

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 95-1996  
March 21, 1996**

**INQUIRY RE: Whether records relating to a contractor and subcontractor are under the control of the BC Hydro**

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### **1. Description of the review**

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on March 13, 1996 under Section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review in which an applicant sought access to records of a contractor that may be under the control of BC Hydro, the public body.

### **2. Documentation of the inquiry process**

On November 21, 1995 the applicant asked BC Hydro to conduct an audit of a contract performed by [the third party] for BC Hydro. The applicant also requested records relating to work performed by [the third party] employees and consultants, one of whom was the applicant. BC Hydro advised the applicant that it did not perform an audit of the contract and that it does not have records which contain the information he requested.

On December 14, 1995 the applicant contacted the Office of the Information and Privacy Commissioner and requested a review of the public body's decision not to disclose the records. During the mediation period, the applicant clarified his request by the following description: he is looking for records to support the contractor's invoices to BC Hydro, that is, hours worked by the contractor's employees and/or subcontractors on BC Hydro contracts. In his view, these records are in the custody of the contractor, [the third party], but under the control of BC Hydro.

### **3. Issue under review at the inquiry**

The issue under review is whether the records that respond to the applicant's request are "under

the control of a public body" within the meaning of that phrase in Section 4(1) of the Act. Section 4(1) states:

A person who makes a request under Section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

As this is an inquiry into a decision to refuse access, BC Hydro bears the burden of proving that the applicant has no right of access to the records or part thereof under Section 57(1) of the Act.

#### **4. BC Hydro's case**

The context of this case is the applicant's belief that he has not been paid in full by [the third party] for work that he performed for it. He has informed BC Hydro that it is its responsibility to ensure that its contractors pay their subcontractors and he asked for an audit of [the third party]. BC Hydro's response is that the applicant's problems should be settled directly with [the third party]. (Submission of BC Hydro, pp. 2-3)

BC Hydro's basic position is that "records created by a contractor that are not directly related to the terms of the contract cannot be considered under a public body's control within the meaning of the Act." BC Hydro can only demand records from a contractor on the basis of a contract. (Submission of BC Hydro, p. 5) The contract in question is discussed below.

According to BC Hydro:

The contract between BC Hydro and [the third party] does not entitle BC Hydro to obtain internal time-sheets or book-keeping records of [the third party]. These are [the third party]'s records only and are neither in BC Hydro's custody nor under BC Hydro's control. BC Hydro has no authority under the contract to demand these records and [the third party] is under no obligation to provide them. (Submission of BC Hydro, p. 9)

#### **5. The applicant's case**

The applicant argues that the distinction that should be drawn is between classes of records directly related to the contract and thereby under the public body's control, and classes of records only indirectly related to the contract and therefore outside of a public body's control. (Final Submission of the Applicant, p. 2)

#### **6. Discussion**

This is the second case involving the same applicant and essentially the same subject matter. See Order No. 92-1996, March 15, 1996.

***BC Hydro's Contract with [the third party], the subcontractor***

I have reviewed all of the components of the relevant contract between these two parties, including a request for a proposal, the [the third party] proposal, and a series of five purchase orders that modify or extend the terms of the contract with respect to time period covered and costs.

sections 21 and 23 of the contract provide that BC Hydro retains property rights in a range of information, data, programs and products that it supplied to the contractor. It shares ownership rights with the contractor for similar information developed while performing this contract. BC Hydro also retained the right to inspect and copy documents respecting the services provided by the contractor for at least one year after the contract ends. (Submission of BC Hydro, pp. 5-7)

BC Hydro emphasizes that sections 21 and 23 do not cover "[p]erformance evaluation reports of [the third party]'s employees or consultants, time-sheets or billing sheets or any other document that is not directly related to the services provided by [the third party]" under the contract. If these records exist, [the third party] prepared them for their own internal purposes, and BC Hydro cannot demand to have these records produced under the terms of its contract. (Submission of BC Hydro, pp. 7-8)

As I stated in Order No. 11-1994, June 16, 1994 p. 12, for a public body to have "control" over a record, it "must be derived from a contractual or specific right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document." I find nothing in the contract between BC Hydro and [the third party] that would authorize BC Hydro to demand production of any records that the applicant is apparently seeking.

A remaining issue concerns the purchase order forms that were used with respect to the [the third party] contract. They were essentially the wrong forms, and BC Hydro argues that neither it nor [the third party] intended to be bound by the terms on the reverse side of them. (Submission of BC Hydro, p. 8) The applicant believes that these terms are applicable to the contract and that they somehow support his claim for access to various records. (Final Submission of the Applicant, p. 9) I fail to see the relevance of this matter to the main issue of determining "control."

The applicant argues that he needs full access to a range of BC Hydro documents in order to understand the nature of the contract between BC Hydro and [the third party]. His submission includes a range of comments and suggestions about how such a contract should be interpreted. (Final Submission of the Applicant, Part 2) Some of these quasi-legal arguments may be relevant

in a lawsuit against BC Hydro or [the third party] for redress of the applicant's grievances; they have nothing to do, in my view, with my decision on the current request for access. A court of law is an appropriate venue for the applicant to seek to settle his perceived ongoing disputes with BC Hydro and the contractor.

Similarly, I am not persuaded by the applicant's attempted distinction between records directly and indirectly related to a contract. BC Hydro's access to and control over *[the third party]'s* records are appropriately determined by the terms of the contract previously discussed.

### ***BC Hydro's in camera submission***

BC Hydro submitted the actual proposal between itself and [the third party] on an *in camera* basis, because it may contain confidential business information and personal information. The applicant argued that there is no valid reason for this record to be kept confidential from him. (Final Submission of the Applicant, p. 11) I have reviewed this proposal, and I agree with BC Hydro that it should be received on an *in camera* basis, since it may disclose confidential business and personal information. Moreover, I am inclined to accept *in camera* submissions in good faith, as I do in the present matter.

## **7. Order**

I find that the records requested by the applicant are not in the custody or under the control of BC Hydro under Section 4(1) of the Act and, accordingly, BC Hydro was authorized to refuse access. Under Section 58(2)(b), I confirm the decision of BC Hydro to refuse access to the applicant.

David H. Flaherty  
Commissioner

March 21, 1996