



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

Order 01-17

**BRITISH COLUMBIA HYDRO AND
POWER AUTHORITY**

David Loukidelis, Information and Privacy Commissioner
April 25, 2001

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Summary: BC Hydro withheld information from the OPEIU respecting a proposed split of BC Hydro's existing pension plan into two plans. BC Hydro is not entitled to withhold information under s. 13(1), as the information did not qualify as, or implicitly reveal, advice or recommendations. BC Hydro authorized to withhold information it withheld under s. 17(1), since its disclosure could reasonably be expected to harm BC Hydro's financial interests.

Key Words: advice or recommendations – developed by or for a public body – financial or economic interest – reasonable expectation of harm – undue financial loss or gain to third party – supplied in confidence – significant harm to competitive position.

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

Authorities Considered: B.C.: Order No. 142-1997, [1997] B.C.I.P.C.D. No. 24; Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 00-37, [2000] B.C.I.P.C.D. No. 40; Order 00-39, [2000] B.C.I.P.C.D. No.42; Order 01-15, [2001] B.C.I.P.C.D. No. 16.

1.0 INTRODUCTION

[1] The applicant in this case is a union, the Office and Professional Employees' International Union, Local 378, ("OPEIU"), which represents some of the employees of the British Columbia Hydro and Power Authority ("BC Hydro"). An OPEIU research analyst made a request to BC Hydro, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for two types of records, described in the request as follows:

- “Copies of minutes of the Board of Directors meeting where the decision was made to proceed with joint trusteeship discussion only on the precondition that the pension plan be split into two components”, and
- “All materials provided to board members, by BC Hydro staff, before this decision was made, relating to the issue of severing the plan into two components”.

[2] BC Hydro provided a few records in response. It severed and withheld some information in the records under ss. 13(1), 14 and 17(1) of the Act. The applicant requested a review, under Part 5 of the Act, of BC Hydro’s decision and, during mediation, received a few more items of information. The OPEIU agreed not to pursue the release of information withheld by BC Hydro under s. 14, which permits public bodies to withhold information that is subject to solicitor client privilege. (The information withheld by BC Hydro under s. 14 was properly withheld under that section.) As mediation did not resolve the remaining issues in dispute, I held a written inquiry under s. 56 of the Act.

[3] I note here that, after I reviewed the parties’ submissions, I invited further comments from BC Hydro on two issues: why certain information (which I highlighted for BC Hydro) should continue to be withheld, when BC Hydro had disclosed what appeared to be the same or very similar information elsewhere; and whether the head of BC Hydro had exercised his discretion in applying ss. 13 and 17 and, if so, what factors he had considered. There were indications in the material before me that the head’s discretion had been exercised, but I wished further information on that point.

[4] BC Hydro responded by saying that it did not object to the disclosure of some items it had withheld under ss. 13(1) and 17(1) and proposed some severing of other items I had highlighted. (BC Hydro did not say if it had disclosed these items.) It also provided submissions as to why the remaining information I had highlighted for further comment should remain withheld. BC Hydro also provided a submission on the head’s exercise of discretion. I invited the applicant to comment on this additional submission, which it did.

2.0 ISSUES

[5] The issue here is whether BC Hydro was authorized to withhold information under ss. 13(1) and 17(1) of the Act from minutes and background information related to the splitting of BC Hydro’s employee pension plan into two plans. Under s. 57(1) of the Act, BC Hydro has the burden of proof on both issues.

3.0 DISCUSSION

[6] **3.1 Background to this Inquiry** – The applicant provided some background details – which BC Hydro confirms – that helped me to place the issues in context. Until 1999, BC Hydro had exclusive jurisdiction over the BC Hydro Employee Pension Plan. The applicant says that, before 1999, BC Hydro and its employees were legally prohibited from making pension arrangements the subject of negotiations. Legislative

changes that year meant that BC Hydro could deal with pension arrangements in negotiations.

[7] Before negotiations on joint trusteeship of the pension plans began, the applicant told me, BC Hydro announced that it would proceed with negotiations only if the existing pension plan were split into two components, one plan for the OPEIU and the International Brotherhood of Electrical Workers and another plan for all other employees. Negotiations on joint trusteeship for the split pension plans have, according to the applicant, since begun and were completed in October of 2000 with the signing of an agreement in principle (p. 3, applicant's second reply submission). BC Hydro confirms that the two parties were, at the time of this inquiry, involved in "negotiations regarding changes to the governance of, and responsibility for, the [pension] Plan" (para. 3.1, initial submission).

[8] With its second reply submission, the applicant provided me with a copy of a proposed agreement in principle, which BC Hydro signed in October of 2000, together with a covering letter from BC Hydro's vice president of human resources. The letter said that he was signing the "proposed 'Agreement in Principle' ", on behalf of BC Hydro,

... with the understanding that it represents the complete terms which will make up the joint trustee agreement, and that all other matters previously raised by any of the Parties in the negotiations have been dropped or withdrawn. In stating this understanding, it is recognized that should one or more of the Parties choose to revisit any of the dropped issues, they may do so once the Agreement in Principle has been formalized into a Joint Trusteeship Agreement and it has been signed off by the Parties."

[9] I also note, however, that BC Hydro's additional submission indicates that joint trusteeship negotiations with the unions were still ongoing.

[10] Again, the responsive records relate to the splitting of the existing pension plan into two plans.

[11] **3.2 Records Involved in this Case** – BC Hydro identified five records that respond to the OPEIU's request, of which only three are in issue here.

[12] Record 1 is a one-page extract from the minutes of a January 7, 2000 meeting of the Executive Committee of the Board of Directors of BC Hydro. BC Hydro disclosed this record in full. Record 2 is a 4-page memo with attachment, to which BC Hydro applied s. 14. This record is not in issue in the inquiry.

[13] Record 3 is a four-page extract from the minutes of a January 24, 2000 meeting of the Executive Committee of BC Hydro's Board of Directors. BC Hydro applied ss. 13(1) and 17(1) to portions of this record. BC Hydro's application of ss. 13(1) and 17(1) on the second page and s. 17(1) on the third page remain in issue in this inquiry.

[14] Record 4 is a two-page undated Executive Summary, with a draft board resolution attached. BC Hydro applied ss. 13(1), 14 and 17(1) to portions of this record. The

OPEIU chose not to pursue s. 14, which BC Hydro had applied to most of the first page of this record. After the inquiry closed, BC Hydro agreed to disclose the s. 13(1) portion and some of the information to which it had applied s. 17(1) on page 2. Accordingly, the application of s. 17(1) to some 7 lines on page 2 and to 8 lines on the attachment to this record is at issue respecting this record.

[15] Record 5 is a one-page draft board resolution. It is a duplicate of the attachment to Record 4. BC Hydro's application of s. 17(1) to portions of this record is in issue. The information withheld from this record is identical to that in the attachment to record 4 and to that withheld on page 3 of record 3.

[16] **3.3 Advice or Recommendations** – Section 13(1) of the Act creates a discretionary exception that says a public body

... may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[17] BC Hydro applied s. 13(1) to about 9 lines on page 2 of record 3, an extract from the minutes of a meeting of January 24, 2000 of the Executive Committee of BC Hydro's Board of Directors.

[18] I most recently considered this exception in Order 01-15, [2001] B.C.I.P.C.D. No. 16, in which I confirmed the views I have expressed before on s. 13(1). That section covers matters such as advice or recommendations on a proposed course of action, on a policy choice or on the exercise of a power, duty or function. I apply the same reasoning and principles here.

[19] The disclosed portions of the relevant records show that BC Hydro was about to start negotiations with its unions on joint trusteeship of the BC Hydro pension plan, that non-union employees had requested that the pension plan be split into two components (one for union employees and one for other employees) and that the Board approved the start of negotiations on joint management of the pension plan, on the basis of the split.

[20] Most of BC Hydro's initial submission and evidence on s. 13(1) was submitted *in camera*. I have decided it is properly received *in camera*. In its public submission, BC Hydro argues generally that the withheld information constitutes advice developed for BC Hydro. The applicant suggests that s. 13(1) does not apply by virtue of ss. 13(2)(l), (m) and (n). (These sections state that a public body must not refuse under s. 13(1) to disclose certain types of information, principally factual information of various types.) Given my decision on s. 13(1), however, I do not need to consider s. 13(2).

[21] I have carefully considered BC Hydro's submissions and evidence, both public and *in camera*, on s. 13(1). They relate, in my view, more properly to possible harm under s. 17(1). In any case, I do not agree that the withheld information falls under s. 13(1). It does not, in my view, contain either implicit or explicit advice or recommendations on a proposed course of action (which course of action is, I note from the disclosed portions of the records, already known to the applicant). Nor would the information to which BC Hydro applied s. 13(1) allow a reader to draw an accurate

inference that would disclose advice or recommendations. In my view, the withheld information consists of implications or possible consequences of the proposed pension plan split. Information as to such implications or consequences does not, in this case, constitute advice or recommendations. I find that s. 13(1) does not apply to the disputed information.

[22] **3.4 Harm to BC Hydro's Financial Interests** – The bulk of BC Hydro's case centres around s. 17(1) of the Act, which reads as follows:

- 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
- (a) trade secrets of a public body or the government of British Columbia;
 - (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
 - (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
 - (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.

Applicable Principles

[23] BC Hydro argues that it must provide evidence showing how disclosure could reasonably be expected to cause harm and suggests that this evidence of necessity involves some speculation (paras. 5.2 & 5.4, initial submission). The OPEIU, for its part, reminds me that, in Order 00-24, [2000] B.C.I.P.C.D. No. 27, I discussed the standard of proof for harms-based exceptions. I said there that the feared harm must not be fanciful, imaginary or contrived and evidence of speculative harm will not suffice, although it is not necessary to establish a certainty of harm (pages 1-12, initial submission). More recently, in Order 00-37, [2000] B.C.I.P.C.D. No. 40, at p. 4, I said the following:

I have observed in a number of cases – most recently, in Order No. 00-24 – that evidence of speculative harm will not meet the reasonable expectation of harm test under s. 17(1). The feared harm must not be imaginary or contrived and, although it is not necessary to establish a certainty of harm, the quality and cogency of the evidence presented must be commensurate with a reasonable person's expectation that the disclosure could cause harm as contemplated by s. 17(1).

[24] I have applied the same reasoning in this case.

Information About Negotiations

[25] BC Hydro prefaces its initial submission with a general statement of its objections to disclosure of the withheld information, in the context of current pension negotiations with OPEIU:

3.3 Negotiations work best when all parties are subject to the same rules and are free to orchestrate their own participation. If one party is given a distinct advantage over another, the opportunity for a fruitful and mutually acceptable conclusion to the negotiations is diminished. (The outcome may, in fact, leave the parties in a worse position than prior to the negotiation's commencement.) Giving negotiating party 'A' unreciprocated insight into the positions, options, instructions, and negotiating criteria of negotiating party 'B' creates an advantage for 'A' and a distinct disadvantage for 'B'.

3.4 As a matter of fairness, the Act should not be used to force B.C. Hydro to disclose negotiating information to the Applicant. The Applicant is not subject to the Act and so Hydro may not appeal to the same rules in order to force the Applicant to disclose its negotiating information. The Act should not be used as an instrument by which one negotiating party achieves an advantage over another and B.C. Hydro submits that the Legislature did not intend the Act to be used as such an instrument. B.C. Hydro submits, also, that the Legislature did not intend the Act to be interpreted so as to offend against fundamental principles of fairness.

[26] BC Hydro says that information which could reasonably be expected to cause such harm includes information about negotiations carried on by or for a public body, as is mentioned in s. 17(1)(e). As of the date of the inquiry and during the time in which I invited further submissions, BC Hydro was still negotiating with the OPEIU on matters addressed by the withheld information. BC Hydro says that disclosure of this information would damage its ability to negotiate effectively with the OPEIU by revealing its positions, options and negotiating criteria (paras. 5.2 - 5.9, initial submission). It says that the withheld information relates to the decision to split the pension plan and "also directly discloses or discloses by inference BC Hydro's strategy, criteria, options and positions in the Negotiations. Therefore, the information bears a direct relation to the Negotiations" (para. 6.2.3.1, reply submission).

[27] The OPEIU argues that BC Hydro should not sever information under s. 17(1)(e), as the subject matter of the request does not relate to any ongoing negotiations. It says that the issue of whether or not to split the pension plan in two is not the subject of negotiations between BC Hydro and itself. The OPEIU suggests that BC Hydro is confusing information on the framework for negotiations with information about the actual negotiations. It says that my predecessor made this distinction in Order No. 142-1997, [1997] B.C.I.P.C.D. No. 24. The OPEIU says that it has accepted the split of the pension plan and that the primary subject of negotiations has been the terms and conditions of a jointly trusted pension plan for unionized employees.

[28] At para. 6.2.3.2 of its reply submission, BC Hydro says, in response, that:

... matters related to dividing the BC Hydro Employees' Pension Plan (the "Pension Plan") are the subject of the Negotiations. For example, the Applicant is

attempting to negotiate reciprocal treatment for divided union and non-union Pension Plans in the Negotiations. BC Hydro also submits dividing the Pension Plan into a union and non-union plan is one of the President and Chief Executive Officer's instructions from the Board for the firm position BC Hydro should take in the Negotiations.

[29] At para. 6.2.3.4 of its reply submission, it says the following:

If the Negotiations are unsuccessful, and a joint management agreement is not concluded, BC Hydro has no mandate, or Board approval, to divide the Pension Plan. As such, the final determination of whether or not the Plan will be divided rests on the successful conclusion of the Negotiations. It is true that the Decision [to split the plan] itself is not the subject of the Negotiations, but it is a fundamental part of the Negotiations.

[30] BC Hydro concludes by saying that, although the withheld information is directly related to the decision to split the pension plan in two, it was withheld as it bears a direct relation to the ongoing negotiations (paras. 6.2.3.2 – 6.2.3.5, reply submission). It says, at para. 5.8 of its initial submission, that its ability to negotiate with the OPEIU would be harmed because the information reveals “positions, options, and negotiating criteria” of BC Hydro.

[31] BC Hydro has provided the rest of its argument and evidence on s. 17(1) *in camera*. Among other things, those materials reveal the contents of the disputed information. It is permissible for me to say, however, that BC Hydro argues, in essence, that the applicant would have an advantage in pension plan negotiations if it received the withheld information, which is about the negotiations. This would harm BC Hydro's position, primarily through harm to its negotiating position, as contemplated by s. 17(1)(e).

[32] BC Hydro has also provided an *in camera* affidavit sworn by the manager of its pension and benefits department who, based on her experience and knowledge of the current negotiations, testified in some detail as to the s. 17(1)(e) harm that disclosure of the withheld information could reasonably be expected to cause. Her affidavit also provides specific examples of the harm BC Hydro considers could occur on disclosure of the withheld information and links specific parts of the withheld information to those projected harms.

[33] First, I consider paras. 3.3 and 3.4 of BC Hydro's initial submission to be a plea for a level negotiating field as between it and the OPEIU. The comments I made about this kind of argument in Order 00-39, [2000] B.C.I.P.C.D. No. 42, at p. 11, apply here as well:

Last, with respect to s. 17(1) generally, I have considered a recurring theme in the GVRD's submissions, that I should in some sense level the playing field between public body employers and their unions. It would be unfair, the GVRD suggests, for the requested information to be disclosed, since it would give CUPE the advantage of having information the GVRD has compiled for use in collective bargaining on behalf of its individual employer clients. The Act should, the GVRD says, be interpreted liberally in order to prevent this unfair result. In my view, any

perceived inequity between the positions of employer and union in light of the fact that the access provisions of the Act apply only to public bodies and not to unions is something only the Legislature can address. I can only uphold a public body's reliance on s. 17(1) and other provisions in the Act if the public body establishes, on evidence that it submits, that the section applies. The GVRD has not done so in this case.

[34] I can only decide whether BC Hydro has made out its case under s. 17(1) in relation to the disputed information. I have no ability to level any playing fields on which labour and management are in contest. Nor do I have any authority to interpret the Act to achieve what BC Hydro calls "fundamental principles of fairness."

[35] I have carefully read and considered BC Hydro's *in camera* material, as well as the disputed information, and am satisfied that BC Hydro has met its burden of proof regarding s. 17(1). Because of the nature of the harm, it is difficult for me to lay out my reasoning in arriving at this conclusion. It will have to suffice for me to say it is reasonable to expect that, if the remaining disputed information is disclosed, BC Hydro's negotiating position (and thus its financial interests) will be harmed within the meaning of s. 17(1). I find that BC Hydro is authorized under s. 17(1) of the Act to refuse to disclose the information still in dispute under that section. I am also satisfied, based on BC Hydro's submissions, that its head exercised his discretion as contemplated by Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38.

[36] As I noted above, BC Hydro has, in its supplementary submission to me, abandoned its reliance on s. 17(1) (and s. 13(1)) in respect of some of the disputed information and has agreed to release that information to the applicant. This concession was appropriate, because that information had already been disclosed elsewhere. I find that BC Hydro is not authorized by s. 17(1) of the Act to withhold that information, which had elsewhere already been disclosed by BC Hydro to the applicant.

4.0 CONCLUSION

[37] For the reasons given above, I make the following orders:

1. Under s. 58(2)(a) of the Act, I require BC Hydro to give the OPEIU access to the information withheld by BC Hydro under s. 13(1) of the Act;
2. Under s. 58(2)(b) of the Act, subject to paragraph 3, below, I confirm BC Hydro's decision that it is authorized to refuse to disclose information that it withheld under s. 17(1) of the Act; and

3. Under s. 58(2)(a) of the Act, I require BC Hydro to give the OPEIU access to the information withheld by BC Hydro under s. 17(1) of the Act that BC Hydro identified in its supplementary submission as information in respect of which it abandoned reliance on s. 17(1).

April 25, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia