

**INQUIRY REPORT
File# 10-019AR**

**Tracy-Anne McPhee
Information and Privacy Commissioner (IPC)**

Public Body: YUKON ENERGY CORPORATION
Date: April 4, 2012

Summary: The Applicant requested a copy of a study of wind energy on Mount Sumanik commissioned by the Yukon Energy Corporation (YEC).

The Public Body identified a record and withheld 58 pages of the 75 page study on the grounds that disclosure would either reveal advice or recommendations in accordance with section 16 or disclosure could reasonably be expected to harm the financial or economic interests of the YEC in accordance with section 17.

Finding: The Public Body is not authorized to withhold any of the record, being a feasibility study, in accordance with section 16. The Public Body is authorized by section 17 to refuse to give access to certain pages of the record that could reasonably be expected to harm the financial or economic interests of YEC. The Public Body is not authorized to refuse to disclose the remainder of the record.

Recommendation: The IPC recommended that YEC sever the information from the record that could reasonably be expected to harm the financial or economic interests of YEC,

according to section 17, and disclose the remainder of the record to the Applicant.

Statutes Considered: *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, sections 16(1), 16(2), 17(1), 54(1)(a), and 57(2)(b)(i).

Authorities Considered: BCIPC: Order F11-17 Ministry of the Attorney General, CanLII 2011 BCIPC No. 23;
BCIPC: Order 02-50 Ministry of the Attorney General, Quicklaw Cite [2002] B.C.I.P.C.D No. 51, paras 124-137;
BCIPC: Order F07-15 Vancouver Coastal Health Authority, Quicklaw Cite [2007] B.C.I.P.C.D No. 21;
BCIPC: Order F10-34 Fraser Health Authority and Partnerships BC, CanLII 2010 BCIPC 50;
BCIPC: Order 00-10 Inquiry regarding Liquor Distribution Branch Data on Annual Beer Sales <http://www.opic.bc.ca>.

I INTRODUCTION

- [1] This Inquiry arises from a request made for a copy of the Yukon Energy Corporation's (YEC) report or study by AECOM about the feasibility or potential of wind energy on Mount Sumanik. YEC identified one record entitled Wind Assessment Feasibility Study (Study), dated January 2009, as responsive to the request. YEC disclosed some pages of the record to the Applicant but refused access to pages 2-43 and 60-75 of the Study applying the exceptions set out in sections 16(1), 17(1) and 17(1)(d) of the Access to Information and Protection of Privacy (ATIPP) Act.
- [2] The Applicant asked for a review of the decision to refuse to disclose 58 pages of the 75 page record. The parties participated in mediation which was not successful in resolving the issue of access to the requested information.

II ISSUES

- [3] The three questions I must decide are:
1. Can YEC rely on section 16(1), a discretionary exception, if it was not identified in the response as a reason for not disclosing the information to the Applicant?
 2. If so, is YEC authorized or required by section 16(1) to refuse to disclose parts of the record?
 3. Is YEC authorized or required by section 17(1) and section 17(1)(d) to refuse to disclose parts of the record?

III PRELIMINARY ISSUES

Record in Dispute

- [4] One record has been identified as being responsive to the Applicant's request. It is a 75 page record which will be referred to here as the Study. The pages in dispute are 2-43 and 60-75 inclusive.
- [5] According to section 53 of the ATIPP Act a copy of the complete record was provided to the IPC. At no time was the record or any of its contents disclosed to the Applicant by the IPC or any of her delegated staff.

Burden of Proof

- [6] According to section 54(1)(a) YEC, the public body, must prove that the Applicant has no right of access to the parts of the record in dispute.

Raising Section 16 as a New Exception

- [7] In its initial response to the Applicant, YEC relied on section 17(1) to refuse access to certain pages of the Study. During the review process YEC advised it was relying on section 16(1) as an additional exception to refuse access.
- [8] The Applicant objects to the use of section 16(1) to justify refusing access to pages of the Study. The Applicant objects on the basis that notice of the new exception was only provided late in the review process and 4 months after YEC's initial response to the access request. The Applicant requested that section 16(1) not be considered in this Inquiry.

- [9] Public bodies have a duty to provide all of the specific reasons and corresponding sections of the ATIPP Act for refusing access to information. Public bodies must make every reasonable effort to assist the records manager to respond to each applicant openly, accurately and completely.¹ YEC did not do so in this case when it failed to include all sections it was relying upon to refuse access.
- [10] Permitting a public body to raise a new exception late in the process is a rare occurrence and will only be considered if the public body can satisfy the IPC that doing so will not prejudice the Applicant, affect the integrity of the process or cause delay.
- [11] In this case, the Applicant was given notice by telephone that YEC intended to rely on an additional exception. Also the Notice of Inquiry and the Fact Report indicated that the exceptions being relied upon for refusing access were sections 16 and 17, giving the Applicant the opportunity to address the operation of both sections in the initial written and reply submissions. The process was not delayed by raising the new exception. As such, I find no prejudice to the Applicant, adverse effect on the integrity of the process or delay and I will consider the operation of both sections 16 and 17 in this Inquiry.

No Control Over What Applicant Does With the Information

- [12] In its written submission and affidavit evidence, YEC has expressed concern that if the information in the Study was released to the Applicant, *“there is nothing in ATIPPA, or in the regulations passed under ATIPPA, which would prevent an applicant from sharing the Study further with other interested persons.”*² This is correct. The right of access in the ATIPP Act is limited only by the exceptions set out in the Act. There is no exception in the ATIPP Act that permits a public body to refuse access on the basis that information might be shared with other interested persons. A public body may be uncomfortable with the loss of control over the information, however this cannot be a consideration when determining whether or not there is a right of access to the requested information.

¹ *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, s 12

² YEC Initial Submission, page 2, para 3; Affidavit of D. Morrison, para 6

Nature of the Public Body

- [13] YEC submits that it is not a typical public body designated under ATIPP. It submits that I should take into account that YEC is a company under the Yukon *Business Corporations Act* with commercial interests and challenges and must compete in the marketplace in certain areas.³
- [14] YEC is specifically named as a public body by Regulation to the ATIPP Act. The Act does not create classes or categories of public bodies. All public bodies, regardless of their structure, have the same responsibilities, duties and obligations according to the Act. If the legislature intended YEC, or any public body, to be treated differently, it would have done so in the legislation.

IV DISCUSSION OF EXCEPTIONS

Section 16

Refusal to Disclose Advice or Recommendations Made to a Public Body

- [15] Section 16(1) of the ATIPP Act, among other things, authorizes a public body to withhold information that would reveal advice or recommendations developed for a public body or a Minister. Section 16(1) must however be read along with the provisions of section 16(2) which requires the public body to assess and consider the nature of the advice or recommendations that are listed there. The relevant provisions for this case are:

Policy advice, recommendations or draft regulations

16(1) A public body may refuse to disclose to an applicant information that would reveal advice, recommendations, or draft Acts or regulations developed by or for a public body or Minister.

16(2) A public body must not refuse to disclose under subsection (1).

³ YEC Initial Submission, page 2, para 4; Affidavit of D. Morrison, para 3

(a) any factual material;...

(h) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body;

(i) a report on the results of field research undertaken before a policy proposal is formulated...

- [16] The generally accepted principle underlying this exception is concisely described by the BC Information and Privacy Commissioner as follows:

This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.⁴

- [17] Section 16(1) gives a public body the discretion to refuse to disclose information that would reveal advice, recommendations, or draft Acts or regulations developed by or for a public body or Minister. However, section 16(2) goes on to identify the kind of information that a public body must not refuse to disclose under section 16(1). If the requested information is one of the things listed in section 16(2), the public body cannot refuse to disclose it.

YEC Submission

- [18] The YEC submits that “a review of the study shows that it is entirely made up of analysis, advice and recommendations for YEC.”⁵ YEC submits that section 16(2)(a) does not apply in these circumstances as the Study contains an analysis of data and the factual material is “tied up” with and connected to the advice and recommendations.
- [19] To be clear, section 16(1) does not authorize a public body to refuse to disclose “analysis.” The exception is applicable to advice and recommendations only. The YEC submission overstates the exception to include “analysis” of material and

⁴ 2011 BCIPC No. 23, para 22

⁵ YEC Initial Submission, page 5, para 14

while I take the point being made by YEC, care must be taken to understand exactly what is excepted by the Act.

- [20] YEC submits that the entire Study is advice and recommendations. Despite this characterization of the information, YEC says it “*exercised its discretion carefully under section 16*”⁶ and disclosed to the Applicant those portions that could be provided “*without jeopardizing the economic interests of YEC or the ratepayers.*”⁷ I do not understand this submission as section 16 does not refer to economic interests of any kind. The submission does not elaborate on how “*the economic interests of YEC or the ratepayers*” is relevant to that exception.
- [21] Lastly, with respect to section 16, YEC submits that section 16(2)(h) does not apply to the Study “*because the wind energy potential addressed in the advice provided through the Study is not a “policy or project” of YEC.*”⁸ I have reviewed the Study which clearly reveals that it has been done and written in relation to a “project” of YEC. I therefore do not agree with the submission of YEC regarding the application of section 16(2)(h).

Applicant’s Submission

- [22] The Applicant submits that parts of section 16, namely subsections 16(2)(h) and (i) “*is an argument that the public body must not refuse to disclose the document.*”⁹
- [23] I agree that the nature of the information listed in section 16(2) must be considered before a public body can decide to refuse to disclose information pursuant to section 16(1).

Conclusion

- [24] I have reviewed the Study provided to me. I find that section 16(2)(i), raised by the Applicant, does not apply to the information contained in the Study.
- [25] I agree that the record contains some advice and/or recommendations. I do not however agree with the YEC submission that all the information it refused to disclose is captured by section 16(1). The record contains a significant amount of

⁶ Ibid

⁷ YEC Initial Submission, page 6, para 19

⁸ YEC Initial Submission, page 6, para 20

⁹ Applicant Reply Submission, page 2, para 2

factual material that, in my view, is easily distinguished from the information that reveals advice and recommendations.

- [26] It is not however necessary for me to determine what factual information could be untangled from the advice or recommendations given because section 16(2)(h) clearly applies in this case. The Study is entitled “Wind Assessment Feasibility Study” and the contents reveal it is a study of the feasibility of wind power. The Study clearly indicates that it has been done and written in relation to a project of YEC. I am therefore satisfied that the requirements of section 16(2)(h) are met. The record is a feasibility study relating to a project of the public body and, as such, YEC must not refuse to disclose it according to the operation of section 16(2)(h).

Section 17

Harm to the Financial or Economic Interests of a Public Body

- [27] Section 17(1) of the ATIPP Act, among other things, authorizes a public body to refuse to disclose information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body. Section 17(1)(d) authorizes a public body to refuse to disclose information that could result in an undue financial loss of gain to a third party.
- [28] The relevant provisions for this case are:

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

17(1) 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 the Yukon or the ability of that Government to manage the economy, including the following information

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or an undue financial loss or gain to a third party;

Standard of Proof for Application of Section 17(1)

- [29] The YEC has the burden of proving that the disclosure of the requested information could reasonably be expected to harm its financial or economic interests.
- [30] Other jurisdictions, with similar legislation, have extensively considered the standard required to establish the application of section 17(1). The British Columbia Information and Privacy Commissioner, in a 2010 decision, clearly articulates the standard when she quotes her predecessor:

Commissioner Loukidelis considered the application of s.17(1) in numerous orders and established the principles for its application in order 02-50.¹⁰ In Order 07-15¹¹, he reiterated the standard of proof required to establish the application of s. 17 as follows:

I have held that there must be a confident and objective evidentiary basis for concluding that disclosure of information could reasonably be expected to result in harm under s. 17(1). Referring to language used by the Supreme Court of Canada in an access to information case, I have said, “there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged.”¹²

- [31] YEC cites that same case (*BC IPC Order F10-34 Fraser Health Authority and Partnerships BC*)¹³ for the premise that a “plausible hypothetical scenario” is sufficient to meet the standard of proof in this case. YEC submits that the affidavit of David Morrison, YEC President and CEO, sets out a “plausible hypothetical scenario” to support this argument.
- [32] I disagree with the YEC submission that “plausible hypothetical scenarios” are sufficient. In making this argument YEC has, in my view, misconstrued what evidence is needed to meet the standard for application of section 17(1).

¹⁰ Order 02-50, [2002] B.C.I.P.C.D No. 51, paras 124-137

¹¹ F07-15, [2007] B.C.I.P.C.D No. 21

¹² 2010 BCIPC 50, para 9

¹³ Ibid, para 24

[33] As noted above, the Fraser Health Authority case clearly states the standard of proof for the application of section 17(1). Commissioner Denham reiterates it when she says:

*The test that the public bodies must meet, as I indicated above, is that there must be a strong basis, supported by objective evidence that disclosure could be reasonably expected to cause the harm that s. 17(1) contemplates. Moreover, there must be a causal connection between the disclosure of the information and the harm that could occur.*¹⁴

[34] I adopt this test in assessing the facts of this case. There are two elements required to meet the test for section 17(1). The evidence must be more than mere speculation of what could or might happen and there must be evidence presented to provide the link between the disclosure of the information and the reasonable expectation of harm.

YEC Submission on Section 17(1)

[35] The only evidence provided to me regarding reasonable expectation of harm to the financial or economic interests of the public body is in the affidavit of David Morrison which says:

*YEC is a company under the Yukon Business Corporations Act and is a commercial business which must compete in the market place in certain areas. My understanding is that the Yukon Government will be developing a policy for independent power production which could increase the situations in which YEC must compete in the marketplace.*¹⁵

*...I am concerned that the Applicant (or others to whom the Applicant could release the Study) may be interested in developing wind energy and then selling that energy to YEC or to other customers in the Yukon.*¹⁶

¹⁴ Supra, note 11, para 23

¹⁵ Affidavit of D. Morrison, para 3

¹⁶ Affidavit of D. Morrison, para 6

- [36] A vague reference that YEC might someday need to compete in the marketplace is not sufficient evidence. There is no evidence provided to me that the Applicant is a competitor or a potential competitor nor any evidence to identify potential other competitors. The second part of the test is not met either in that I have no evidence of how the disclosure of the requested information could result in financial or economic harm to the public body.
- [37] Mr. Morrison also deposes that revealing the specific geographic locations contemplated by the Study could result in potential competitors pursuing those properties and thus having an adverse financial or economic effect for the YEC.

YEC Submission on Section 17(1)(d)

- [38] YEC argues that the disclosure would be a windfall or an undue gain to a third party according to section 17(1)(d) of the Act.
- [39] YEC cites British Columbia *Order 00-10 Inquiry Regarding Liquor Distribution Branch Data on Annual Beer Sales (April, 19, 2000)*¹⁷ to identify what is undue gain or loss and to support their position that disclosure would be a windfall or undue gain for the Applicant. I accept the definitions in that case of what is an “undue” loss or gain.
- [40] I do not however agree that the case is helpful in this circumstance. That case dealt with an access request from a brewery to a public body for sales information about two competitor breweries which were classified as third parties. The public body had the sales information in its custody because the businesses were obligated to provide it to government. The sales information requested pertained to competitor commercial businesses that were not public bodies. The Commissioner found, in that matter, that the information was the financial and commercial information of the third parties. He also adopted the definition consistently used in Ontario decisions that “*if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue.*”¹⁸

¹⁷ BCIPC Order 00-10

¹⁸ Ibid, para ; YEC Initial Submission, para 25

- [41] The YEC also submits that it would be “*simply unfair and inappropriate for the ratepayers to have expended \$11,020.00 to obtain the Study and for the Applicant (or any third party to who the Applicant might provide a copy of the Study) to obtain a benefit from the study at no cost.*”¹⁹ I understand this to mean that disclosure of the Study will somehow result in ratepayers suffering a financial loss, presumably because they have ultimately paid for the Study and the Applicant can obtain it for free. I also understand that YEC is concerned that if the Applicant provides the Study to any unidentified third parties, they will gain competitive information unduly.
- [42] The affidavit of Mr. Morrison states that the vast majority of the Study is really one “interconnected piece of advice” and that releasing any additional portions of the Study could jeopardize the economic interests of YEC or “give an undue financial windfall to a third party and thus harm the economic interests of the Yukon ratepayers.”²⁰
- [43] The only parties identified in this matter are YEC as the public body, and the Applicant. Other than the suggestion that the ratepayers have paid for the Study, YEC has not identified any third parties as contemplated by section 17(1)(d) or how the disclosure can reasonably be expected to result in undue financial loss or gain to them.

Applicant’s Submission

- [44] With respect to section 17(1), the Applicant submits that s/he does not believe that disclosure of the Study could be reasonably expected to harm financial or economic interests of YEC or the Government. The Applicant submits that “*existing Yukon legislation that controls power generation and distribution protects the public body.*”²¹
- [45] The Applicant also submits:

If by some stretch of the imagination, some other interest were to develop a wind project on Mt Sumanik and sold the electricity to Yukon Energy Corporation, the public body would actually benefit, in that it and the Yukon

¹⁹ YEC Initial Submission, page 7, para 24

²⁰ Affidavit of D. Morrison, para 5

²¹ Applicant Initial Submission, page 1, para 2

*Utilities Board would set the purchase rate, and Yukon Energy would burn less diesel fuel to generate electricity, which would save the utility and ratepayers money.*²²

- [46] Unfortunately, the Applicant did not provide any support for these arguments such as references to specific sections of legislation, cases or affidavit material. As such, I am not able to fully consider the specific argument being made by the Applicant.
- [47] The Applicant's reply submission makes reference to subsections 17(2)(a) and (b). The Applicant says that these subsections do not apply to the Study and, as such, the YEC cannot refuse access because the Study "*would appear to include the results of product testing carried out by and for the public body.*"²³
- [48] Having reviewed the record, I do not find that it includes the results of "product testing" as contemplated by section 17(2). As a result, I find that section 17(2) is not applicable to this case.

Analysis

- [49] The affidavit of David Morrison as President and CEO of YEC merits considerable weight due to his knowledge and expertise. It is also the only evidence provided by the public body to support the argument that disclosure of the requested information could reasonably be expected to harm the financial or economic interests of the public body (section 17(1)) or result in undue financial loss or gain to a third party (section 17(1)(d)).
- [50] Unfortunately, with one exception, the affidavit fails to provide "*a strong basis, supported by objective evidence that disclosure could be reasonably expected to cause the harm that s. 17(1) contemplates.*"²⁴ In addition, there is insufficient evidence to meet the test for application of section 17(1)(d) and justify the argument that disclosure of the requested information would result in undue financial loss or gain to a third party.
- [51] In order to meet the standard of proof required, more evidence is needed to show the logical connection between the information requested and the contemplated

²² Ibid, para 3

²³ Applicant Reply Submission, page 2, para 6

²⁴ Supra, note 13, para 23

harm or undue financial loss or gain that disclosure might pose. A more detailed affidavit, reference to legislation or other supporting documents are necessary. The public body should make efforts to quantify the potential harm where possible. While this is a difficult task, some estimate or range of potential costs in dollar or percentage amounts would be useful addition to the evidence. Application to present evidence *in camera* is possible if it is necessary to make a comprehensive argument without revealing information that might benefit potential competitors.

[52] The one exception to the deficiencies of the evidence is with respect to the argument that revealing “specific geographic locations” could result in certain land tenures being pursued or obtained by others. While he does not indicate who the potential others might be, I have considered Mr. Morrison’s evidence together with a review of the record and I am persuaded that disclosure of the exact locations and the plans for the work needed there “*could reasonably be expected to harm the financial or economic interests of a public body.*”²⁵

[53] To be clear, I do not consider the words “Mount Sumanik” to reveal specific geographic location information. The Applicant requested the Study done about Mount Sumanik and the YEC identified the record as responsive so it is clearly about Mount Sumanik. In addition, the YEC website, designed to inform the public, provides extensive information about wind energy and its work in the area of Mount Sumanik.

Conclusion

[54] With the exception of the “specific geographic locations,” the YEC has not provided sufficient evidence to meet the standard of proof and has not met the burden that there is a reasonable expectation of harm to the financial or economic interests of the public body or undue loss or gain to a third party that could result from the disclosure of the requested information.

[55] As a result, except as recommended below, YEC is not authorized by section 17(1) or section 17(1)(d) to refuse to disclose the record in dispute. YEC is authorized to refuse to disclose parts of the record, as recommended below, but is not authorized to refuse to disclose the remainder of the Study.

²⁵ *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, s 17

V FINDINGS

- [56] For the reasons given above, and according to section 57 of the Act, I find that YEC is not authorized to refuse disclosure of the record, being a feasibility study in accordance with section 16(1) and section 16(2)(h) of the ATIPP Act.
- [57] I confirm that YEC is authorized to refuse to disclose some information contained in the record, as recommended below, according to the operation of section 17(1) of the ATIPP Act.
- [58] The public body has not provided sufficient evidence to meet the standard of proof required to meet the test for section 17(1) and section 17(1)(d) and is therefore not authorized to refuse to disclose the remainder of the Study.

VI RECOMMENDATION

- [59] According to section 57 of the ATIPP Act, and for the reasons given above, I recommend that YEC give the Applicant access to the Study, except for the parts noted below. The following pages or portions of the record should be redacted from the record:

Page 4, paragraph 2, second sentence
Page 4, paragraph 6
Page 5, words following the numbers 7.2, 7.5 and 7.6
Page 7, words following the words Table 2
Page 7, words following the words Figure 1
Page 9, all information except the first three lines
Page 10, Figure 2 description and figure
Page 10, paragraph 2.2.3 (title and words)
Page 11, in its entirety,
Page 12, first paragraph
Page 28, paragraph 7.2
Page 29, paragraph 7.5
Page 30, paragraph 7.6

- [60] For greater clarity, I have forwarded copies of the above noted pages marked with the recommended redactions to YEC along with their copy of this Inquiry Report.

VII PUBLIC BODY'S DECISION AFTER REVIEW

- [61] Section 58 of the Act requires YEC to decide, within 30 days of receiving this report, whether to follow my recommendation. YEC must give written notice of its decision to me and the parties who received a copy of this report, noted on the distribution list below.
- [62] If YEC does not give notice of its decision within 30 days of receiving this report, it is deemed to have refused to follow my recommendation.
- [63] If the Public Body does not follow my recommendation, it must inform the Applicant, in writing, of the right to appeal that decision to the Yukon Supreme Court.

VIII APPLICANT'S RIGHT OF APPEAL

- [64] If YEC does not follow my recommendation to give access to the redacted record, the Applicant has the right to appeal to the Yukon Supreme Court pursuant to section 59(1)(a).
- [65] The Applicant has the right to appeal to the Yukon Supreme Court my decision that YEC is authorized to refuse to disclose the pages or portions of the record noted above in my recommendation, pursuant to section 59(1)(b).

April 4, 2012

ORIGINAL SIGNED BY

Tracy-Anne McPhee
Yukon Information and Privacy Commissioner

Distribution List:

- Public Body – Yukon Energy Corporation
- Applicant
- Records Manager