Order F24-14

BRITISH COLUMBIA UTILITIES COMMISSION

Carol Pakkala
Adjudicator

February 27, 2024

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Summary: The City of Richmond requested the British Columbia Utilities Commission (BCUC) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to the appointment of panel members for an inquiry. BCUC refused to disclose the records on the basis that s. 61(2)(a) of the *Administrative Tribunals Act* (ATA) applies and says that FIPPA does not apply. The adjudicator finds that FIPPA does not apply because s. 61(2)(a) of the ATA applies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 3(3)(e), 25; *Administrative Tribunals Act*, [SBC 2004] c. 45, ss. 61(1), 61(2)(a*)*

INTRODUCTION

[1] The City of Richmond (Richmond) requested records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) from the British Columbia Utilities Commission (BCUC). The request was for records related to the appointments of the panel members for BCUC's Inquiry into the Regulation of Municipal Energy Utilities (Municipal Inquiry). BCUC withheld the records under s. 3(1)(b) of FIPPA and s. 61 of the *Administrative Tribunals Act* (ATA).

[2] Richmond asked the Office of the Information and Privacy Commissioner (OIPC) to review the decision of BCUC to deny access to the records. Richmond also raised the application of s. 25(1) (public interest disclosure) on the grounds that disclosure was in the public interest. Mediation conducted by the OIPC failed to resolve the matter and the applicant requested that it proceed to an inquiry. Both parties provided submissions in this inquiry.

Preliminary matter

Allegations of bias

[3] Both BCUC and Richmond make substantial submissions on the issue of bias on the part of BCUC Commissioners involved (or alleged by Richmond to be involved) in the Municipal Inquiry. Richmond sought leave to appeal the decision of the chair of the Municipal Inquiry refusing to recuse himself on the grounds of bias.[1] The BC Court of Appeal denied leave to appeal the issue of bias on the ground that there was no reasonable prospect of success. Richmond says the records it seeks to access may support its arguments on the reasonable apprehension of bias and improper involvement of another BCUC commissioner in decisions related to the Municipal Inquiry.[2] The bias issue is outside of my jurisdiction, and I will not consider the parties' submissions on this issue any further.

Section 3(1)(b) of FIPPA renumbered

[4] I am reviewing BCUC's decision to refuse access under s. 3(1)(b) of FIPPA. However, after BCUC made its decision, FIPPA was amended and s. 3(1)(b) was renumbered and is now s. 3(3)(e). There were no other changes to the provision. BCUC's submissions use s. 3(3)(e), so for the sake of consistency and clarity I will do the same.

ISSUES

[5] There are three issues in this inquiry:

1. Are the requested records outside of the scope of FIPPA due to s. 61(2)(a) of the ATA?

2. Are the requested records excluded from the scope of FIPPA due to s. 3(3)(e) of FIPPA?

3. If the records are within the scope of FIPPA, is BCUC required to disclose the records under s. 25(1)(b) of FIPPA?

[1] *North Vancouver (City)* v. *British Columbia (Utilities Commission)*, 2023 BCCA 203 (CanLII).
[2] Richmond's submissions at para. 10.

DISCUSSION

Background[3]

[6] BCUC regulates British Columbia's energy utilities and conducts related inquiries, including the Municipal Inquiry. The issue in the Municipal Inquiry was whether subsidiary companies that are wholly owned by a municipality should be treated as if they are the municipality for the provision of energy services. Richmond, along with other municipalities, participated in the Municipal Inquiry. Richmond provides district energy utility services through its wholly owned local government corporation, Lulu Island Energy Company Ltd.

[7] Richmond challenged BCUC's statutory authority to undertake the Municipal Inquiry in the first place and argued it was an intrusion into the exclusive jurisdiction of municipalities over district energy utility services. Richmond maintained the Municipal Inquiry lacked independence and clear separation of BCUC from the Fortis companies that it regulates. Richmond objected to both the composition of the Municipal Inquiry's panel and its decision on the municipal exclusion. Richmond made multiple separate requests to BCUC for access to records related to the Municipal Inquiry.[4]

Records at issue

[8] The records are four pages of emails and based on my review, I find that they are about the appointment of the panel members for the Municipal Inquiry. BCUC withheld the records in their entirety.

Administrative Tribunals Act, s. 61

[9] The application of s. 61 of the ATA in this inquiry is the threshold issue. If s. 61 applies to the disputed records, then FIPPA does not apply. Section 61 of the ATA provides, in part:

> **61** (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.
>
> (2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:
>
> > (a) a personal note, communication or draft decision of a decision maker; […]

[3] These background details are from the submissions of both parties and are not in dispute.
[4] Richmond's May 12, 2021 request for review letter. One of these requests resulted in Order F23-94, 2023 BCIPC 110 (CanLII).

[10] Sections 44 (1)(b), (2), (2.1) and (3) are about the Commissioner's powers to order production of records to review them for the purposes of conducting investigations, audits or inquiries.

[11] Section 61(2)(a) of the ATA has only been considered in one previous order. In Order F18-02, the adjudicator found that s. 61(2)(a) of the ATA applied to the handwritten notes of a Commissioner for Teacher Regulation as well as their communications with Teacher Regulation Branch investigators.[5]

Parties' submissions, s. 61 of the ATA

[12] BCUC says the intent of the ATA is to codify the common law principles affecting administrative tribunals and provide clarity and consistency to the administration of justice through statutory tribunals.[6] In particular, BCUC says s. 61 of the ATA was intended to codify the common law principle of deliberative privilege, sometimes described as deliberative secrecy or deliberative privacy.[7]

[13] BCUC says the principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This principle, it argues, also extends to the administrative aspects of the decision-making process – at least those matters which directly affect adjudication – such as the assignment of adjudicators to cases.[8] BCUC says the purpose of the principle is to ensure public confidence in an impartial and independent judicial system.[9] It provides peace of mind to the decision-maker and allows them to rule on the issues before them independently and impartially.[10]

[14] BCUC claims deliberative secrecy applies to the records at issue based on both s. 61(2)(a) of the ATA or s. 3(3)(e) of FIPPA and more generally on the common law principle.[11] BCUC says s. 61(2)(a) of the ATA, while similar to s. 3(3)(e) of FIPPA, is broader because it does not require the decision maker's communication to have been made while acting in a judicial or quasi-judicial manner.[12]

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[5] Order F18-02, 2018 BCIPC 02 (CanLII) at para 25. [5] The only other order is Order F13-27, 2013 BCIPC 36 (CanLII) but the s. 61(2)(a) ATA issue was abandoned so the adjudicator made no findings about it.

[6] BCUC's initial submissions at para. 12.

[7] BCUC's initial submissions at para. 13. BCUC uses these terms interchangeably in its submissions. In my analysis below, I apply the common law principle of deliberative secrecy.

[8] BCUC's initial submissions at para. 14 referencing *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37 at para. 15, relying upon *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 per McLachlin J. (as she then was) at 831-33.

[9] BCUC's initial submissions at para. 17 relying upon *Kosko c. Bijimine*, 2006 QCCA 671 at para. 40, citing *Valente v. the Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at 689.

[10] BCUC's initial submissions at para. 17 relying upon *Kosko* at para. 40.

[11] BCUC's initial submissions at para. 4.

[12] BCUC's initial submissions at para. 28.

[15] BCUC says the principles of statutory interpretation tell us that where legislatures enact more than one statute touching on a subject matter, the statutes must be read together in harmony.[13] This principle is called *pari materia* (in a like matter). Applying that principle, BCUC says while both s. 61(2)(a) of the ATA and s. 3(3)(e) of FIPPA codify the common law principle of deliberative secrecy, they cannot have the same meaning. BCUC says s. 61 must encompass something more than a person acting in a judicial or quasi-judicial manner.[14]

[16] BCUC says s. 61(2)(a) of the ATA applies to communications relating to the assignment of a commissioner to a particular panel so such information is precluded from the application of FIPPA.[15]

[17] Richmond says that s. 61 of the ATA must be interpreted in the same way as s. 3(3)(e) of FIPPA. Richmond says these sections only apply when a decision-maker is actively engaged in the deliberative processes protected by the section.[16] Richmond says that if every communication and record between BCUC employees is excluded from FIPPA, then the language of the ATA and of s. 3(3)(e) of FIPPA would mirror ss. 3(3)(a) and (b) of FIPPA. Sections 3(3)(a) and (b) expressly exclude all court records and any records of a judge, master or justice of the peace. Richmond says, based on the contrast between these sections, the Legislature intended for all court records to be excluded from FIPPA, and for tribunal records to be covered by FIPPA, unless specifically excluded.[17]

[18] Richmond says if BCUC's position is accepted by the OIPC, it would render BCUC's obligations under Part 2 of FIPPA completely meaningless. Richmond suggests that the Legislature did not intend for all communications between BCUC employees to be excluded from FIPPA. If that had been the intent, then BCUC would not have been included as a public body subject to FIPPA.[18]

Analysis

[19] For the reasons that follow, I find that the requested records are excluded from the scope of FIPPA under s. 61(2)(a) of the ATA.

[13] BCUC's initial submissions at para. 31.
[14] BCUC's initial submissions at para. 32.
[15] BCUC's initial submissions at para. 33.
[16] Richmond's submissions at para. 27.
[17] Richmond's submissions at para. 30.
[18] Richmond's submissions at para. 30.

[20] Section 61(2)(a) says that FIPPA does not apply to a personal note, communication or draft decision of a decision maker. Section 61(1) of the ATA defines a decision maker as follows:

> **61** (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.

[21] I am satisfied that BCUC is a "tribunal" within the meaning of s. 61(1) of the ATA. This finding is consistent with a previous OIPC order involving BCUC and the application of s. 61 of the ATA which found as follows:

> First, I am satisfied that the BCUC is a "tribunal" because of what the UCA and the ATA say. The ATA is legislation that governs administrative tribunals. The ATA defines the term "tribunal" as "a tribunal to which some or all of the provisions of this Act are made applicable". Section 2.1 of the UCA expressly says that parts of the ATA apply to the BCUC, including many of the provisions regarding hearings…[19]

[22] I adopt this same reasoning and find the BCUC is a tribunal within the meaning of s. 61(1) of the ATA.

[23] I turn now to whether s. 61(2)(a) of the ATA applies to the records in dispute. Previous orders have not interpreted the meaning of s. 61(2)(a) of the ATA which I do next before applying this provision.

[24] The Supreme Court of Canada has affirmed many times that the basic modern rule of statutory interpretation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and its intent.[20]

[25] Further, the statutory interpretation principle of *pari materia* (in a like matter), directs that I read the ATA and FIPPA in harmony. To read them as such, it is helpful to see the provisions side by side:

s. 61(2)(a) of ATA	**s. 3(3)(e) of FIPPA**
a personal note, communication or draft decision of a decision maker	a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity

[19] Order F22-41, 2022 BCIPC 46 (CanLII) at para. 30.
[20] Order F15-06, 2015 BCIPC 6 (CanLII) at para. 16 quoting from R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at p. 67, with the Court most recently approving of this in *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para. 36.

[26] Reading them together, I find they cannot have the same meaning. The ATA became law long after FIPPA so I must assume the Legislature knew that s. 3(3)(e) of FIPPA already existed and would not have seen a need to duplicate it. I conclude the Legislature meant for s. 61(2)(a) of the ATA to work in harmony with s. 3(3)(e) of FIPPA, but to mean something different.

[27] Previous orders have found s. 3(3)(e) of FIPPA only applies when a person is acting in a judicial or quasi-judicial capacity in relation to the record in question.[21] Reading s. 61(2)(a) of the ATA harmoniously with this interpretation of s. 3(3)(e) of FIPPA means that it must extend to more than only those types of records.

[28] For the above reasons, I find s. 61(2)(a) of the ATA is broader in meaning than s. 3(3)(e) of FIPPA. However, I do not interpret s. 61(2)(a) so broadly as to exclude all records of administrative tribunals from the scope of FIPPA. There is no indication that the Legislature's intention was to exclude all records of administrative tribunals from FIPPA. If that was the intention, I think s. 61 of the ATA would contain a more definitive provision excluding all tribunal records.

[29] To determine the broader meaning of s. 61(2)(a) of the ATA, and which records it excludes from FIPPA, I must look to the object of the ATA and the intention of the Legislature. At the second reading of Bill 56, the Attorney General made the following comments about the underlying intent of the proposed ATA:[22]

> "...this legislation codifies the common law and introduces consistent standards and practices for the benefit of all tribunals..."
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> "In the exercise of their powers, administrative tribunals are generally bound by the authority granted to them in their enabling statutes. Accordingly, if a tribunal's legislation is silent or unclear, the courts may or may not imply certain powers so that the tribunal can discharge its mandate effectively. Much of the bill that we are considering today codifies powers that the courts have recognized. Codification means we're expressing in legislation things that the courts have found to be principled or part of the common law. "

[30] I find that the common law principle that s. 61(2)(a) of the ATA is meant to codify is deliberative secrecy. At common law, the principle of deliberative secrecy prevents disclosure of how and why decision-makers make their decisions.[23] Deliberative secrecy also extends to the administrative aspects of

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[21] Order F14-44, 2014 BCIPC 47 (CanLII), Order 00-16, 2000 CanLII 7714 (BC IPC). Note: these orders dealt with s. 3(1)(b) which is now s. 3(3)(e) of FIPPA.
[22] British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 37th Parl, 5th Sess, Vol. 25, No. 15 (18 May 2004) at 11193 (Hon. G. Plant).
[23] *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37 at para. 14.

the decision-making process – at least those matters which directly affect adjudication – such as the assignment of judges to particular court cases.[24] Based on this principle, I find that deliberative secrecy extends to communications about the appointment of administrative decision-makers to particular cases before a tribunal.

[31] I am satisfied, based on my review of the records in dispute and what BCUC says in its submissions and evidence, that each email is a communication of a "decision maker", as that term is defined in s. 61(1) of the ATA. Since the emails have been completely withheld, I cannot say more about the identity of the individuals or what precisely they are saying without revealing the specifics of the information in dispute. I find that the common law principle of deliberative secrecy, codified by s. 61(2)(a) of the ATA, extends to the appointment of the panel members to the Municipal Inquiry. Based on these findings, I conclude s. 61(2)(a) of the ATA applies to the records in dispute and as such, these records are excluded from the application of FIPPA.

[32] For clarity, I do not interpret s. 61(2)(a) of the ATA to exclude all communications of administrative tribunals. I interpret it to exclude those communications to which deliberative secrecy applies.

[33] Given that I have found the records are excluded from the scope of FIPPA, s. 3(3)(e) and s. 25 of FIPPA do not apply.

CONCLUSION

[34] For the reasons given above, I find that FIPPA does not apply because s. 61(2)(a) of the ATA applies. Given that FIPPA does not apply, no order under s. 58 is necessary.

February 27, 2024

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File No.: F21-89117 and F21-89093

[24] *MacKeigan* v. *Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796 per McLachlin J (as she then was) at pp. 831-33.