Order F22-57

MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT

Erika Syrotuck
Adjudicator

November 14, 2022

CanLII Cite: 2022 BCIPC 65
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 65

Summary: An applicant requested records relating to the McAbee Fossil beds from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry). The adjudicator found that the Ministry was authorized to refuse to disclose some information on the basis of common law settlement privilege and s. 12(1) (Cabinet confidences). The adjudicator found that s. 22(1) did not apply to the information considered under that exception.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* RSBC 1996, c 165 Schedule 1, ss. 12(1), (2) and 22(1); *Mineral Tenure Act* RSBC 1996 c 292, s. 17.1*, Mineral Rights Compensation Regulation* BC Reg 19/99.

INTRODUCTION

[1] The applicant requested records relating to the McAbee Fossil beds from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1]

[2] The Ministry provided 8,936 pages in response to the applicant's request. It disclosed much of the information, but withheld some under a number of different exceptions to disclosure in part 2 of FIPPA.

[3] The applicant requested that the OIPC review the Ministry's decision to withhold the information. Mediation did not settle the issues and the matter proceeded to inquiry.

[1] The applicant initially made two requests and the Ministry joined them into one request before responding. This is a summary of the joined request.

[4] At the inquiry, the Ministry requested permission to add settlement privilege as an issue in the inquiry. Although the applicant objected, the OIPC approved the Ministry's request.

[5] The Ministry did not provide the records at issue under settlement privilege for my review. At the inquiry, I considered whether I should decide settlement privilege without reviewing the relevant records.

[6] On July 14, 2022, I issued Order F22-34. Among other things, I ordered the Ministry to produce the records it withheld under settlement privilege under s. 44(1)(b) of FIPPA for the purpose of deciding whether settlement privilege applies to them. Since the Ministry applied ss. 12(1) and 22 to some of the same information to which it applied settlement privilege, I was unable to decide whether those exceptions applied in the absence of those records. The Ministry complied with the s. 44(1)(b) order, so I can now dispose of all of the remaining issues.

ISSUES

[7] The issues I must decide in this order are:

1. Is the Ministry authorized to withhold the information in dispute under settlement privilege?

2. Is the Ministry required to withhold the information in dispute under s. 12(1) and 22(1) of FIPPA?

[8] While it is not set out in FIPPA, past orders have established that the Ministry bears the burden of proving its claim of settlement privilege.[2] In addition, under s. 57(1) of FIPPA, the burden of proof is on the Ministry to show that the applicant has no right of access to the records in dispute under s. 12(1).

[9] Under s. 57(2) of FIPPA, the applicant has the burden to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

DISCUSSION

Background

[10] The applicant's request is for records relating to the McAbee Fossil Beds Heritage Site (McAbee), located near the village of Cache Creek, British Columbia.

[2] Order F21-11, 2021 BCIPC 15 (CanLII) at para 5.

[11] On July 18, 2012, the provincial government designated McAbee as a provincial heritage property under s. 23 of the *Heritage Conservation Act.* [3]

Information at issue

[12] The information at issue comprises portions of records such as emails, handwritten notes, and various documents.

Settlement Privilege

[13] Settlement privilege is a common law privilege that protects communications made for the purpose of settling a dispute.

[14] Part 2 of FIPPA makes no mention of settlement privilege. However, the BC Supreme Court found that since FIPPA contains no clear legislative intent to abrogate it, parties are entitled to rely on settlement privilege to refuse to disclose information responsive to an access request under FIPPA.[4]

[15] Settlement privilege is a class privilege and applies to communications that meet the following three criteria:

1. A litigious dispute must be in existence or within contemplation;

2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

3. The purpose of the communication must be to attempt to effect a settlement.[5]

[16] I turn now to whether the Ministry has demonstrated that those requirements are met.

Is there a litigious dispute?

[17] The first requirement is that there is a litigious dispute, either in existence or within contemplation. A litigious dispute for the purpose of settlement privilege includes a matter to be resolved by arbitration or "any adjudicative body or third-party decision maker."[6]

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[3] By Order in Council, a copy of which is attached as Exhibit A to affidavit #1 of the Stewardship Officer.
[4] *Richmond (City) v Campbell* 2017 BCSC 331 at paras 71-73.
[5] *Nguyen v Dang* 2017 BCSC 1409 at para 22; Order F21-11, 2021 BCIPC 15 (CanLII) at para 11; Order F18-06, 2018 BCIPC 8 (CanLII) at para 60.
[6] Order F20-21, 2020 BCIPC 25 (CanLII) at para 64 citing *Nova Scotia Teachers Union v. Nova Scotia (Attorney General),* 2019 NSSC 175 at paras 40 and 46, aff'd 2020 NSCA 17.

[18] However, a "dispute" for the purpose of settlement privilege does not include negotiations related to establishing a commercial contract.[7] This is because, until a contract exists, there are no legal obligations between the parties that could be the subject of a litigious dispute.[8]

Parties positions' on whether there is a litigious dispute

[19] The Ministry submits that the litigious dispute in this case is about mineral and mining claims relating to McAbee.

[20] The Ministry explains that, before McAbee was designated as a heritage property, there were several mineral and mining claims that overlapped with the area that the Ministry planned to protect.[9] It says that these claims and mining activities were putting McAbee and its resources at risk. The Ministry says that it worked, at the direction of Cabinet, to settle these claims.[10]

[21] The Ministry says that, before McAbee was officially designated a heritage site, five mineral claim holders entered into "Mineral Title Discharge and Compensation Agreements" (Agreements) to negotiate the settlement of their claims.[11] It says that some of the claims proceeded to arbitration under s. 17.1(2) of the *Mineral Tenure Act* (Act)[12] but all of the claims were settled between 2012 and 2014.[13]

[22] The Ministry says that another claim holder, who had the right to mine fossils, chose not to enter into an Agreement to settle their claim.[14] Rather, the fossil claim holder waited for the site to be legally designated as a heritage site which triggered the expropriation and compensation process under the *Mining Rights Compensation Regulation* (Regulation).[15] The Ministry explains that the process under the Regulation sets out compensation for mineral titles at fair market value using a prescribed process and evaluation methodologies that are standard in the mining industry.[16]

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[7] Order F20-21, 2021 BCIPC 25 (CanLII) at para 65 citing *Maillet v. Thomas Corner Mini Mart & Deli Inc*., 2017 BCSC 214 at paras 1-17; *Jeffrie v. Hendriksen,* 2012 NSSC 335 at paras 25-40.
[8] Order F20-21, 2021 BCIPC 25 (CanLII) at para 65.
[9] Ministry's initial submissions, paras 144 and 145.
[10] Affidavit #1 of the Stewardship Officer at para 37.
[11] Ministry's initial submissions, para 146.
[12] Affidavit #4 of the Stewardship Officer at para 10.
[13] Ministry's initial submissions, para 146 and affidavit #1 of the Stewardship Officer at para 42.
[14] Ministry's initial submissions, para 149.
[15] BC Reg 19/1999. The *Mining Rights Compensation Regulation* sets out a process for compensation for expropriation of a mineral title under s. 11 of the *Park Act*. Section 11(2) of the *Park Act* gives the Minister power to expropriate claims under the *Mineral Tenure Act*. Section 2(a) of the *Application Regulation* (BC Reg 373/1994) under the *Heritage Conservation Act* says that s. 11 of the *Park Act* applies to McAbee.
[16] Ministry's initial submissions, para 149.

[23] The applicant did not make submissions on whether there was a litigious dispute, any other parts of the test for settlement privilege or any other exceptions to disclosure.

Order F22-13 and further submissions

[24] Order F22-13[17] also concerned whether there was a dispute or negotiation for the purpose of settlement privilege in the context of a public body's statutory right to expropriate.

[25] In that case, the public body, the Ministry of Transportation and Infrastructure purchased privately owned land for a highway improvement project.

[26] The adjudicator found that, even though the public body had the legal right to expropriate the land under the *Expropriation Act,* there was no dispute for the purpose of settlement privilege. Rather, the adjudicator found that the public body and the land owner had successfully entered into a commercial contract for the sale of the property. In making this finding, the adjudicator looked at the specific factual circumstances surrounding the purchase. For example, the public body had indicated that it would only use its legal right to expropriate land in rare circumstances. Rather, when a landowner resisted selling property, the public body's practice was to investigate other options, such as a redesign that did not require use of that specific property. Therefore, the adjudicator found that court proceedings related to expropriation of the property were not "within contemplation" because they were only a possibility.

[27] That order was published after the parties made their submissions in this inquiry. I wrote to the parties to give them an opportunity to make submissions on Order F22-13. Only the Ministry provided a further submission.

[28] In its further submissions, the Ministry says that the circumstances of the negotiations with the mineral claim holders are not comparable to a commercial negotiation.[18] Specifically, it says that, unlike in Order F22-13, there was no possibility of a compromise or concession. The Ministry asserts that ultimate result was going to be that the claim holders would be divested of their mineral claims. It says that this is evidenced by the fact that some claims proceeded to arbitration.

[29] The Ministry says at the time the fossil claim was settled, the Ministry and this claim holder were actively involved in the expropriation process under the Regulation.[19]

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[17] Order F22-13, 2022 BCIPC 15 (CanLII).
[18] The arguments in this paragraph are from the Ministry's August 18, 2022 submissions.
[19] Ministry's August 18, 2022 submissions.

Analysis and finding

[30] For the reasons that follow, I am satisfied that resolving the mineral and mining claims as described by the Ministry is a litigious dispute for the purpose of settlement privilege.

[31] Unlike in Order F22-13, I do not see the parties' efforts to resolve the mineral and fossil claims as negotiations relating to a commercial contract. In a commercial contract, the parties have no legal obligations to each other in the event that they are unable to reach an agreement. In this case, I accept that, if the parties were not able to resolve the mineral and mining claims, the Ministry not only had the legal right to expropriate the rights of the claim holders[20] but was actively engaged in the statutory expropriation process with some claim holders. In other words, I am satisfied that, if the parties had been unable to settle, the claims would have been decided through the arbitration process set out in the Act and Regulation. Therefore, unlike in Order F22-13, I am satisfied that a litigious dispute relating to expropriation of all the claims was within contemplation.

[32] For this reason, I am satisfied that a litigious dispute was within contemplation and therefore that the first part of the test is met.

Communications confidential

[33] The second part of the test is whether the communications were made with the express or implied intention that they were confidential and would not be disclosed to the court in the event that settlement negotiations failed.

[34] The Ministry says that negotiations between the Ministry and the claim holders were confidential in nature. With regards to the claims settled as a result of the Agreements, the Ministry provided evidence that the Agreements included a confidentiality clause.[21]

[35] With regards to the fossil claim holder who waited for the province to establish a Provincial heritage site, the Ministry says that all negotiations with respect to the claim were treated by the parties with the same level of understanding regarding confidentiality obligations.[22]

[36] The Ministry says that it continues to treat the information in dispute in a confidential matter.[23]

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[20] Under s. 17.1 the *Mineral Tenure Act* and the accompanying process set out in the *Mineral Rights Compensation Regulation.*

[21] I note that the Ministry provided the exact wording of the confidentiality clause. See affidavit #1 of the Stewardship Officer at para 44.

[22] Affidavit of the Stewardship Officer at para 45.

[23] Ministry's initial submissions, para. 157, Affidavit #1 of the Stewardship Officer at para. 48.

[37] In my view, the Ministry's evidence demonstrates that communications related to negotiations with the claim holders who signed the Agreements were made with the express intent that they were confidential and would not be disclosed to any party, including the arbitrator, in the event that settlement negotiations failed. Further, I am satisfied that communications between Ministry and the claim holder who was not subject to an Agreement were made with the implied intention that the communications were confidential. As a result, I find that the second part of the test is met.

Communications for the purpose of effecting a settlement

[38] The final part of the test is whether the purpose of the communication was to effect a settlement.

[39] Settlement privilege applies not just to settlement offers: it also applies to communications that are reasonably connected to the parties' negotiations.[24]

[40] The specific information the Ministry withheld under settlement privilege is the following:

- The amount paid to settle one of the claims;[25]
- An "opinion of value" provided by the lawyer for the fossil claim holder;[26]
- A Ministry employee's handwritten notes about settlement negotiations;[27]
- Information that reflects the Ministry's understanding of claim holders' interests, expectations and concerns;[28]
- Information in two emails about funding to settle the fossil claim;[29]
- Part of a Ministry decision note giving an update on the status of settlement negotiations for the mineral claims;[30] and
- Part of a Ministry budget document about negotiation, valuation and arbitration of two of the claims. [31]

[41] The Ministry submits that the above information, if disclosed, would reveal or allow an accurate inference to be made about confidential information relating to settlement negotiations between the Ministry and claim holders.[32]

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[24] *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.* 2013 ABCA 10 [*Bellatrix*] at para 26.
[25] Page 453, part 2. See also affidavit #1 of the Stewardship Officer at para 46.
[26] Affidavit #1 of the Stewardship Officer at para. 46. Information in dispute at pages 605-703, part 1.
[27] Page 32, part 3 of the records in dispute.
[28] Pages 161-162, part 1 and 634-635 part 6 of the records in dispute.
[29] Pages 536 -537, part 4 of the records in dispute.
[30] Affidavit of the Stewardship Officer, para 46. Record at page 1183, Part 3.
[31] Page 414, part 4 of the records in dispute.
[32] Ministry's initial submissions, para 156.

[42] Settlement privilege typically applies to communications exchanged between the parties as they try to reach a settlement.[33] As far as I can tell, the only record that was actually exchanged between the parties was the "opinion of value". I am satisfied that this document is reasonably connected to the parties' negotiations. In Order F20-21, the adjudicator similarly found that a report meant to help the parties determine the fair market value of the asset at issue was reasonably connected to the negotiations.[34]

[43] In addition, although some of the records were not exchanged between the parties, I find they would reveal confidential communications exchanged for the purpose of effecting a settlement.

[44] For example, the amount paid to a claim holder appears in several emails internal to the Ministry. The Supreme Court of Canada has made it clear that the negotiated amount is protected by settlement privilege.[35] Therefore, I find that disclosure of this information would reveal information protected by settlement privilege.

[45] In addition, the content of the notes indicates that the notes reflect communications between the Ministry and one of the claim holders about the settlement negotiations. I find that disclosure of the notes would reveal confidential communications between the parties undertaken for the purpose of effecting a settlement.

[46] The Ministry also withheld information that would reveal its positions or the claim holders' positions during the settlement negotiations. For example, the Ministry recorded the interests, expectations and concerns of claim holders in an internal document. The Ministry says that it used this information in its negotiations.[36] I am satisfied that this information would reveal matters discussed during negotiations and/or the parties' negotiating positions. In addition, I find that disclosure of the descriptions of the amounts budgeted in the budget document and the information in the decision note would reveal information about the claim holders' positions.

[47] I find that this information falls within the scope of settlement privilege. Recently, the Federal Court found that evidence relating to the parties' positions was covered by settlement privilege.[37] In making this finding, the Federal Court referenced the broad scope of the privilege, specifically that the scope is "usually described as encompassing negotiations as a whole."[38] Consistent with the

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[33] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 at para 31.
[34] Order F20-21, BCIPC 25 at para 72.
[35] *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 [*Sable*] at para 18.
[36] Affidavit #1 of the Stewardship Officer, para 46.
[37] *Treaty Land Entitlement Committee Inc. v. Canada (Indigenous and Northern Affairs),* 2021 FC 329 at paras 43-44.
[38] *Ibid* at para 44 citing *Sable supra* note 35 at paras 13-14.

Federal Court's reasons, I am satisfied that settlement privilege applies to the information that I have found would reveal the parties' positions during the negotiations.

[48] However, I am not satisfied that the remaining information would reveal communications made for the purpose of effecting a settlement.

[49] Specifically, I am not satisfied that the dollar amounts in the budget document would reveal information subject to settlement privilege. The budget document is attached to an email, which indicates that the dollar amounts include the Ministry's internal budget to spend on valuation and arbitration of some of the claims. To be clear, nothing indicates to me that these amounts in any way reflect the amounts of any of the settlements.

[50] In addition, the Ministry withheld some information in emails that it describes as information about possible funding to settle a claim. Other than the settlement amount, which I have already found above at paragraph 44 is protected by settlement privilege, I am not satisfied that disclosing this information would reveal confidential communications made for the purpose of effecting a settlement.

[51] Although settlement privilege has a broad scope,[39] I am not persuaded that information about the Ministry's internal finances is the type of information that warrants protection by settlement privilege. This information does not reveal anything about the back and forth between the parties as they tried to settle the mineral and mining claims. As such, I am not persuaded that protecting this information would further the purpose of the privilege, which is to encourage parties to settle disputes without the time and expense of litigation.

[52] In addition, settlement privilege is jointly held by both parties. However, I am aware of recent case law in BC indicating that settlement privilege "may apply" to one party's undisclosed communications relating to the settlement negotiations.[40] However, I am not persuaded that information about internal funding or amounts budgeted to spend on activities relating to settlement (but not the amounts of the settlement itself) are the type of internal communications to which settlement privilege may apply. In my opinion, they are too far removed from the settlement negotiations themselves.[41]

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[39] *Bellatrix supra* note 24 at para 26.
[40] *Cowichan Tribes v Canada (Attorney General),* 2020 BCSC 1507 at para 78 citing *Thomas v. Rio Tinto Alcan Inc.,* 2019 BCSC 421 at para 80 and *Concord Pacific Acquisitions Inc. v. Oei*, 2016 BCSC 2028 at para 52.
[41] I also note that at the time it made its further submissions on Order F22-13, the Ministry said that it thought the claim holders should be invited to this inquiry. I considered what the Ministry had to say. Given my findings that most of the information is subject to settlement privilege, I did not find it necessary to do so. Regarding the remaining information, it seems to me that the claim

[53] Overall, I am not satisfied that this information is reasonably connected to the parties' negotiations.

Conclusion on settlement privilege

[54] I find that settlement privilege applies to all of the information in dispute except for the information in two emails about possible funding and the dollar amounts in the budget document.

[55] The Ministry also applied s. 12(1) to the information about possible funding in the emails and s. 22(1) to the information it withheld in the budget document. I turn to whether these exceptions apply to the information at issue.

Section 12(1) – cabinet confidences

[56] Section 12(1) of FIPPA requires a public body to refuse to disclose information that would reveal the substance of deliberations of the Executive Council (also known as Cabinet) or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees. However, s. 12(1) does not apply in the circumstances set out in s. 12(2).

[57] The purpose of s. 12(1) is to widely protect the confidence of Cabinet communications.[42] Explaining the rationale for protecting cabinet confidences, the Supreme Court of Canada has said that "[t]hose charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny".[43]

[58] The Ministry applied s. 12(1) to information in two emails. It says this information contains "details regarding possible funding" to settle a claim and "Cabinet involvement in this process."[44]

Section 12(1) – substance of deliberations

[59] I must first determine whether the withheld information would reveal the "substance of deliberations" of Cabinet or its committees.

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holders would not be in any position to meaningfully comment on the Ministry's internal finances so I did not invite them.

[42] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para 41.

[43] *Babcock v Canada (Attorney General),* 2002 SCC 57 at para 18.

[44] Affidavit #1 of the Stewardship Officer at para 46.

[60] In the context of s. 12(1) the phrase "substance of deliberations" refers to the body of information that the Cabinet or any of its committees considered (or would consider in the case of submissions not yet presented) in making a decision.[45] The BC Court of Appeal articulated the test for s. 12(1) as asking the question: "Does the information sought to be disclosed form the basis for Cabinet deliberations?"[46] In addition, s. 12(1) applies to information which would permit an accurate inference to be drawn about the "substance of deliberations."[47]

[61] I am satisfied that the portions of the emails in dispute would reveal the "substance of deliberations" of Cabinet or its committees within the meaning of s. 12(1) about funding to settle a claim. I make this finding based on information that the Ministry has provided, with the OIPC's prior approval, *in camera* (that is, only to the Commissioner),[48] so I cannot provide any further details.

Section 12(2)

[62] The next step is to determine whether any of the circumstances set out in s. 12(2) apply. Section 12(2) states that subsection (1) does not apply to:

> (a) information in a record that has been in existence for 15 or more years,
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> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
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> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
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> > (i) the decision has been made public,
> >
> > (ii) the decision has been implemented, or
> >
> > (iii) 5 or more years have passed since the decision was made or considered

[63] As I explained in Order F22-34, "background explanations" in s. 12(2)(c) includes everything factual that Cabinet used to make a decision, and "analysis" includes discussion about the background explanations but not analysis of policy

[45] *Aquasource, supra* note 42 at para 39.
[46] *Ibid* at para 49.
[47] Order F14-51, 2014 BCIPC 55 (CanLII) at para 16.
[48] Ministry's initial submissions at para 73; Affidavit #1 of the Stewardship Officer at para 14.

options presented to Cabinet.[49] Section 12(2)(c) does not apply to background explanations or analysis interwoven with the substance of deliberations.[50]

[64] I am not satisfied that any of the information in the two emails at issue falls into any of the circumstances set out in ss. 12(2)(a), (b) or (c). Specifically, I do not think the information at issue is properly considered background explanations or analysis.

[65] In conclusion, I find that s. 12(1) applies to the information in the two emails about possible funding.

Section 22(1)

[66] The Ministry applied s. 22(1) to the information it withheld in the budget document. The Ministry applied s. 22(1) to all of the information it withheld in the budget document; however, I will only consider s. 22(1) in relation to the dollar amounts because I found that the remaining information was protected by settlement privilege.

[67] Section 22(1) requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[68] Since s. 22(1) only applies to "personal information", the first question that must be answered is whether the information at issue is "personal information" within the meaning of FIPPA. Schedule 1 of FIPPA says that "personal information" "means recorded information about an identifiable individual other than contact information." I am not satisfied that the dollar amounts are personal information because I do not see how they reveal any information about an identifiable individual.

[69] Therefore, I conclude that s. 22(1) does not apply to the dollar amounts in the budget document.

CONCLUSION

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

1. Subject to item 3 below, the Ministry is authorized, in part, to refuse access to the information in dispute on the basis of common law settlement privilege.

[49] Order No. 48-1995, BCIPD No. 21 at para 13. This approach was confirmed by the BC Court of Appeal in *Aquasource supra* note 42.
[50] *Aquasource supra* note 42 at para 50.

2. The Ministry is required to refuse access to the information in dispute under s. 12(1).

3. As the Ministry is not required to refuse access to the information considered under s. 22(1), I require the Ministry to give the applicant access to the information highlighted in a copy of the records provided to the Ministry along with this order.

4. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 3 above.

[71] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with the orders by December 27, 2022.

November 14, 2022

ORIGINAL SIGNED BY

Erika Syrotuck

OIPC File Nos.: F19-79973 & F19-81027