



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

Order F08-12

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Michael McEvoy, Adjudicator

June 19, 2008

Quicklaw Cite: [2008] B.C.I.P.C.D. No. 20

Document URL: <http://www.oipc.bc.ca/orders/OrderF08-12.pdf>

Summary: The applicant, a former employee of BC Hydro, requested records relating to himself, a third party and a private company the two had previously shared an interest in. BC Hydro released some records but withheld some in whole or part. BC Hydro was required to disclose some of the records. BC Hydro was also authorized to withhold some of the records under ss. 13(1) and 14 and was required to withhold others under s. 22(1) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 14, 17(1)(c), 22(2)(a), (c), (f), (g) and (h), 22(3)(d), (f), (g) and (h).

Authorities Considered: **B.C.:** Order No. 92-1996, [1996] B.C.I.P.C.D. No. 18; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-36, [2002] B.C.I.P.C.D. No. 36; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-27, [2003] B.C.I.P.C.D. No. 27; Order F06-19, [2006] B.C.I.P.C.D. No. 32.

Cases Considered: *B. v. Canada* (1995), 5 W.W.R. 374 (B.C.S.C.); *Kranz v. Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C).

1.0 INTRODUCTION

[1] The applicant requested records, under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), from the British Columbia Hydro and Power Authority (better known as “BC Hydro”). He asked for all documents relating to himself, a private corporation (“corporation”) and to another individual, who is an

employee of BC Hydro (“third party”), covering a period from July 12, 2005 to the date of the request.¹

[2] BC Hydro located over 1000 responsive records and withheld most them in their entirety because, it said, they fell within exceptions to disclosure under FIPPA. The remaining records were provided to the applicant after being severed.² BC Hydro based its decision to withhold or sever the records on ss. 13, 14, 17 and 22 of FIPPA.

[3] This prompted the applicant to seek a review of BC Hydro’s decision by this Office. Attempts to resolve the issues through mediation were unsuccessful and the matter was referred for an inquiry under Part 5 of FIPPA. The Notice of Inquiry sent to the parties noted that BC Hydro relied upon ss. 13, 14, 17(1)(c), 22(2)(f) and (h) and 22(3)(d), (g) and (h) of FIPPA to support its decision. The Notice was later amended to include ss. 22(2)(g) and 22(3)(f).

[4] This Office gave notice of the inquiry, under s. 54(b) of FIPPA, to the third party whose personal information the applicant seeks.

[5] BC Hydro made initial and reply submissions, while the third party and the applicant made only initial submissions.

2.0 ISSUES

[6] The issues in this inquiry are:

1. Whether BC Hydro is authorized by s. 13(1) of FIPPA to refuse to disclose certain records.
2. Whether BC Hydro is authorized by s. 14 of FIPPA to refuse to disclose certain records.
3. Whether BC Hydro is authorized by s. 17(1)(c) of FIPPA to refuse to disclose certain records.
4. Whether BC Hydro is required by s. 22 of FIPPA to refuse to disclose certain records.

[7] Section 57(1) of FIPPA provides that, in respect of issues 1, 2 and 3, it is up to BC Hydro to prove that the applicant has no right of access. With respect to issue 4, the applicant bears the burden of proving that disclosure of the personal information contained in the records in question would not be an unreasonable invasion of third-party privacy.

¹ Portfolio Officer’s Fact Report, para 1.

² BC Hydro’s letter to applicant, May 4, 2006.

3.0 DISCUSSION

[8] **3.1 Background**—The applicant is a former employee of BC Hydro and the third party, as noted above, is a current employee of BC Hydro. These two individuals shared a business interest at one time, but apparently had a falling out. The disagreement led to a legal dispute which is presently before the courts.³

[9] Some months before events giving rise to this inquiry, BC Hydro had responded to a similar request for information from the applicant by providing him with some partially severed records.⁴ One of those records was a memorandum the third party wrote to other BC Hydro employees in which the third party describes aspects of his business relationship with the applicant. The applicant disagrees with a number of statements in this memorandum. This is what prompted him to request further access to records, so he could find out “just what is going on with respect to this matter”.⁵

[10] Other aspects of the background to this case were (properly) provided *in camera* and I therefore cannot disclose them here.

[11] **3.2 The Records in Dispute**—BC Hydro supplied a table listing the records, the exceptions applied and whether it withheld the record in full or in part.⁶ In her affidavit, Elizabeth Davis, the Freedom of Information Coordinator for BC Hydro, states that the table should prevail, in the event of a discrepancy between the exceptions to disclosure indicated on the pages of records in Exhibit B to her affidavit, being the withheld records provided *in camera*, and the exceptions indicated in the table.

[12] The number of pages of records provided in Exhibit B is 1,022. Three of those records, numbers 902, 908 and 917, are noted on BC Hydro’s table as being disclosed. This inquiry will therefore deal with the remaining 1019 records.

[13] **3.3 Preliminary Matters**—Elizabeth Davis swears in her affidavit that certain records provided to me are outside the scope of the applicant’s request because they were created after the date of his request. Davis has marked those records with an asterisk on the table.

[14] I have reviewed the 34 records in question and, with the exception of record 694, all are outside of the time-frame of the applicant’s request and I therefore find they are not properly the subject of this inquiry. Those records

³ BC Hydro’s initial submission, para. 6.

⁴ BC Hydro’s initial submission, para. 7.

⁵ Applicant’s request for review, p. 1.

⁶ Davis affidavit, Exhibit C.

are numbered as follows: 83, 84, 473, 474, 475⁷, 477-479, 480⁸, 482-484, 486-488, 490, 597-600⁹, 660-662, 669, 670, 698-700, 702, 703, 705, 706, 708. Record 694 is within the time frame of the applicant's request and I will therefore consider it below in my discussions of s. 14 and s. 22 of FIPPA respectively.

Section 3(1)(c)

[15] While the issue was not set out in the Notice of Inquiry, BC Hydro notes on the table referred to above that s. 3(1)(c) of FIPPA may apply to records 850-863 and therefore these records would not be within the scope of this inquiry. Although BC Hydro did not elaborate on this contention, I will deal with it here because it concerns my jurisdiction to consider the records in question.

[16] Section 3(1)(c) reads as follows:

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: ...
- (c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[17] My review indicates that BC Hydro sent records 850-852, 857, 862 and 863 to a Portfolio Officer in this Office in the course of the applicant's previous request for records, noted above. In my view, these documents were created for this Office and they relate to the exercise of this office's functions under FIPPA. By virtue of s. 3(1)(c), FIPPA does not apply to them. The balance of the records in question, records 853-856 and 858-861, do not fall under s. 3(1)(c). BC Hydro argues in the alternative that it is still required to withhold these records under s. 22 and I consider them in my analysis of s. 22 below.

[18] **3.4 Solicitor-Client Privilege**—BC Hydro says solicitor-client privilege protects over 822 of the 983 records that I have yet to dispose of in this case. Section 14 of FIPPA reads as follows:

The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[19] It is well established that s. 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to

⁷ This ruling applies to the top portion of this record only which represents a continuation of record 474. The balance of the record is considered below under my analysis of s. 14 of FIPPA.

⁸ This ruling applies to the top portion of this record only which represents a continuation of record 479. The balance of the record is considered below under my analysis of s. 14 of FIPPA.

⁹ This ruling applies to the top portion of this record only which represents a continuation of record 599. The balance of the record is considered below under my analysis of s. 14 of FIPPA.

as legal advice privilege) and litigation privilege.¹⁰ BC Hydro argues that legal professional privilege applies here.

[20] BC Hydro relies on the *B. v. Canada*¹¹ (cited with approval by Burnyeat, J., in *Kranz v. Attorney General of Canada*¹²) as setting out the criteria for legal professional privilege:

As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communication (and papers relating to it) are privileged.

[21] BC Hydro notes that Commissioner Loukidelis relied on this same passage in Order 00-08.¹³

[22] BC Hydro submits that the records to which it has applied s. 14 meet the test set out above for these reasons:

The pages to which section 14 have [*sic*] been applied were all communicated in writing in a confidential way (limited email distribution) between BC Hydro (the client) and a legal advisor in direct relation to the seeking, formulation, or provision of legal advice.¹⁴

[23] BC Hydro also points me to its *in camera* submission as a further basis to sustain its contention. What I can reveal about the essence of this argument, without disclosing specific *in camera* evidence, is that in the course of BC Hydro's counsel providing legal advice, it was necessary for them to obtain and confirm, in confidence, comprehensive facts, background and analysis which were relevant to the matters at hand.

[24] The applicant asks me to consider two cases in determining whether solicitor-client privilege applies in this case. The first is Order F06-19,¹⁵ wherein

¹⁰ See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56.

¹¹ (1995), 5 W.W.R. 374 (B.C.S.C.).

¹² [1999] 4 C.T.C. 93 (B.C.S.C).

¹³ [2000] B.C.I.P.C.D. No. 8, at p. 11.

¹⁴ BC Hydro initial submission, para. 31.

¹⁵ [2006] B.C.I.P.C.D. No. 32.

the adjudicator articulated the principles underlying both kinds of privilege. The second decision is Order No. 92-1996¹⁶ in which, coincidentally, BC Hydro was the public body. The ruling in that order was that the disputed records were protected by litigation privilege because the applicant had threatened to sue BC Hydro on numerous occasions. By contrast, the applicant notes that in the case before me he has

[n]ot contacted BC Hydro about the matter of the defamatory remarks made and distributed by this memo...I have only asked for all documentation relating to this false record.¹⁷

Section 14 findings

[25] BC Hydro correctly cites the four conditions necessary to establish solicitor-client privilege. However, Thackray J. also added a cautionary note in the paragraph which followed the passage cited by BC Hydro and which BC Hydro did not include. That paragraph reads as follows:

It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.¹⁸

[26] The Commissioner has referred to this paragraph, along with the passage noted above, in a number of orders.¹⁹ It is with this caution, and all of the other relevant case law concerning solicitor-client privilege in mind, that I have considered the voluminous set of records before me. Included in my considerations are the submissions of the applicant, the third party and BC Hydro, as well as the affidavit evidence of David Avren, Associate General Counsel for BC Hydro, Elizabeth Davis, the Freedom of Information Coordinator for BC Hydro and Bruce Ripley, who was Vice-President of BC Hydro's Engineering Services during the time period relating to the records in dispute.

Files of BC Hydro's legal counsel

[27] The affidavit evidence of David Avren is that records 1 through 470 are drawn from his files. Avren also swears that records 471 to 642 are from the files of Ray Aldeguer, BC Hydro's General Counsel, who worked with Avren on the matters which are the subject of this inquiry. I have carefully reviewed these records and find, based on that review and the evidence before me, that BC Hydro has properly withheld them because they satisfy the criteria for solicitor-client privilege under s. 14 of FIPPA.

¹⁶ [1996] B.C.I.P.C.D. No. 18.

¹⁷ Applicant's initial submission, para. 4.

¹⁸ B. v. Canada, (1995), 5 W.W.R. 374 (B.C.S.C.).

¹⁹ See for example Order 00-08, [2000] B.C.I.P.C.D. No. 8, at p. 11.

Third-Party's files

[28] I conclude, given the labelling of the documents, that records 643 to 692 are drawn from the files of the third party as a BC Hydro employee. BC Hydro argues that each is a confidential communication in writing, by way of a limited email distribution, between BC Hydro (the client) and a legal advisor in direct relation to the seeking, formulation or provision of legal advice. I find that, with the exception of record 682, BC Hydro properly withheld all of records 643-692 under s. 14 of FIPPA. Record 682 is not a communication between a client and a legal advisor. Though I find this record is not subject to solicitor-client privilege, BC Hydro also argues it is required to withhold the record under s. 22(1) of FIPPA and I will therefore consider it below under my analysis of that section.

A miscellaneous file

[29] Records 693 to 697 are drawn from the files of a person who is associated with BC Hydro, though it is not clear whether that person is an agent, contractor or employee of the company. There is no evidence this person is acting in the capacity of legal counsel to BC Hydro.

[30] Record 693 involves a communication between this person, the third party and BC Hydro's legal counsel in a manner which brings it within the ambit of s. 14 of FIPPA. However records 694-697 do not involve BC Hydro's legal counsel and are simply communications between BC Hydro personnel. As there is no other indication that they are protected by privilege, I find that s. 14 does not apply to them. That said, I will consider whether BC Hydro is required to withhold records 694-697 in my analysis of s. 22(1) of FIPPA found below.

Records in the files of Bruce Ripley

[31] Bruce Ripley's affidavit evidence is that records 698 to 848 are from his files. Ripley states in his affidavit that the following records from his files are subject to solicitor-client privilege;²⁰ 701, 704, 707, 710-735, 738-753, 755-758, 763-766, 769-773, 784-801, 803-806, 809-812, 814-821, 823-825, 829, 833 and 834. Ripley submits that these records relate to confidential communications with BC Hydro's legal counsel, David Avren or Ray Aldeguer, relating to the seeking, formulating or giving of legal advice.

[32] While I agree that the e-mail which starts at the bottom of record 763 and concludes at the top of 764 is privileged, the e-mail that follows on record 764 and concludes at 766 is not. The latter e-mail is a communication to Bruce Ripley from a person not connected with BC Hydro and is not otherwise of a character that brings it within the ambit of s. 14 of FIPPA. While the record in

²⁰ I have not made reference here to records outside the scope of this proceeding which I have already dealt with in my preliminary ruling.

question is copied to Ray Aldeguer, this, in and of itself, is not sufficient to render the document privileged in the circumstances.

[33] I am also not persuaded that records 829, 833 and 834 are privileged. There is a suggestion that one of the persons involved in these e-mail exchanges may be a lawyer. However, there is no evidence that, even if this were the case, this person is acting as legal counsel on BC Hydro's behalf here.

[34] Although I find solicitor-client privilege does not apply to the six records just noted, BC Hydro also argues that it is required to withhold them pursuant to s. 22(1) of FIPPA. I will consider this submission below in my s. 22 analysis.

[35] I find that BC Hydro has properly claimed solicitor-client privilege over the balance of the records in Bruce Ripley's files and those records are therefore properly withheld.

Miscellaneous records

[36] The balance of the records for which legal professional privilege is claimed relate to communications between various BC Hydro employees and David Avren or Ray Aldeguer, or both. In each instance, I find these records are properly withheld under s. 14 of FIPPA. I refer here to records 874, 956, 959, 969-974,²¹ 976-993, 995, 996, 998-1006, 1008, 1009, 1011-1022.

[37] **3.5 Advice or Recommendations**—BC Hydro partially or fully severed 27 of the remaining records in dispute under s. 13(1) of FIPPA.²² Section 13(1) of FIPPA reads as follows:

Policy advice or recommendations

13(1) The head of 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.

[38] The purpose of s. 13(1) is to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.²³ A number of orders have considered the interpretation of s. 13(1) and without repeating them here I apply the principles set out in those orders.²⁴

²¹ BC Hydro's table did not include record 974 under s. 14 and I assume this was an oversight. It is a communication from David Avren to Ray Aldeguer and others setting out certain legal advice.

²² The records in question are 767, 833, 834, 838-840, 841, 881, 883, 884, 888-890, 898-901, 903, 909-911, 918-920, 925 and 946-948.

²³ In Order 01-15, [2001] B.C.I.P.C.D. No. 16, the Commissioner noted that this was especially the case while the public body is considering a given issue.

²⁴ See for example Order 02-38, [2002] B.C.I.P.C.D. No. 38.

[39] BC Hydro submits that the information contained in these records either explicitly reveals advice or recommendations or makes direct reference to advice or recommendations and that neither s. 13(2) nor s. 13(3) applies. BC Hydro argues that it has properly exercised its discretion under s. 13 by considering a number of relevant factors, including the extent to which the record in question is significant or sensitive (or both), the age of the record, and whether the decision to which the advice or recommendations relates has already been made.

[40] The applicant's submission makes no reference to the s. 13(1) issue.

[41] I have considered each of the records in question and make the following findings.

[42] Records 838-841, 881, 883, 888,²⁵ 889, 890,²⁶ 899, 900, 901, 903, 909-911, 918-920, 925 and 946-948 all fall within the ambit of s. 13(1). The information contained in these partially severed records is either advice or recommendations or of a nature that would allow an individual to draw accurate inferences about advice or recommendations developed for or by BC Hydro.

[43] Based upon BC Hydro's submissions,²⁷ I am also satisfied that it properly exercised its discretion in applying s. 13 of FIPPA to these records.

[44] The balance of the records, 767, 833, 834, 884 and 898, are either factual in nature or do not in any way constitute advice or recommendations. I am unable to say more without disclosing the contents of the records. I find that s. 13(1) does not apply to these records.

[45] BC Hydro also argues that it is required to withhold the balance of these records under s. 22(1) of FIPPA. I will consider this in my analysis of that section below. In addition, BC Hydro submits that records 833 and 834 are properly withheld under s. 17(1)(c)²⁸ and I will deal with that claim now.

[46] **3.6 Harm Under Section 17**—Section 17(1)(c) of FIPPA reads as follows:

Disclosure harmful to the financial or economic interests of a public body

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

²⁵ That portion of the record for which s. 13 is asserted.

²⁶ That portion of the record for which s. 13 is asserted.

²⁷ BC Hydro's initial submission, paras. 21 and 22.

²⁸ In addition to s. 22(1) of FIPPA.

government of British Columbia or the ability of that government to manage the economy, including the following information:

...

- (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;

[47] Of the remaining records, BC Hydro argues that s. 17(1)(c) of FIPPA applies to 12 of them.²⁹ BC Hydro submits that there is clear evidence in the affidavit material of a plan to deal with matters related to management of personnel or administration of BC Hydro and that this plan has not been implemented or made public yet.³⁰

[48] BC Hydro argues that, consistent with the test set out in previous orders³¹ respecting s. 17, the nature of the evidence it has provided in this case is detailed and convincing, is not fanciful, imaginary or contrived and establishes a reasonable expectation of harm.³² It specifically argues that there is a reasonable likelihood of financial harm to its interests as a whole and specifically to its hydrogen and fuel cell program.³³

[49] BC Hydro acknowledges that it has the burden of proof under s. 17.³⁴ The applicant does not make any argument on the application of s. 17.

[50] I have considered both BC Hydro's public and *in camera* submissions on this point and find they are not persuasive. Without disclosing any *in camera* material, I find that BC Hydro's argument is speculative and indirect to say the least. Based upon the evidence BC Hydro has provided to me, no reasonable expectation of harm to either BC Hydro's general interests or, as it claims, its hydrogen and fuel cell program, has been established.

[51] I analyze these records below, however, under the s. 22 discussion.

[52] **3.7 Third-Party Privacy**—The parts of s. 22 relevant to this case are as follows:

Disclosure harmful to personal privacy

22(1) The 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.

²⁹ Records 694-696, 709, 764 (in part), 802, 822, 827-829, 833 and 834.

³⁰ BC Hydro's initial submission, para. 40.

³¹ See for example the Commissioner's ruling in Order 00-24, [2000] B.C.I.P.C.D. No. 27.

³² BC Hydro's initial submission, para. 38.

³³ Ripley affidavit, para. 13.

³⁴ BC Hydro's initial submission, para. 35.

-
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
 - ...
 - (c) the personal information is relevant to a fair determination of the applicant's rights,
 - ...
 - (f) the personal information has been supplied in confidence,
 - (g) the personal information is likely to be inaccurate or unreliable, and
 - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
- (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,
 - ...
 - (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
 - (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
 - (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation...

[53] In Order 01-53,³⁵ the Commissioner discussed the application of s. 22 and I have applied that decision and other decisions from this Office without elaboration.

³⁵ [2001] B.C.I.P.C.D. No. 56.

Do the records contain personal information?

[54] There remain 113 records³⁶ which BC Hydro says it is required to withhold pursuant to s. 22 of FIPPA. BC Hydro submits that almost all of the information contained in the responsive records is the personal information of the third party and, to a lesser extent, another individual not employed by BC Hydro.³⁷ BC Hydro also argues that, in considering the definition of personal information, it is important to note that allegations made by one person about another person's actions and behaviours are the personal information of the individual about whom the allegations are made.³⁸

[55] The applicant argues that he has a strong *prima facie* right to his own personal information.³⁹ He also submits that he should be given all documentation relating to the memorandum I referred to above because in his view the matters the third party set out in it are false. He does not dispute that the records he seeks contain the personal information of third parties and indeed his information request is aimed specifically at records relating to and linking himself, the corporation and the third party.

[56] I begin with the observation that personal information is defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information”.

[57] I find here that the disputed records contain the personal information of, in some cases, the applicant and, in all cases, of third parties. The personal information, for the most part, is about persons other than the applicant and concerns the third party. The personal information is found in records drafted by the third party himself and in other material, where fellow BC Hydro employees, and others, have said things about the third party.

[58] As is noted above, the applicant bears the burden of proof in this inquiry that disclosure of personal information contained in the records would not be an unreasonable invasion of third-party privacy.

[59] **3.8 Unreasonable Invasion of Privacy**—BC Hydro says that s. 22(3) of FIPPA presumes the disclosure of certain categories of personal information to be an unreasonable invasion of personal privacy. It argues that in this case certain presumptions are present, some of them to a very extensive degree.

³⁶ Records 682, 694-697, 709, 754, 759-762, 764 (the latter portion following that already covered by s. 14), 765-768, 774-783, 802, 807, 808, 813, 822, 826-837, 842-848, 853-856, 858-861, 876-879, 884-887, 888 (that portion not covered by my s. 13(1) finding), 890 (that portion not covered by my s. 13(1) finding), 891-898, 904-907, 912-916, 921-924, 926, 931, 932, 935-945, 952-955, 958, 960-964 and 966-968.

³⁷ BC Hydro's initial submission, para. 47.

³⁸ BC Hydro's initial submission, para. 46.

³⁹ Applicant's initial submission, para. 2.

Specifically BC Hydro points to ss. 22(3)(d), (f), (g) and (h) as presumptions that it says apply in this case.⁴⁰

Employment history

[60] BC Hydro argues that the third party's occupational and employment history abounds in the responsive records.⁴¹ BC Hydro submits that employment history refers to any information regarding an individual's work record. BC Hydro also submits that occupational history refers to any information on a person's profession, business or calling, temporary or regular employment, and includes details of how a person spends her or his time.

[61] The applicant made no submission on the presumptions under s. 22(3). The third party submits that all of the documents relate to his employment history with BC Hydro.

[62] Section 22(3)(d) has been discussed in numerous orders. My approach to this section has been guided by the Commissioner's analysis of s. 22(3)(d) in Order 01-53⁴² and other orders that have elaborated on that decision.⁴³ I find that, of the 113 records in issue here, a considerable number of them relate to the third party's employment history. For example, many of these records include a work history chronology of the third party. The third party himself wrote this chronology and it is replicated numerous times in this group of records.

[63] I am less able to comment on the precise nature of other records because argument about them was received *in camera*. What I am at liberty to say is that some of those records are properly characterized as being covered by s. 22(3)(d), while others are not.⁴⁴

[64] I find that disclosure of the personal information in the following records is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(d): 682, 694-697, 709, 760-762, 764 (the latter portion of this page only, which was not covered by my earlier ruling concerning the application of s. 14), 765-768, 774, 776, 779, 802, 807, 808, 813, 826, 827, 828, 830, 831, 832, 834, 842, 844, 845, 846, 847, 848, 853, 854-856, 858-861, 876-879, 884, 885-887, 888 (with the exception of that part not covered by my finding under s. 13), 890 (with the exception of that part not covered by my finding under s. 13), 891, 892-898, 904-907, 913-916, 921-924, 926, 938-945, 952-955, 958, 961-964 and 966-968.

⁴⁰ BC Hydro's initial submission, para. 51.

⁴¹ BC Hydro's initial submission, para. 53.

⁴² [2001] B.C.I.P.C.D. No. 56.

⁴³ For example, Order 02-36, [2002] B.C.I.P.C.D. No. 36 and Order 03-27, [2003] B.C.I.P.C.D. No. 27.

⁴⁴ Those not covered are numbers 754, 775, 777, 778, 780-783, 822, 829, 835-837, 843, 912, 931, 932, 935-937 and 960.

Financial information

[65] BC Hydro argues that personal financial information, particularly information about the third party's financial activities as they relate to his business dealings outside BC Hydro, is extensively recorded and discussed throughout the responsive records. BC Hydro submits that, even if some of this information may be known to the applicant, and it is only speculation to attribute such knowledge, the character and the content of internal BC Hydro discussion about that information would not be known to the applicant.⁴⁵

[66] Neither the applicant nor the third party specifically references s. 22(3)(f) in their submissions.

[67] There is no question that a number of the 113 records contain information about the third party as it relates to his financial dealings outside BC Hydro. These records are: 760, 761, 762, 765, 766, 775-783, 807, 808, 827, 828, 831, 832, 834, 844, 845, 855, 856, 860, 861, 878, 879, 887, 888 (that part not covered by my finding under s. 13), 890 (that part not covered by my finding under s. 13), 891, 896, 897, 906, 907, 915, 916, 923, 924, 926, 940, 941, 944, 945, 952-956, 961, 963, 964, 967 and 968.

[68] I find that the personal information found in these records is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(f) if disclosed.

Sections 22(3)(g) and (h)

[69] BC Hydro contends that certain of the records are covered by the presumptions under ss. 22(3)(g) and (h). It concedes that the successful application of the latter presumption is, to a degree, tied to the application of s. 22(3)(g). BC Hydro argues that some of the records contain material that is consistent with an "evaluation" as that term is defined under s. 22(3)(f) of FIPPA.⁴⁶

[70] BC Hydro also notes that its *in camera* submission respecting s. 22(3)(g) and (h) is made with

... an eye to the Commissioner's statements in paragraph [45] of Order 01-53; without the benefit of having seen the records subject to that order BC Hydro does not wish to make a mistake with respect to information that is obviously personal, ... [*in camera* material] in nature.⁴⁷

⁴⁵ BC Hydro's initial submission, para. 55.

⁴⁶ BC Hydro's initial submission, para. 57 and 59.

⁴⁷ BC Hydro's initial submission, para. 58.

[71] In Order 01-53,⁴⁸ the Commissioner determined that ss. 22(3)(g) and (h) did not apply. While I am not at liberty to canvass the nature of the *in camera* evidence before me here, I can say that the rationale the Commissioner gave in Order 01-53 for rejecting the s. 22(3)(g) and (h) arguments is applicable in this case. I therefore conclude that neither s. 22(3)(g) nor s. 22(3)(h) has any application to the records here.

[72] **3.9 Relevant Circumstances**—Section 22(2) contains a non-exhaustive list of relevant circumstances that a public body must consider in determining whether or not disclosure of the personal information would constitute an unreasonable invasion of third-party privacy.

Public scrutiny

[73] The applicant argues that disclosure of all of the documents is desirable for the purpose of subjecting the activities of BC Hydro to public scrutiny.⁴⁹ The applicant submits that a goal of FIPPA is to make public bodies more accountable by giving a right of public access to records.⁵⁰ The applicant canvasses at some length his concerns about a memorandum the third party wrote, to which he gained access under an earlier request made to BC Hydro under FIPPA. The memo canvasses aspects of the private business relationship between the applicant and the third party. The applicant states that the memo is damaging to both his personal and professional reputation. He says that, in addition to misrepresenting the facts of his relationship with the third party, it appears this “false record” has been widely distributed throughout BC Hydro and treated in a cavalier fashion by being “just left lying around”.⁵¹

[74] I have concluded that s. 22(2)(a) is not a relevant circumstance here. I am unable to see how the disclosure of the records is desirable for the purpose of subjecting the activities of BC Hydro to public scrutiny. The root of the applicant’s concern is his ongoing dispute with third persons and, collaterally, the extent to which he believes false allegations have been made against him. Disclosure of the disputed records might potentially serve the applicant’s private interests but they would not serve to subject the public body to public scrutiny. I also cannot accept the applicant’s allegation that BC Hydro has inappropriately distributed the memorandum in question as a basis to apply the public scrutiny circumstance under s. 22(2)(a). There is in any case no indication from my review of the submissions and evidence that BC Hydro has inappropriately handled or circulated the memorandum referred to by the applicant and I therefore find this concern to be without merit.

⁴⁸ [2001] B.C.I.P.C.D. No. 56.

⁴⁹ Applicant’s initial submission, para. 3.

⁵⁰ Applicant’s initial submission, para. 1.

⁵¹ Applicant’s initial submission, para. 3(c). The applicant quotes a passage from the memo which states, “I will have the package on my desk, to the right of the computer monitor. In the event I am away from my desk when/if Bruce arrives, Brenda will ask him to see any of you for assistance”.

Fair determination of rights

[75] The applicant argues that the withheld documents should be reviewed in light of s. 22(2)(c). The applicant does not elaborate on this argument.

[76] Many previous orders have set out the requirements for determining whether s. 22(2)(c) applies to the circumstances of a case:⁵²

- The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
- The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
- The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
- The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[77] There is evidence before me of a legal dispute between the applicant and the third party concerning a disagreement they have over a business interest they once shared. The applicant has not provided me with any evidence as to how the requested records bear any relation to the dispute in which he is involved or how or why they would be necessary to ensure a fair hearing in any legal proceeding. Neither of these points is self-evident from my review of the records. For this reason, s. 22(2)(c) is not a relevant circumstance here.

Personal information supplied in confidence

[78] As noted above, there are 113 records being considered under s. 22. BC Hydro argues that s. 22(2)(f) is a circumstance that weighs against disclosure of all of these records.

[79] I agree with BC Hydro that the vast majority of these documents contain the personal information of persons other than the applicant which has been supplied in confidence. With regard to most of these records, there is an explicit expression of confidentiality⁵³ stated and for others it is clear from the contents of the record that they were supplied confidentially. Therefore, s. 22(2)(f) is a circumstance which favours withholding from disclosure all of the 113 records in question, with the exception of those I describe in the following paragraph.

⁵² See for example Order 01-07, [2001] B.C.I.P.C.D. No. 7.

⁵³ Record 709 is not marked on BC Hydro's table as being supplied in confidence. However I have concluded that not only is it explicitly marked as confidential but its contents clearly lead me to this conclusion as well.

[80] The six records which are an exception to this were not, in my view, supplied in confidence. These are records 912, 931, 932, 935, 936 and 937. All of them emanate from BC Hydro and all relate to the applicant's previous request for information from BC Hydro. In my view none of the personal information in question was supplied in confidence under FIPPA. Therefore s. 22(2)(f) is not a relevant circumstance in relation to records 912, 931, 932, 935, 936 and 937.

Personal information is likely to be inaccurate or unreliable

[81] BC Hydro argues that information in 18 of the records is likely to be inaccurate or unreliable and therefore s. 22(2)(g) favours their non-disclosure. These are records 807, 808, 813, 830-832, 834, 952-955, 958, 961, 963, 964 and 966-968. BC Hydro submits that inaccurate information is that which "does not reflect the truth" and is "more likely to arise when the source of the personal information is someone other than the person concerned". BC Hydro also argues that unreliable information is that which is of "unsound or inconsistent character or quality".

[82] The nature of the *in camera* evidence is such that I am unable to state how this argument applies without disclosing the records in question. Suffice it to say that with the exception of small parts of records 813, 830, and 834, s. 22(2)(g) is a circumstance which significantly favours non-disclosure of the records in question. I have already identified as being supplied in confidence under s. 22(2)(f) those small portions of records 813, 830, and 834 not covered by s. 22(2)(g).

Unfair damage to reputation

[83] BC Hydro argues that s. 22(2)(h) is a circumstance which favours non-disclosure in relation to 86 of the records, being records 682, 694-696, 709, 760-762, 764-768, 802, 807, 808, 813, 822, 827-832, 834, 842-846, 853-856, 858-861, 876-879, 885, 887, 891-898, 904-907, 913, 915, 916, 921, 923, 924, 926, 931, 932, 935-938, 940-942, 944, 945, 952-955, 958, 961-968.

[84] Having carefully reviewed the *in camera* material, I am satisfied that BC Hydro has sufficiently particularized its claim to establish that in some, but not all, cases disclosure of the records would unfairly damage the reputation of any person referred to. Again, I am constrained in being able to set out my reasons for reaching this conclusion.

[85] I find that s. 22(2)(h) favours non disclosure of records 682, 760-762, 764-766, 802, 807, 808, 813, 830-832, 834, 952, 955, 958 and 961-964 and 966-968. While I find that most of the remaining records are related to the themes expressed in the foregoing documents, I am not persuaded that s. 22(2)(h) is applicable to them.

Section 22 conclusions

[86] I have concluded that of the 113 records under consideration the public body is required to refuse to disclose most of them because disclosure would be an unreasonable invasion of third-party privacy. Those records are numbers 682, 694-697, 709, 754, 759-762, 764-768, 802, 807, 808, 813, 822, 826-837, 842- 848, 853-856, 858-861, 876-879, 884-887, 888 (that portion of the record for which BC Hydro claims s. 22), 890 (that portion of the record for which BC Hydro claims s. 22), 891-898, 904-907, 913-916, 921-924, 926, 938-945, 952-955, 958, 960-964 and 966-968. The primary focus of these records is related to the actions and employment history of the third party. In most cases the disclosure of personal information in them is presumed to be an unreasonable invasion of personal privacy under ss. 22(3)(d) and (f) of FIPPA. These presumptions are, of course, rebuttable, but there is no evidence before me that would do so in this case. Indeed, with respect to most of the records, there are other circumstances present further favouring their non-disclosure.

[87] There are some documents however which BC Hydro is not required to withhold and I order them disclosed. Records 775-783 may have been provided in confidence by the third party, but, in my view; their disclosure would not unreasonably invade his personal privacy. These records relate to the litigation between the third party and applicant and for that reason are almost certainly known to the applicant. There is no requirement to withhold them from disclosure here.

[88] The other records I find BC Hydro is required to disclose are records 912, 931, 932, 935, 936 and 937. These records all emanate from BC Hydro and pertain to the applicant's earlier request for records made to BC Hydro. In the particular circumstances of this case there is no reason these records cannot be released. There is nothing in these records of a confidential nature and there is no other basis under FIPPA for withholding them.

[89] **3.10 Records Not Marked in BC Hydro's Table**—There are 32 records for which no check marks or indications of any kind appear on the table as to how BC Hydro dealt with them. I have reviewed these records and have reached the following conclusions:

- Records 692, 957, 965, 975, 994, 1007 and 1010 are all the final pages of different emails. In some cases these pages are blank, while in other instances they contain a small amount of non-personal information that is not responsive to the applicant's request. For this reason there is no reason for me to deal with them in this Order.
- Records 736 and 737 appear to be a copy of a supplemental affidavit in the legal dispute between the third party and the applicant. I expect that

the applicant already has a copy of this record and but nevertheless I order its disclosure to the applicant.

- Records 849, 864-873, 875, 880, 882, 927-930, 933, 934 and 949-951 are all records which relate to the applicant's earlier request for records and BC Hydro's efforts to locate them. My review of these records suggests they have likely already been released to the applicant. In any event there is no reason they should be withheld and I order them to be disclosed to the applicant.

4.0 CONCLUSION

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

1. Under s. 58(2)(a) of FIPPA, I require BC Hydro to give the applicant records 775-783 and 912, 931, 932, 935, 936 and 937 it withheld under s. 22(1).
2. Under s. 58(2)(a) of FIPPA, I require BC Hydro to give the applicant records 736, 737, 849, 864-873, 875, 880, 927-930, 933, 934 and 949-951.
3. Under s. 58(2)(b) of FIPPA, I confirm that BC Hydro is authorized by s. 13(1) to refuse access to records 838-841, 881, 883, 888 (that portion of the record for which BC Hydro claims s. 13), 889, 890 (that portion of the record for which BC Hydro claims s. 13), 899, 900, 901, 903, 909-911, 918-920, 925 and 946-948.
4. Under s. 58(2)(b) of FIPPA, I confirm that BC Hydro is authorized by s. 14 to refuse access to records 1-82, 85-472, 475 (excluding the top portion which I determined above was not within the scope of the applicant's request), 476, 480 (excluding the top portion which I determined above was not within the scope of the applicant's request), 481, 485, 489, 491-596, 600 (excluding the top portion which I determined above was not within the scope of the applicant's request), 601-659, 663, 681, 683-691, 693, 701, 704, 707, 710-735, 738-753, 755-758, 763, 769-774, 784-801, 803-806, 809-812, 814-821, 823-825, 874, 956, 959, 969-974, 976-993, 995-1006, 1008, 1009, 1011-1022.
4. Under s. 58(2)(c) of FIPPA and for the reasons given regarding s. 22, I require BC Hydro to refuse the applicant access to records 682, 694-697, 709, 754, 759-762, 764-768, 802, 807, 808, 813, 822, 826-837, 842- 848, 853-856, 858-861, 876-879, 884-887, 888 (that portion of the record for which BC Hydro claims s. 22), 890 (that portion of the record for which

BC Hydro claims s. 22), 891-898, 904-907, 913-916, 921-924, 926, 938-945, 952-955, 958, 960-964 and 966-968.

5. I require BC Hydro to give the applicant access to the records ordered disclosed within 30 days of the date of this order, as FIPPA defines "day", that is, on or before August 1, 2008 and, concurrently, to copy me on its cover letter to the applicants, together with a copy of the records.

Should the parties require any clarification of this Order, they are at liberty to apply to me through the Registrar of Inquiries on or before July 3, 2008.

June 19, 2008

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No. F06-28973