said that if a third party's competitor would gain an advantage from the acquisition of competitively valuable information at no cost, the gain will be undue.⁶⁹

⁶⁵ Affidavit of Senior Contract Manager at paras 7-11.

⁶⁶ *Ibid* at para 25.

⁶⁷ Contractor's initial submission at paras 44-47.

⁶⁸ Applicant's response submission at para 3.

⁶⁹ Order F19-50, 2019 BCIPC 56 (CanLII) at para 67.

[77] I accept the Senior Contract Manager's evidence about the small number of competitors in the Contractor's field, the competitive nature of that field, and the ability of competitors to use the withheld information to their advantage. I am satisfied that there is a reasonable likelihood of an undue gain to one or more of the Contractor's competitors if the technical data were disclosed, since the gain would be achieved at no cost to the competitors. I am persuaded that there is a clear and direct connection between disclosure of this data and the contemplated harm. The test for s. 21(1)(c)(iii) is therefore met with respect to this information in Appendix 11-6. There is therefore no need to consider whether s. 21(1)(c)(i) also applies.

Conclusion on s. 21(1)

[78] I have found that all of the withheld information is commercial information under s. 21(1)(a). I have found that only a small amount of the commercial information, which is in Appendix 11-6, was supplied in confidence under s. 21(1)(b). Finally, I have found a reasonable likelihood of an undue gain to one or more of the Contractor's competitors if this information were disclosed. BC Hydro must, therefore, refuse to disclose it.

Unreasonable invasion of third-party personal privacy – s. 22(1)

[79] Section 22(1) of FIPPA provides that a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[80] The OIPC's analytical approach to s. 22(1), which I will apply, is well established:

This section only applies to "personal information" as defined in FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.⁷⁰

[81] The Contractor says that disclosure of the information it withheld under s. 22 would be an unreasonable invasion of the employees' personal privacy, but

⁷⁰ Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

does not say why.⁷¹ BC Hydro adopts the Contractor's submission on this point.⁷² The applicant says that s. 22(1) does not apply.⁷³

Is the information personal information? – s. 22(1)

[82] The first step in the s. 22 analysis is to determine whether the withheld information is personal information. Both “personal information” and “contact information” are defined in Schedule 1 of FIPPA:

“personal information” means recorded information about an identifiable individual other than contact information;

“contact information” 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;

[83] As I noted above, BC Hydro has the burden of proving that the information it seeks to withhold under s. 22(1) is personal information. The information it withheld consists of the names, email addresses, and signatures of some of the Contractor's employees.

[84] No party made submissions on whether the information withheld under s. 22(1) is personal information. The applicant refers to an order where the adjudicator found, based on the facts in that case, that some information in dispute was contact information. The applicant does not say why that case is relevant here or explain why some or all of the information in this case may be contact information.⁷⁴

[85] The withheld name and email on page 7 appear in a section of the Agreement setting out who is to be each party's representative. The section itself specifies: “If no names or contact details are included in this Section 4 as of the Effective Date, then each party will promptly give written notice to the other party of their respective Representative...” In my view, this strongly suggests that the drafters of the Agreement expected this section to be populated with contact details, and in the executed copy of the Agreement, it was. I find that this name and email address are contact information because they are included in the Agreement to enable an individual at a place of business to be contacted.

[86] Similarly, the name and email address on page 8 appear in a section of the Agreement that specifies where the parties to the Agreement are to send

⁷¹ Contractor's initial submission at para 52.

⁷² BC Hydro's initial submission at para 46.

⁷³ Applicant's response submission at para 4.

⁷⁴ Applicant's response submission at paras 32-33, citing Order F21-03, 2021 BCIPC 3 (CanLII) at paras 16-27.

notices or communications required or permitted to be given under the Agreement. Given the clear purpose of this information, I find that it is also contact information.

[87] The balance of the information consists of the names and signatures of various individuals. Nothing about the context in which this information appears suggests that the information is included in order for those individuals to be contacted. I therefore find that this information is personal information.

Not an unreasonable invasion of privacy – s. 22(4)

[88] Section 22(4) sets out circumstances where disclosure of personal information would not be an unreasonable invasion of a third party's privacy. In particular, it says:

A disclosure of personal information is not an unreasonable invasion of a third party's 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,

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

[89] The personal information that remains in dispute under s. 22(4) consists of the names and signatures of signatories, as well as the names of key individuals responsible for the performance of the Contractor's obligations under the Agreement.

[90] The applicant refers to an OIPC order where the adjudicator found that disclosure of some public body employees' signatures would not be an unreasonable invasion of their privacy because s. 22(4)(e) applied.⁷⁵ However, in this case, the names and signatures are those of the Contractor's employees. Section 22(4)(e) applies to information about a 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. The Contractor's employees do not fall into any of these categories, so I find that s. 22(4)(e) does not apply.

[91] No party made a submission on any other s. 22(4) subsection. However, in my view, s. 22(4)(f) is relevant. In Order F21-08, the adjudicator found that s. 22(4)(f) applied to the names of contract signatories and the names of

⁷⁵ Applicant's response submission at para 34, citing Order F24-37, 2024 BCIPC 45 (CanLII) at paras 245-247.

individuals who managed specific contracts.⁷⁶ I make a similar finding about the personal information in this case. The Agreement is a contract to supply goods and services to a public body, and the names and signatures of its signatories, and those responsible for the performance of the Contractor's obligations, are details of it. Since s. 22(4)(f) applies to this information, its disclosure would not be an unreasonable invasion of those individuals' privacy.

Summary and conclusions on s. 22(1)

[92] I have found that some of the information BC Hydro withheld under s. 22(1) is contact information and not personal information, and that s. 22(4)(f) applies to all of the personal information at issue. BC Hydro is therefore not required to withhold any of the information at issue under s. 22(1).

CONCLUSION

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

1. Subject to item 4 below, I confirm in part BC Hydro's decision to refuse to disclose information under s. 17(1).
2. Subject to item 4 below, I require BC Hydro to refuse to disclose information under s. 21(1).
3. BC Hydro is not required to refuse to disclose information under s. 22(1).
4. BC Hydro is required to give the applicant access to the information I have highlighted in yellow in the copy of pages 2, 4, 5, 7-17, 41-42, 47, 51, 81, 120, 130, 132-133, 140-235, 270, 323, 370, 405, 626, 974, 981, 999-1001, 1004-1007, 1009, 1060, 1073-1074, and 1084-1087, which are provided to BC Hydro with this order.
5. BC Hydro must copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 4 above.

⁷⁶ Order F21-08, 2021 BCIPC 12 (CanLII) at paras 115-116.

[94] Pursuant to s. 59(1) of FIPPA, BC Hydro is required to comply with this order by April 16, 2025.

March 5, 2025

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

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