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**NON-CONFIDENTIAL VERSION  
FOR PUBLIC RECORD**

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BY E-FILING

September 13, 2017

British Columbia Utilities Commission  
Sixth Floor – 900 Howe Street  
Vancouver, B.C. V6Z 2N3

Attention: Patrick Wruck, Commission Secretary

Dear Mr. Wruck:

**Re: British Columbia Utilities Commission (Commission)  
British Columbia Hydro and Power Authority (BC Hydro)  
Inquiry of Expenditures related to the adoption of the SAP Platform (Inquiry)  
Project No. 3698878**

We write on behalf of BC Hydro in connection to the Commission's letter (Exhibit A-20 in the Inquiry) requesting that BC Hydro and interveners' legal counsel who have signed the Commission's Confidentiality Declaration and Undertaking form comment on the Commission's proposed redactions to BC Hydro's Code of Conduct Filing (Exhibit B-17-1) filed in compliance with Order No. G-86-17.

We are filing this submission with the Commission on a **confidential basis** because it refers to personal information the disclosure of which BC Hydro believes would be harmful to the personal privacy of individuals as explained further below. We are also providing a redacted version of this submission for the public record of the Inquiry.

**Summary**

We enclose with this submission a redacted version of the Code of Conduct Filing. The enclosed version discloses, unredacted, the information that BC Hydro is comfortable disclosing, and has redacted the information BC Hydro believes it must not disclose pursuant to its obligations under the *Freedom of Information and Protection of Privacy Act (FOIPPA)* to protect personal information and to refuse to disclose personal information if the disclosure would be an unreasonable invasion of the personal privacy of individuals.

BC Hydro believes that pursuant to the *FOIPPA* it must not disclose, and therefore has redacted, the following types of information in the enclosed version of Code of Conduct Filing:

- (i) information that identifies [REDACTED],
- (ii) information about [REDACTED],
- (iii) information that identifies the individuals [REDACTED],
- (iv) information that can be used to identify these individuals through association or inference, and
- (v) other private personal information.

### Comments on the Code of Conduct Filing documents

The Code of Conduct Filing includes a complaint received by BC Hydro's Code of Conduct Advisor in April 2010 (the 2010 Complaint) that included the following conclusions and recommendations:

[REDACTED]

If a breach (of the Code of Conduct) did not occur, there is now, at a minimum, the appearance of it, given the recently published 2011 RRA...

Given the importance and sensitivity associated with the proposed rate increases in the F2011 RRA submission, even the appearance of attempting to mislead the BC Utility Commission in financial matters, or not being seen to perform the proper due diligence on a proposed SAP IT Program far in excess of \$50M, could bring serious harm to BC Hydro's reputation.

It is recommended that [REDACTED] be reviewed to establish if there has been any intent to mislead the BC Utility Commission."<sup>1</sup>

The Code of Conduct Filing includes documents related to the investigation and resolution of serious allegations made [REDACTED] by an employee that wished to remain anonymous. The complaint itself, and the investigation and resolution of it were treated with utmost confidentiality to protect from potential harm [REDACTED] the individuals who were interviewed during the investigations. The 2010 Complaint was submitted to BC Hydro's Code of Conduct Advisor on an anonymous and confidential basis<sup>2</sup>, the investigation of it was conducted on a privileged and confidential basis<sup>3</sup>, and the review of the 2010 Complaint undertaken in 2016 was conducted on a private and confidential basis.<sup>4</sup>

<sup>1</sup> Tab 1 of enclosure, 2010 Complaint, page 4 of 6.

<sup>2</sup> Tab 1 of enclosure.

<sup>3</sup> Tabs 3 and 16 of enclosure.

<sup>4</sup> Tab 95 of enclosure.

Clearly, the consequential information in these documents was provided on the understanding it would remain confidential, and disclosure of it could damage the reputations of persons referred to. Several of the persons referred to [REDACTED] are no longer with BC Hydro but that does not end BC Hydro's obligations to protect personal information about them.

### **BC Hydro's response to the Commission's Proposal**

In previous submissions with respect to these issues, we highlighted BC Hydro's obligations under the *FOIPPA* to protect personal information that is in BC Hydro's custody and control. BC Hydro's Ethics Officer also emphasized to the Commission the importance of safeguarding the confidentiality and preserving the integrity of BC Hydro's confidential disclosure and whistleblowing process. BC Hydro has not changed its position on these issues.

To balance the need to disclose information that truly is important to the Inquiry while preserving the integrity of BC Hydro's confidential Code of Conduct reporting program and protecting the privacy of individuals to the extent possible, BC Hydro filed the Code of Conduct Filing documents with the Commission on a confidential basis and proposed the following process:

- interveners' legal counsel may have access to the documents by signing the Commission's Confidentiality Declaration and Undertaking form,
- the information request (IR) process with respect to these documents also be confidential, and
- following the IR process if the Commission or an intervener counsel believes that any of the information (either a document included with the Code of Conduct Filing or an IR response) is important to the Inquiry and should be placed on the public record, disclosure and redaction of the specific document(s) could be considered at that time.

In Exhibit A-20 the Commission characterised BC Hydro's proposed process as a "request for full confidentiality of the Code of Conduct Filing." This is not accurate given that the final step of BC Hydro's proposed process contemplates documents being placed on the public record to the extent the Commission determines disclosure of specific documents is important to the Inquiry.

The Commission's proposal to place the entire Code of Conduct Filing on the public record with minimal redactions (as identified in Exhibit A-21) is based on an underlying premise that "no information should be kept confidential without a fully substantiated justification of the need for confidentiality."<sup>5</sup> With respect, in our view an approach that presumes all information with minor redactions should be disclosed on the public record may be appropriate for the types of information that are typically submitted in rate-setting or CPCN proceedings, but the

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<sup>5</sup> Exhibit A-20, page 2, first paragraph.

Commission's approach is not appropriate when considering disclosure of personal information protected under the *FOIPPA* or under the *Personal Information Protection Act (PIPA)*.<sup>6</sup>

Individuals have rights to protection of their personal information and these rights should not be taken lightly. Public bodies in the province, including both BC Hydro and the Commission, are tasked with ensuring that the unauthorized disclosure of personal information in their control and custody is prevented.<sup>7</sup>

The BC Government's "Guide to Good Privacy Practices" provides guidance to public bodies applying the *FOIPPA*. This guidance provides the following definition for protected "personal information":

"Simply put, personal information is any recorded information about an identifiable individual other than their business contact information. Personal information includes information that can be used to identify an individual through association or inference."<sup>8</sup>

In our view, it is very important to note that the protection of personal information extends to information that can be used to identify an individual through association or inference. For example, [REDACTED]

Information should also be redacted if it can be used to infer the identities of individuals that provided confidential [REDACTED].

Section 22(1) of the *FOIPPA* provides that a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Pursuant to section 22(3) of the *FOIPPA*, a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if, among other things:

- the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation
- the personal information relates to employment, occupational or educational history
- the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party

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<sup>6</sup> A copy of Parts 1 to 3 of the *FOIPPA* is included with this submission. The *FOIPPA* applies to public bodies, including BC Hydro and the Commission. Private bodies and individuals also have obligations to protect personal information under the *PIPA*.

<sup>7</sup> *FOIPPA*, s. 30.4.

<sup>8</sup> <http://www2.gov.bc.ca/gov/content/governments/services-for-government/information-management-technology/privacy/personal-information>.

- the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party

The BC Government provides the following guidance to public bodies applying the *FOIPPA* with respect to disclosure of personal information in their custody:

“Personal information may only be disclosed on a need to know basis or when you need it to perform your duties. When you make a decision to disclose personal information, consider both the benefit and the potential harm that may result from its release.”<sup>9</sup>

In BC Hydro’s view, the Commission’s underlying premise for its approach to redaction of the Code of Conduct Filing, which presumes that all information with minor redactions should be disclosed on the public record, is at odds with the underlying premise of the protection of personal privacy under the *FOIPPA* which require that personal information may only be disclosed on a need to know basis.

At the top of page 2 of Exhibit A-20, the Commission identified four factors it also considered in assessing the need for confidentiality. Our response to each of the Commission’s four factors is as follows:

- the complainant in the Code of Conduct Filing, through legal counsel, has consented to the public disclosure of the 2010 Complaint on an anonymous basis
  - BC Hydro comment: When the complainant submitted the 2010 Complaint to BC Hydro’s Code of Conduct Advisor, the complainant asked to remain anonymous to protect his/her privacy. [REDACTED]  
[REDACTED] The complainant’s consent to public disclosure of the 2010 Complaint has no bearing on the privacy rights of [REDACTED] those that provided confidential [REDACTED]. It appears that the complainant seeks to use BC Hydro or the Commission to publicly disclose the allegations he/she made [REDACTED] while maintaining his/her anonymity through legal counsel.

[REDACTED]

- BC Hydro comment: [REDACTED]  
[REDACTED]

<sup>9</sup> <http://www2.gov.bc.ca/gov/content/governments/services-for-government/information-management-technology/privacy/good-privacy-practices>.

[REDACTED] nor does it render the *FOIPPA* inapplicable to the personal information in the Code of Conduct Filing.

- numerous other email correspondences among BC Hydro employees (both current and former employees), all of whose names were left unredacted, were provided by BC Hydro in non-confidential responses to information requests filed in this proceeding
  - BC Hydro comment: Unlike most of the information in the Code of Conduct Filing, the emails that BC Hydro filed with the Commission on a non-confidential basis in this Inquiry were not originally provided in confidence; the disclosure of the previously-filed emails by current employees was in most cases consented to by the applicable employee; and in BC Hydro's view the disclosure of the previously-filed emails does not constitute an unreasonable invasion of a third party's personal privacy as specified in section 22 of the *FOIPPA*.
- a number of the documents provided as part of the Code of Conduct Filing have already been provided non-confidentially in this proceeding
  - BC Hydro comment: Information that is publicly available and innocuous on its own can be harmful to the privacy of individuals if it is disclosed as part of the set of documents about [REDACTED] a potential breach of the Code of Conduct.

In our view, the four factors considered by the Commission have no bearing on the *FOIPPA* privacy rights of the individuals identified in the Code of Conduct Filing documents or on the confidentiality of information that can be used to identify the individuals through association or inference.

Although the Commission has the power to order that BC Hydro disclose personal information that BC Hydro is otherwise required to protect under the *FOIPPA*, in deciding whether to make such an order the Commission ought to carefully consider whether the disclosure would be an unreasonable invasion of a third party's personal privacy, including both the benefit and the potential harm that may result from the release of such information. Further, the Commission should also consider appropriate limitations on the release to ensure that the information is disclosed only to those that need to know it. The imperative to consider these factors is prescribed by section 22(2) of the *FOIPPA*, which is paraphrased as follows:

In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, a public body must consider all the relevant circumstances, including among other things whether

- the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny
- the third party will be exposed unfairly to financial or other harm

- the personal information has been supplied in confidence
- the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

With respect to the benefit and the potential harm that may result from disclosure of the entire Code of Conduct Filing with the minimal redactions proposed by the Commission, in BC Hydro's view this would be harmful to the personal privacy of identified individuals and to BC Hydro's confidential Code of Conduct reporting process, and it is not necessary for the purposes of the Inquiry. As Chairperson Morton stated at the October 28, 2016 procedural conference for the Inquiry, "this proceeding's purpose, just to remind us all, is fact-finding to try to understand the circumstances of BC Hydro's implementation of the SAP program and SAP modules and, if appropriate, to make recommendations about further process. The purpose of this inquiry is not to determine or levy any penalty against BC Hydro."<sup>10</sup> Again, BC Hydro's position is that if a specific document in the Code of Conduct Filing (or an IR response regarding the Filing) is important to the fact-finding purposes of the Inquiry, disclosure of the document on a redacted basis could be considered after the IR process consistent with the need to know approach to disclosure of personal information.

BC Hydro's Freedom of Information Office has diligently considered and identified the information in the Code of Conduct Filing that BC Hydro is comfortable disclosing and the information which must be redacted to meet BC Hydro's obligations under the *FOIPPA* to protect personal information and to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

With this submission, BC Hydro is filing two hardcopy versions of the Code of Conduct Filing with the Commission. One version shows the information BC Hydro believes must be redacted within black-outlining, and in the other version this information is redacted.

BC Hydro consents to the Commission placing the enclosed redacted version of the Code of Conduct Filing on the public record. BC Hydro wishes to be clear; however, that it does not consent to public disclosure of the redacted information in the attachment. If the Commission considers that the redacted information in the attachment ought to be disclosed, the Commission will have to either disclose the information itself, or order BC Hydro to do so. In BC Hydro's view, it would follow that the Commission would be responsible for any harm to individuals that may result from such disclosure.

Finally, BC Hydro reminds the Commission that under section 23 of the *FOIPPA*, if a public body intends to give access to a record that the public body has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the third party must be given a written notice under subsection 23(3). The notice must state that a request has been received for access to information the disclosure of which may affect the interests or invade the personal privacy of the third party, describe the contents of the record, and state

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<sup>10</sup> Inquiry Transcript Volume 2, page 37, lines 15-20.

that within 20 days after the notice is given the third party may consent to the disclosure or may make representations explaining why the information should not be disclosed. In such circumstances the third party is to be given the opportunity to make representations concerning disclosure. Accordingly, if the Commission intends to disclose the redacted information or order BC Hydro to do so, BC Hydro believes that prior notice should be given to the affected individuals and such individuals should be given the opportunity to represent their interests.

Yours very truly,

LAWSON LUNDELL LLP



Ian Webb

cc. BC Hydro and Intervener counsels that have signed the Commission's Undertaking  
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