



Compliance and Enforcement Decision CRTC 2020-196

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Ottawa, 18 June 2020

File number: 9090-2019-00518-09

Hydro-Québec – Application for review of a notice to produce

*The Commission **denies** Hydro-Québec's application to review a notice to produce and confirms the production requirements set out in the notice.*

Introduction

1. In April 2019, Commission enforcement staff identified 189 complaints submitted to the Spam Reporting Centre in relation to an alleged short message service (SMS) phishing scam.
2. As a result of these complaints, Commission enforcement staff launched an investigation into potential violations of sections 6 to 9 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (Canada's Anti-Spam Legislation [CASL] or the Act).
3. In the context of this investigation, on 2 October 2019, a person designated by the Commission¹ issued and caused a notice to produce (NTP)² to be served on Hydro-Québec.
4. The NTP required Hydro-Québec to produce information relating to 10 service addresses and their associated customer accounts no later than 18 October 2019. More specifically, the NTP sought (i) any and all subscriber billing and account information connected with Hydro-Québec's services provided to 10 service addresses on specific dates, (ii) any records pertaining to the process that Hydro-Québec used to validate the identity and/or credit history of the account holder(s) of the 10 service addresses, and (iii) an indication of whether the same person continued to receive service, as of the date of Hydro-Québec's response, at the respective hydro service location.

¹ Section 14 of the Act states that, for the purposes of any of sections 15 to 46, the Commission may designate persons or classes of persons appointed under section 8 of the *Canadian Radio-television and Telecommunications Commission Act* to exercise powers in relation to any matter referred to in the designation.

² Subsection 17(1) of the Act states that a person who is designated for the purpose of section 17 may cause a notice to be served on a person requiring them to produce a copy of a document that is in their possession or control, or to prepare a document based on data, information or documents that are in their possession or control and to produce that document.

5. On 17 October 2019, the Commission received an application for review of the NTP from Hydro-Québec.³ In its application, the public utility requested that the Commission vary the requirements of the NTP so that Hydro-Québec would be required to produce only the information provided in the appendix to its application.
6. Hydro-Québec requested that the production requirements of the NTP be varied because
 - the designated person did not obtain a court order authorizing him to require non-public personal information or confidential information from a public organization;
 - some of the information requested in the NTP has no rational link with the purposes permitted by subsection 17(2) of the Act; and
 - much of the requested information is confidential personal information protected under Quebec's *Act respecting Access to documents held by public bodies and the Protection of personal information* (the Access Act).
7. On 8 November 2019, the Commission received representations from a designated person in response to Hydro-Québec's application. In these representations, the designated person argued that
 - the designated person did not require prior judicial authorization to request the information identified in the NTP;
 - the NTP was issued for, and each of its requirements relates to, a purpose permitted by subsection 17(2) of the Act; and
 - the NTP applies everywhere in Canada, and it does not conflict with the Access Act. Therefore, Hydro-Québec is allowed to disclose all of the information requested in the NTP.
8. According to subsection 18(3) of the Act, after considering the representations made by the applicant and by a person designated for the purposes of section 17, the Commission can allow the application, deny the application, or vary the information requirements and conditions set out in the NTP in any manner it considers reasonable in the circumstances.

Issues

9. On the basis of the record of this proceeding, the Commission has identified the following issues to be addressed in this decision:
 - Did the designated person require a court order authorizing him to request non-public personal information or confidential information from Hydro-Québec?

³ Subsection 18(1) of the Act states that at any time before they are required to produce a document, a person may apply in writing to the Commission either for a review of the notice on the grounds that the requirement to prepare or produce a document is unreasonable in the circumstances or that the production would disclose privileged information or for a review of the conditions imposed to prevent disclosure.

- Are the purposes for issuing the NTP and its requirements permitted under subsection 17(2) of the Act?
- Is Hydro-Québec prohibited under the Access Act from disclosing the information requested in the NTP?

Did the designated person require a court order authorizing him to request non-public personal information or confidential information from Hydro-Québec?

10. Hydro-Québec argued that the investigative powers conferred by the Act do not allow the designated person to compel a public body to disclose non-public personal information or confidential information without a court order.
11. Hydro-Québec submitted that the designated person needed to obtain a court order because the predominant purpose of the NTP is to collect information with a view to determining the penal liability of the persons whose information is being sought and laying charges of violations of CASL against them. To support this position, Hydro-Québec pointed to the ruling of the Supreme Court of Canada in *R. v. Jarvis* (Jarvis).⁴ According to Hydro-Québec, in that ruling, the Court found that a court order is required when the predominant purpose of an inquiry is to establish the penal liability of the person subject to the inquiry. However, Hydro-Québec did not explain in any detail why it considers proceedings under CASL to be penal in nature or how *Jarvis* applies in the present circumstances.
12. The designated person submitted in reply that the ruling in *Jarvis* does not apply, nor can it be extended to apply, in the present case because the NTP was not issued in the context of a criminal investigation.
13. The Commission finds, for the reasons that follow, that prior judicial authorization was not required to request the information set out in the NTP.
14. In Compliance and Enforcement Decision 2017-367,⁵ the Commission dealt extensively with the nature of its proceedings under CASL and concluded that CASL is administrative and regulatory in nature rather than criminal or penal. The predominant purpose of proceedings under CASL, including those related to NTPs, is not the determination of penal liability, i.e. whether an offence has been committed.⁶ Rather, the overall purpose of the Act is to promote the efficiency and adaptability of the Canadian economy by regulating commercial conduct that discourages the use of electronic means to carry out commercial activities (see section 3). The Act explicitly states that violations of sections 6 to 9 of the Act are not offences (see section 30). The Act also states that the purpose of administrative monetary penalties imposed by the Commission is to promote compliance with the Act and not to punish (see subsection 20(2)).

⁴ [R. v. Jarvis, \[2002\] 3 SCR 757](#) at paragraph 88.

⁵ Compliance and Enforcement Decision 2017-367, along with Compliance and Enforcement Decision 2017-368, were upheld by the Federal Court of Appeal in *3510395 Canada Inc. v. Canada (Attorney General)* 2020 FCA 103.

⁶ See paragraphs 195 to 207 of Compliance and Enforcement Decision 2017-367.

15. The Commission notes that, unlike in certain other statutes,⁷ there is no provision in CASL that requires a designated person to obtain judicial authorization before issuing an NTP.
16. In light of the above, the Commission finds that the designated person did not require a court order to request non-public personal information or confidential information from Hydro-Québec.

Are the purposes for issuing the NTP and its requirements permitted under subsection 17(2) of the Act?

17. Subsection 17(1) of the Act grants designated persons broad authority to require persons to produce or prepare documents that are in their possession or control. That authority is limited by subsection 17(2) of the Act, which provides that the request to produce or prepare documents must be made only for one or more of the following purposes:
- a) verifying compliance with the Act;
 - b) determining whether any of sections 6 to 9 has been contravened; and
 - c) assisting an investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct prohibited under any of sections 6 to 9.
18. Hydro-Québec argued that some of the information requested in the NTP has no rational link with the purposes of CASL. Specifically, Hydro-Québec submitted that the credit history of the account holders of interest is irrelevant to determining whether unsolicited commercial electronic messages (CEMs) have been sent.
19. The designated person replied that all of the information requested in the NTP is relevant to the investigation and explained how each of the items requested in the NTP is directly linked to purposes permitted under paragraphs 17(2)(a) and (b) of the Act. The designated person argued that subscriber billing and account information, as well as records pertaining to the process that Hydro-Québec used to validate the credit history of the account holders of interest, would help identify financial transactions relevant to the ongoing investigation and implicated persons who may be involved with or responsible for the commission of a violation of section 6 or 9 of the Act.
20. The Commission finds, for the reasons that follow, that the designated person issued the NTP to Hydro-Québec for purposes permitted under subsection 17(2) of the Act.
21. The Commission considers that Hydro-Québec's representations on this issue reveal a potential misunderstanding of the nature and purposes of section 17 of the Act and of the circumstances of the issuance of the NTP. Hydro-Québec appears to assume that the designated person issued the NTP only to collect information to determine whether the account holders of interest have sent CEMs without the consent of recipients. Rather, the Commission considers that the designated person issued the NTP to obtain information that

⁷ See, for example, subsection 231.2(3) of the *Income Tax Act*.

may aid in an ongoing investigation into potential violations of any of sections 6 to 9 of the Act by, but not necessarily only by, the account holders of interest.

22. In the Commission's view, the information requested in the NTP, including records pertaining to the process used by the applicant to validate the credit history of the account holders of interest, can assist the designated person in corroborating information already obtained during the investigation. This information could help the designated person determine whether all or some of the 10 service addresses listed in the NTP correspond to locations where evidence could be found in relation to potential violations of sections 6 to 9 of the Act. This information could also help the designated person identify new addresses not yet known to Commission enforcement staff where such evidence may be found.
23. If the designated person determines that CEMs that did not comply with the Act were sent, the information requested in the NTP will assist him in following the money trail and, as a result, aid in determining which person or persons sent those messages or caused or permitted them to be sent, contrary to section 6 of the Act. This information could also help the designated person determine whether any person aided, induced, procured, or caused to be procured the doing of any such prohibited act, contrary to section 9 of the Act. As noted in past NTP review decisions, the Commission considers that financial information can be of assistance to Commission enforcement staff in making such determinations.⁸
24. Whether money associated with activities in contravention of the Act remains with the account holders of interest or flows through them to other third parties may establish whether and to what degree the account holders and additional persons benefitted from – and by association, may be involved with or responsible for – activities in contravention of section 6 or 9 of the Act. The Commission therefore considers that the credit history of the account holders of interest may help determine whether they were involved in activities that contravene section 6 or 9 of the Act. This information may also help identify additional persons who may be involved with or responsible for contravening activities, and establish or clarify links between the account holders of interest and other third parties associated with these activities.
25. In light of the above considerations, the Commission finds that the purposes for issuing the NTP and its requirements are permitted under subsection 17(2) of the Act. The Commission notes, however, that the information requested in item 2, Part 1 of the NTP, as worded, concerns any records pertaining to the process that Hydro-Québec used to validate the identity and/or credit history of the account holders of interest, rather than the contents of the credit history of the account holders.

Is Hydro-Québec prohibited under the Access Act from disclosing the information requested in the NTP?

26. Hydro-Québec argued that much of the information requested in the NTP is privileged confidential personal information protected under the Access Act.

⁸ See the Commission [letter](#) to 3510395 Canada Inc., operating as Compu.Finder, 28 November 2014, and the Commission [letter](#) addressed to Royal Bank of Canada, 4 April 2016.

27. Hydro-Québec submitted that, according to section 53 of the Access Act,⁹ it must refuse to disclose non-public personal information without the consent of the person to whom the information relates, unless one of the exceptions provided in subsections 59(1) to (9) of the Access Act applies.
28. Hydro-Québec submitted that the exceptions set out in subsections 59(1) to (3) do not apply to the circumstances of this case, and that, accordingly, it cannot disclose the confidential personal information requested in the NTP. However, Hydro-Québec did not explain why the other exceptions provided under section 59 do not apply.
29. The designated person submitted in reply that the information requirements in the NTP are compatible with the Access Act because the exception to section 53 provided in subsection 59(8) and section 67 of the Access Act applies to the NTP issued to Hydro-Québec. This exception allows public bodies to disclose personal information to a person or body without the consent of the persons concerned if the information is necessary for the application of an act in Quebec.
30. The Commission finds, for the reasons that follow, that the Access Act does not prohibit Hydro-Québec from disclosing the information requested in the NTP.
31. The Commission considers that the exception provided in subsection 59(8) and section 67 of the Access Act applies to the circumstances of this case. Subsection 59(8) states that a public body may release personal information without the consent of the person concerned to a person, body, or agency, in accordance with sections 61, 66, 67, 67.1, 67.2, 68, and 68.1. Section 67 states that a public body may, without the consent of the person concerned, release personal information to any person or body if the information is necessary for the application of an act in Quebec, whether or not the law explicitly provides for the release of the information.
32. The Commission, established by the *Canadian Radio-television and Telecommunications Commission Act*, constitutes a person or body within the meaning of subsection 59(8) and section 67 of the Access Act. Because Hydro-Québec is a public body and CASL is a federal statute that applies everywhere in Canada, the Commission considers that this exception allows Hydro-Québec to disclose the personal information requested in the NTP without the consent of the persons whose information is being sought.
33. The Commission has indicated in past NTP review decisions that in any proceeding to review an NTP, the person bringing the application must provide sufficient particulars, evidence, or other information to support their arguments and requested relief.¹⁰ The Commission considers that an application brought on the basis that an NTP would disclose privileged information should explain to the Commission why, specifically, the applicant is prohibited from producing the information requested and should assist the Commission in determining what steps, if any, should be taken to remedy the proposed defects. This obligation is clearly

⁹ Subsection 53(1) of the Access Act states that personal information is confidential except when the person to whom the information relates consents to its disclosure.

¹⁰ See, for instance, Commission [letter](#) to Sharon Rapanos, 14 August 2015.

stated in Part 5 of the NTP. Despite this fact, Hydro-Québec did not specify why the exception to section 53 of the Access Act provided in subsection 59(8) and section 67 of that Act does or does not apply to the circumstances of this case.

34. In light of the above, the Commission considers that the Access Act contains an exception that applies to the NTP issued to Hydro-Québec. Therefore, the Commission finds that the Access Act does not prohibit Hydro-Québec from disclosing the information requested in the NTP.

Conclusions

35. As discussed above, the Commission considers that

- the designated person did not require a court order authorizing him to request non-public personal information or confidential information from Hydro-Québec;
- the purposes for issuing the NTP and its requirements are permitted under subsection 17(2) of the Act; and
- the Access Act does not prohibit Hydro-Québec from disclosing the information requested in the NTP.

36. Accordingly, the Commission **denies** Hydro-Québec's application for review of the NTP and confirms the production requirements set out in the NTP that was issued to Hydro-Québec on 2 October 2019.

37. Hydro-Québec must provide the documents specified in the NTP to Bryon Braymore in the same form and manner set out in the NTP. Mr. Braymore must receive the documents no later than 15 days following the date on which this decision is served, by 4:00 p.m., Eastern Daylight Time.¹¹

38. The Commission hereby notifies Hydro-Québec of its right to appeal this decision by bringing an appeal in the Federal Court of Appeal within 30 days of the date of this decision. An appeal on a question of fact may be brought only with the leave of the Federal Court of Appeal. An application for leave to appeal must be made to the Federal Court of Appeal within 30 days of the date of this decision (see section 27 of the Act).

Secretary General

Related documents

- *3510395 Canada Inc., operating as Compu.Finder – Violations of Canada's Anti-Spam Legislation*, Compliance and Enforcement Decision CRTC 2017-368, 19 October 2017
- *3510395 Canada Inc., operating as Compu.Finder – Constitutional challenge to Canada's Anti-Spam Legislation*, Compliance and Enforcement Decision CRTC 2017-367, 19 October 2017

¹¹ This constitutes the date and time limit of effective receipt by the recipient, proven by any means that demonstrates the receipt time with certainty (the burden of proof is on the sender).