



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F15-07

BRITISH COLUMBIA UTILITIES COMMISSION

Michael McEvoy
Deputy Commissioner

February 19 2015

CanLII Cite: 2015 BCIPC 7
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Summary: In the course of investigating consumers' complaints about Active Energy, BCUC commissioned an investigative report from Consumer Protection BC. During the process, BCUC decided the report should be held in confidence and later, having heard submissions, decided to expunge it from the record. BCUC's enforcement action later resulted in a settlement agreement with Active Energy. The applicant requested access to the report and BCUC decided to disclose it. For reasons given in Order F15-06, Active Energy's appeal is allowed, as s. 61(2)(c) of the *Administrative Tribunals Act* excludes the record from FIPPA's application.

Statutes Considered: *Administrative Tribunals Act*, s. 61(2)(c).

Authorities Considered: B.C.: Order F15-06, 2015 BCIPC 6 (CanLII); Order F07-07, 2007 CanLII 10862 (BC IPC).

INTRODUCTION

[1] This Order is issued concurrently with Order F15-06 which deals with another request for access to the same record as is in dispute in this case.

[2] As noted in Order F15-06 in connection with disputes between Active Energy Corp ("Active Energy") and other third parties, the regulator, the British Columbia Utilities Commission ("BCUC") directed Consumer Protection BC to

investigate the allegations and report to BCUC. Consumer Protection BC delivered its report to BCUC on June 18, 2012 (“report”).

[3] The fate of that report in terms of BCUC’s regulatory proceedings is fully set out in Order F15-06 as are the other background details and evidence. I will rely on much of that evidence as is applicable here, but without repeating it except to the extent necessary.

[4] In this case, an access request for the report was made to BCUC by the owner and manager of a business that, I infer, had been one of the third parties who had ostensibly been a customer of Active Energy. The request was made on October 2, 2012. On October 22, 2012, BCUC notified Active Energy of this request, under s. 23 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), seeking input from Active Energy about release of the report.

[5] On February 8, 2013, BCUC notified Active Energy of its intention to disclose the report and, on February 19, 2013, Active Energy requested that the Office of the Information and Privacy Commissioner (“OIPC”) review that decision. Mediation by the OIPC did not resolve the request for review, so an inquiry was held under Part 5 of FIPPA. BCUC did not participate in the inquiry.¹

ISSUES

[6] As with Order F15-06 the Notice of Written Inquiry issued by the OIPC on May 15, 2014 stated that, at the inquiry, the issues to be addressed were whether the report was within the custody or under the control of BCUC within the meaning of s. 3(1) of FIPPA. The notice also included the issue of whether BCUC was required to refuse access under ss. 21 and 22 of FIPPA.²

[7] By way of a revised Investigator’s Fact Report dated August 27, 2014, this Office’s Registrar of Inquiries indicated that Active Energy had notified this Office that it would not make submissions under ss. 21 or 22 of FIPPA, but would argue that s. 61(2)(c) of the *Administrative Tribunals Act* (“ATA”) applies to the report.³ The revised Investigator’s Fact Report stated the issues as follows:

¹ As was the case with the inquiry leading to Order F15-06 BCUC chose not to participate in this inquiry. As noted in Order F15-06 this is unfortunate, as BCUC could have assisted this Office with evidence relevant to its processes and what happened here. Having said this, the record before me is sufficient for the purposes of this inquiry, just as in the inquiry leading to Order F15-06.

² On January 27, 2014, the applicant notified this Office that it did not seek access to personal information where both BCUC and Active Energy agreed that it applied.

³ Although the Notice of Written Inquiry did not mention this provision, on June 19, 2014, counsel for Active Energy notified the applicant that Active Energy intended to argue that this provision applies.

1. Is the information in the record at issue outside of the scope of FIPPA due to s. 61(2)(c) of the ATA?
2. Is the record at issue within the custody or under the control of BCUC for the purposes of ss. 3(1) and 4(1) of FIPPA?
3. If there is information contained in the record at issue within the scope of FIPPA, is BCUC required to refuse access under s. 22 of FIPPA?

[8] As was the case in Order F15-06, because I have determined that s. 61(2)(c) of the ATA applies, neither s. 21 nor s. 22 need be addressed. Nor do I need to consider whether the report is in BCUC's custody or control, again for reasons set out in Order F15-06 since s. 61(2)(c) of the ATA excludes it from FIPPA's operation.

DISCUSSION

[9] BCUC's decision does not explicitly address the ATA issue, which Active Energy raised for the first time in this inquiry. As that is, as noted in Order F15-06, a jurisdictional issue, it falls within Active Energy's right under FIPPA to request a review of BCUC's decision to disclose the report.

Does the ATA oust FIPPA's application?

[10] I do not need to repeat here my reasoning in Order F15-06, as Active Energy's submissions on the s. 61(2)(c) issue are, essentially, word-for-word the same as its submissions in Order F15-06. The applicant's submissions in this case do not alter my thinking on the issue, articulate though the submissions are. Against this backdrop, I apply the reasoning set out in Order F15-06 and for the those reasons find that s. 61(2)(c) of the ATA applies to the report. The report is thus excluded from the right of access to records created under FIPPA. BCUC's decision to give access to the report is therefore overturned, on the basis that FIPPA does not apply.

[11] As in Order F15-06 given my finding about s. 61(2)(c), it is not necessary to make a finding on the custody or control issue. I leave for another day the issue of whether the fact that information is "expunged" from a proceeding, such that it might be said to cease to exist, or have no import in that proceeding, also means that a public body does not have custody or control of the same record for the purposes of FIPPA.⁴

⁴ Or, for that matter, other purposes, including auditing, litigation or archival purposes.

CONCLUSION

[12] For the reasons given above and in Order F15-06 I find that, s. 61(2)(c) of the ATA operates to make FIPPA inapplicable to the report in dispute. As with Order F15-06 and numerous previous orders, no order under s. 58 is necessary.⁵

February 19, 2015

ORIGINAL SIGNED BY

Michael McEvoy, Deputy Commissioner

OIPC File No.: F13-52114

⁵ See, for example, Order F07-07, 2007 CanLII 10862 (BC IPC).