Order F23-94

BRITISH COLUMBIA UTILITIES COMMISSION

Jay Fedorak
Adjudicator

November 3, 2023

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Summary: The City of Richmond requested from the British Columbia Utilities Commission (BCUC) records relating to the appointment of two individuals as Commissioners of BCUC. BCUC disclosed some records but withheld the remainder under s. 22(1) (unreasonable invasion of privacy). The City of Richmond raised the application of s. 25(1) (public interest disclosure). The adjudicator found that s. 25(1) did not apply. He also found that s. 22(1) applied to most but not all of the information in dispute. The adjudicator ordered BCUC to disclose some of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 22(1), 22(2)(a), 22(2)(f), 22(3)(d), 22(3)(g), 22(4)(e), 25(1)(b).

INTRODUCTION

[1] The City of Richmond (applicant) requested records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) from the British Columbia Utilities Commission (BCUC). The records related to the appointments of two individuals (the third parties) as Commissioners of BCUC. BCUC disclosed some records but withheld the remainder under s. 22(1) (unreasonable invasion of privacy) on the grounds that disclosure would constitute an unreasonable invasion of the third parties' personal privacy.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the decision of BCUC to deny access to the information. The applicant also raised the application of s. 25(1) (public interest disclosure) on the grounds that disclosure was in the public interest. Mediation failed to resolve the matter and the applicant requested that it proceed to an inquiry.

ISSUE

[3] The issues in this inquiry are:

1. 1. Does s. 25(1) require BCUC to disclose the information in dispute without delay?

2. 3. Does s. 22(1) require BCUC to refuse to disclose the information in dispute?

[4] Under s. 57(2) of FIPPA, the applicant has the burden of proving that disclosure of any personal information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1) of FIPPA, while BCUC has the burden of proving that the information at issue is personal information. There is no statutory burden of proof with respect to the application of s. 25(1). Previous orders have indicated that it is in the interests of both parties to provide the adjudicator with whatever evidence and argument they have regarding s. 25(1).[1]

DISCUSSION

[5] **Background –** The applicant, along with other municipalities, disagreed with a decision of BCUC regarding an interpretation of a term in the *Utilities Act* (UA). The dispute concerned whether subsidiary companies, when they are wholly owned by a municipality, should be treated under the UA as if they were the municipality regarding the provision of energy services. The applicant alleged the BCUC commissioner who led the inquiry examining that issue was biased in favour of FortisBC, a large utility company that participated in the process, and the applicant requested that he disqualify himself. He refused. The applicant was concerned because the commissioner and another BCUC commissioner had previously been employed by FortisBC.

[6] **Records at issue –** The records include resumes, employment applications, evaluations, recommendations, writing samples, assessments, requests for appointment and other information the BCUC compiled or created as part of the appointment of the two third parties. The records comprise 143 pages and BCUC withheld them in their entirety.

Public interest disclosure – section 25

[7] Section 25 requires a public body to disclose information in certain circumstances without delay despite any other provision of FIPPA. This section

[1] For example, see: Order 02-38, 2002 BCIPC 38 (CanLII) and Order F07-23, 2007 BCIPC 38 (CanLII).

overrides all FIPPA's discretionary and mandatory exceptions to disclosure. The applicant submits that s. 25(1)(b) applies, so the parts of s. 25 that are relevant in this case state:

> **25**(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> …
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies despite any other provision of this Act.

[8] Because s. 25 overrides all other provisions in FIPPA, previous orders have found that it applies in only the clearest and most serious situations. Section 25 sets a high threshold, intended to apply only in significant circumstances.

[9] **Section 25(1)(b) (clearly in the public interest) –** The application of s. 25(1)(b) requires that the disclosure of the information at issue be clearly in the public interest. Former Commissioner Denham outlined the proper approach to applying s. 25(1)(b) in Investigation Report F16-02 as follows:

> Analyzing the application of s. 25(1)(b) in a specific situation begins by considering whether the information at issue concerns a subject, circumstance, matter or event justifying mandatory disclosure. The list of these things cannot be exhaustively enumerated. However, the following factors should be considered in determining whether they meet the test for further consideration under s. 25(1)(b):
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> - is the matter the subject of widespread debate in the media, the Legislature, or by other Officers of the Legislature or oversight bodies; or
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> - does the matter relate to a systemic problem rather than to an isolated situation?
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> In addition, would its disclosure:
>
> - contribute to educating the public about the matter;
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> - contribute in a substantive way to the body of information that is already available about the matter;
>
> - enable or facilitate the expression of public opinion or enable the public to make informed political decisions; or

> - contribute in a meaningful way to holding a public body accountable for its actions or decisions?
>
> This is not to say that in order for information to be disclosed under s. 25(1)(b) it must be the subject of public debate; there may well be situations where there is a clear public interest in disclosure of information about a topic that is not currently the object of public concern or is not known to the public.
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> Once it is determined that the information is about a matter that may engage s. 25(1)(b), a public body should consider the nature of the information itself to determine whether it meets the threshold for disclosure. However, this threshold is not static. In any given set of circumstances there may be competing public interests, weighing for and against disclosure, and the threshold will vary according to those interests.[2]

[10] Previous orders have determined that the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e., unmistakably) in the public interest."[3]

[11] For disclosure of information to be in the "public interest" means more than just that the public would find the information interesting. The term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity.[4]

[12] Furthermore, the public's interest in scrutinizing the work of public bodies, while important, does not in and of itself trigger the application of s. 25. As former Commissioner Loukidelis stated, s. 25(1)(b) "is not an investigative tool for those who seek to look into the affairs of a public body. It is an imperative requirement for disclosure which is triggered by specific information the disclosure of which is clearly in the public interest."[5]

[13] The first step in my analysis is to determine whether the matter may engage s. 25(1)(b). If I find that it does, I will then proceed to examine the nature of the information itself to determine whether it meets the threshold for disclosure.

[14] The applicant's case for the application of s. 25(1)(b) is that disclosure is necessary to determine whether the third parties misrepresented their previous

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[2] Investigation Report IR16-02 2016 BCIPC 36 (CanLII), pp. 26-27.
[3] Order 02-38, at paras. 45-46, citing Order No. 165-1997, 1997 BCIPC 22 (CanLII), p. 3. See also Order F18-26, 2018 BCIPC 29 (CanLII), para. 14.
[4] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC), para. 33.
[5] Order 00-16, 2000 BCIPC 7714 (CanLII), p. 14.

employment history prior to joining the BCUC.[6] The applicant submits that there was a reasonable apprehension of bias and conflict of interest on the part of the third parties when they participated in the inquiry regarding the *Utilities Act.* The applicant requested that the third party chairing the inquiry disqualify himself, but he refused. The third party relied on his employment history in denying this request. The applicant seeks the records at issue to determine whether they contradict the assertions that the third party made in his decision not to disqualify himself.[7]

[15] The applicant concludes that "the requested records relate to matters that are clearly in the public interest, as they will contribute in a meaningful way to holding the public body accountable for its decisions and actions".[8]

[16] BCUC submits that the applicant has failed to establish that disclosure of the records is in the public interest and that the applicant's case is based solely on unsubstantiated allegations that the third parties were biased. Moreover, BCUC argues that it does not dispute that the third parties were previously employed by FortisBC. BCUC also asserts that it is not unusual or irregular for employees of regulators to have experience working in the industry that they regulate.[9]

[17] BCUC submits that the threshold for applying s. 25(1)(b) is high. It cites Investigation Report F16-02 and the test for the application of s. 25(1)(b), which is that a reasonable observer would conclude that disclosure is plainly and obviously in the public interest. BCUC asserts that the applicant has failed to establish that there is a clear public concern about bias or lack of independence BCUC's exercise of its administrative functions. Moreover, it submits that the information in the records would not advance the debate on those issues.[10]

Analysis

[18] The applicant's submission does not plainly identify the matter it claims to be clearly in the public interest. It refers generally to holding BCUC accountable for its decisions and actions. BCUC interprets the applicant's position as concern about bias or lack of independence in the exercise of its administrative functions.

[19] In describing the issues of apprehension of bias and conflict of interest, the applicant does not specify whether the decision at issue was BCUC's decision to appoint the third parties or the decision of one of the third parties not to disqualify himself from the hearing. It has not explained why understanding the

[6] Applicant's response submission, para. 20.
[7] Applicant's response submission, paras. 12-18
[8] Applicant's response submission, para. 21.
[9] BCUC's reply submission, paras. 4-5.
[10] BCUC's initial submission, paras. 6-11.

roles of the third parties in their previous employment with Fortis BC is clearly in the public interest. It has not identified the significance of the interests of Fortis BC in the inquiry in question. This is not evident from the records or the submissions.

[20] As noted above at paragraph 12, the public's interest merely in scrutinizing the activities of public bodies alone, in and of itself, is insufficient grounds to conclude that disclosure of the records at issue would be clearly in the public interest. The applicant's submissions do not appear to go beyond this general interest in public scrutiny.

[21] There is no evidence before me that the information in dispute concerns an issue of recent public debate. The matter at issue in the BCUC inquiry was of a technical nature in the application of administrative law. It is not evident from the submissions or the face of the records why the public interest would be engaged. Nor is there evidence of any public concern about bias or conflict of interest among BCUC officials. The only evidence before me is the concerns expressed by the applicant and other municipalities that were unhappy with the decision of one of the third parties at the Inquiry.

[22] Therefore, I find that the applicant has failed to establish that the information at issue relates clearly to a matter of public interest.

[23] Moreover, in my view, the withheld information would not contribute meaningfully to public policy discussions. The records consist of resumes and other information relating to how the third parties met the qualifications for the position of Commissioner. There is nothing on the face of the records that appears to indicate they are biased in favour of a former employer to the point that it would prevent them from administering their duties impartially.

[24] Therefore, I find that s. 25(1)(b) does not apply.

Section 22(1) – unreasonable invasion of third-party privacy

[25] Section 22(1) requires public bodies to withhold the personal information where disclosure of that personal information would be an unreasonable invasion of a third party's personal privacy. The established approach to the application of s. 22(1) of FIPPA is described in Order F15-03, where the adjudicator stated the following:

> This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3)

> applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[11]

[26] I have taken the same approach in considering the application of s. 22(1) here.

Step 1: Is the information "personal information"?

[27] Under FIPPA, "personal information" is recorded information about an identifiable individual, other than contact information. "Contact information" is "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[12]

[28] BCUC submits that all of the information in dispute is the personal information of the third parties and other individuals. BCUC cites a Court of Appeal decision that found information that candidates had submitted in the process of a job competition was personal information, including employment, occupational and educational history. It asserts that the information in dispute was personal information compiled in its appointment processes.[13]

[29] The applicant does not make submissions regarding whether the information at issue is personal information.

[30] I can confirm that the information in dispute includes information about the named third parties that the third parties created or supplied themselves or that other individuals created about them. The information is also not contact information. This information, therefore, constitutes their personal information.

[31] Nevertheless, the information in dispute also includes generic information about the position of commissioner of BCUC. While BCUC submits it retrieved those records from the employment files of the third parties, it is not information about the third parties. It is information about the position. This information is on pages 94-100, 108-14, 131-37. I note that pages 99, 113, 114, 136 and 137 also include the names of individuals who held the position at the time those records were created. With the exception of those names, the information on those pages does not constitute personal information.

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[11] Order F15-03, 2015 BCIPC 3 (CanLII), para. 58.
[12] FIPPA provides definitions of key terms in Schedule 1.
[13] BCUC's initial submission, paras. 20-22; *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company*, 2005 BCCA 604.

[32] Therefore, I find that, with the exception of the generic information about the position of commissioner noted above, the records contain identifiable information about the third parties. I find that none of this information is contact information.

[33] For these reasons, I find that most of the information I am considering under s. 22(1) is personal information.

Step 2: Does s. 22(4) apply?

[34] The relevant provision is s. 22(4)(e) reads as follows:

> **22** (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
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> …
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> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[35] **Section 22(4)(e) (position, functions and remuneration) –** This provision applies to factual information about the actions of employees of public bodies in the normal course of business, but not to qualitative information about how they performed their job duties. In the context of a workplace investigation, it would not apply to information about the actions and statements that are under investigation.

[36] BCUC submits that s. 22(4)(e) does not apply to any of the personal information in the records because it is not about the third parties' positions, functions, or remuneration.

[37] The applicant does not make submissions regarding the application of s. 22(4)(e).

[38] I find that the records include the single fact that the third parties and other individuals held the position of commissioner at certain times. This information is on pages 99, 113, 114, 136 and 137. It is about the position of those individuals as employees of a public body. Section 22(4)(e) applies to this information, so BCUC cannot withhold it under s. 22(1) and I will not consider it any further.

[39] I can confirm that the rest of the personal information about the third parties does not constitute information relating to the position, functions or remuneration of employees of public bodies in accordance with s. 22(4)(e). It is information relating to the assessment and appointment of individuals who applied to become a commissioner, so s. 22(4)(e) does not apply.

Step 3: Does s. 22(3) apply?

[40] BCUC submits that s. 22(3)(d) and (g) apply. Those provisions read as follows:

> **22** (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:
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> …
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> (d) the personal information relates to employment, occupational or educational history,
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> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

[41] **Section 22(3)(d) (employment history) –** BCUC submits that the information about the third parties consists of their employment history. It cites a number of previous orders that have found that applications for appointment and resumes constitute candidates' employment history. These orders include ones that have found that "once an individual has been hired, what is put into their file about their hiring is then covered by section 22(3)(d)".[14] BCUC cites other previous orders that have found interview scores and job competition results and the qualitative assessments of job applications to fall within s. 22(3)(d).[15]

[42] The applicant did not make any submissions concerning the application of s. 22(3)(d).

[43] I can confirm that the personal information at issue relates to the appointments of the third parties and consists of resumes, writing samples, and assessments of their applications. This is information that previous orders have found to constitute educational and employment history in accordance with s. 22(3)(d).

[44] Therefore, I find that s. 22(3)(d) applies to the personal information of the third parties and disclosure is presumed to be an unreasonable invasion of privacy.

[45] **Section 22(3)(g) (personal evaluations) –** BCUC submits that some of the information in dispute relates to performance reviews, job references and

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[14] BCUC's initial submission, para. 31; Order 52-1995, 1995 CanLII 1418.

[15] Order F09-24, 2009 BCIPC 30 (CanLII), para. 9; Order F15-03, 2015 BCIPC 3 (CanLII), para. 66; Order 12-12, 2012 BCIPC 17 (CanLII), para. 31; Order F14-41, 2014 BCIPC 44 (CanLII), para. 45; Order 00-53, 2000 BCIPCD 57 (CanLII); Order 02-56, 2002 BCIPC 58 (CanLII).

notes about a candidate's performance in an interview. It cites previous orders that have found s. 22(3)(g) to apply to this type of information.[16]

[46] The applicant did not make any submissions regarding the application of s. 22(3)(g).

[47] I can confirm that some of the disputed information consists of performance reviews, job references and notes about a candidate's performance in an interview. I find that s. 22(3)(g) applies to this information and disclosure is presumed to be an unreasonable invasion of privacy.

Step 4: Do the relevant circumstances in s. 22(2) rebut the presumption of unreasonable invasion of privacy?

[48] The relevant provisions read as follows:

> **22** (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (f) the personal information has been supplied in confidence,

[49] **Section 22(2)(a)(public scrutiny) –** The applicant asserts that disclosure is desirable for the purpose of subjecting BCUC to public scrutiny. Its arguments with respect to the application of s. 22(2)(a) are similar to those it presented in arguing the application of s. 25(1)(b). It alleges that the third parties have misrepresented their previous work experience. It submits:

> The legitimacy of BCUC as regulator depends upon its independence and a clear separation of BCUC from those it regulates. Filling the ranks of the BCUC at its highest levels with former long serving executives and senior employees of FortisBC, who are then tasked to regulate and investigate FortisBC's past and present activities that have resulted from the implementation of corporate policies and procedures which they played a role in establishing, is the opposite of regulatory independence and separation.

[16] Order 01-07, 2001 BCIPC 7 (CanLII), para. 21; Order 02-56, 2002 BCIPC 58 (CanLII); Order F21-08, 2021 BCIPC 12 (CanLII), para. 138; Order F22-22, 2022 BCIPC 24 (CanLII), para. 36; Order F05-02, 2005 BCIPC 2 (CanLII), para. 57-59; Order 01-53, 2001 BCIPC 56 (CanLII), paras. 42-47.

> In their current quasi-judicial roles, [the third parties] exercise substantial authority, meaning the potential for abuse is extraordinary. Due to the significance of these roles, and the relevance of their work history in a reasonable apprehension of bias or conflict of interest matter, particularly in light of the concerns outlined above, the City submits that disclosure of the records would not be an unreasonable invasion of privacy.[17]

[50] BCUC denies that this provision applies. It submits that the allegations of the applicant against the third parties are unfounded. It argues that it is well known publicly that the third parties had been employed with FortisBC. [18]

[51] The applicant seeks to hold BCUC accountable for its regulatory decisions. The records at issue do not relate to those decisions. The applicant has not put those decisions before me. I have no evidence before me that the third parties, as commissioners, have shown favour to any organization. The applicant makes unsubstantiated allegations of bias and conflict of interest against the third parties based solely on the fact of their previous employment, which is public knowledge. Moreover, information about the third parties' previous employment with Fortis BC forms only a small part of the information at issue. Even with respect to the references in resumes to the third parties' previous employment, it is not clear that disclosure would be desirable for the purposes of holding BCUC accountable.

[52] I find that s. 22(2)(a) does not apply in this case.

[53] **Section 22(2)(f)(supplied in confidence) –** BCUC submits that the third parties supplied their employment and educational history in confidence when they applied for their appointments. It cites a previous order that found that candidates typically supply this information in confidence, owing to the sensitivity of the information.[19]

[54] The applicant makes no submissions as to whether the third parties supplied their personal information in confidence.

[55] I find it reasonable to conclude that the third parties in this case, like other candidates for job competitions, supplied their personal information to the BCUC in confidence for the purpose of pursuing their appointments. There is nothing before me to suggest that the general expectation of confidentiality in such circumstances does not apply in this case.

[56] Therefore, I find that the third parties provided their personal information in confidence and this weighs in favour of withholding the information.

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[17] Applicant's response submission, paras. 27-28.
[18] BCUC's reply submission, paras. 2 and 15.
[19] BCUC's initial submission, para. 40; Order F14-41, 2014 BCIPC 44 (CanLII), para. 61.

[57] **Other considerations –** In addition to the circumstances listed in s. 22(2), I may consider others that the parties have raised. I may also identify additional relevant considerations.

[58] The information in dispute includes two academic articles that one of the third parties wrote and published in legal journals.[20] These articles are available publicly. It is not evident from the submissions or the records themselves why BCUC collected these articles. The third party may have supplied them as part of their application. BCUC may have obtained them through other means. In the absence of further context, I am unable to determine that the disclosure of academic articles that are publicly available would unreasonably invade the privacy of the author.

[59] Therefore, I find the fact that these articles are published and publicly available is a relevant consideration favouring disclosure.

Conclusion on s. 22(1)

[60] Section 22(1) only applies to personal information, and I have found that, with the exception of the generic information about the position of commissioner, the information in dispute is personal information.

[61] I have found that s. 22(4)(e) applies to the personal information indicating that the third parties and other individuals held the position of commissioner at certain times. That information is on pages 99, 113, 114, 136 and 137. BCUC is not authorized to refuse to disclose that information under s. 22(1).

[62] I found that most of the remainder of the personal information falls within either ss. 22(3)(d) or (g). Some of the personal information relates to the employment history of the third parties under s. 22(3)(d) and disclosure of this personal information is presumed to be an unreasonable invasion of privacy. Other personal information constitutes personal references or evaluations of the third parties under s. 22(3)(g) and disclosure is presumed to be an unreasonable invasion of privacy.

[65] I have found that the candidates supplied their employment and educational history in confidence in accordance with s. 22(2)(f). These are relevant circumstances favouring withholding that personal information.

[66] I have found that the two academic articles are published in legal journals, and, in the absence of further context, this is a relevant circumstance favouring disclosure.

[20] Response records, pp. 1-78.

[67] In conclusion, I find that s. 22(1) applies to most of the information in dispute. The only exceptions are the generic information, the passages subject to s. 22(4)(e) and the two academic articles.

CONCLUSION

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

1. Subject to item 2 below, I require BCUC to refuse access, under s. 22(1), to part of the information it withheld under s. 22(1).

2. I require BCUC to disclose to the applicant all of the information on pages 1-78, 94-100, 108-14, 131-37.

3. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 2 above.

[69] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by December 18, 2023.

November 3, 2023

ORIGINALSIGNED BY

Jay Fedorak, Adjudicator

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