Order F24-37

MINISTRY OF ENERGY, MINES AND LOW CARBON INNOVATION

Erika Syrotuck
Adjudicator

May 7, 2024

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Summary: The applicant requested a draft report from the Ministry of Energy, Mines and Low Carbon Innovation (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry provided the draft report but withheld some information under various exceptions under Part 2 of FIPPA, including s. 14 (solicitor-client privilege). The adjudicator found that s. 14 did not apply to the information the Ministry withheld under that provision and ordered the Ministry to produce it for the purpose of deciding whether other exceptions apply. With respect to the other information at issue, the adjudicator found that ss. 12(1) (Cabinet confidences), 17(1) (harm to a public body's financial or economic interests) and s. 21(1)(harm to a third party's business interests) applied to some but not all of the information in dispute under those provisions. The adjudicator found that s. 13(1) (advice or recommendations) did not apply to the remaining information in dispute under that provision. With respect to the other exceptions at issue, the adjudicator found that s. 19(1)(a)(threat to safety or mental or physical health) applied to the names and some signatures of BC Hydro employees working on Site C, but that s. 22(1)(unreasonable invasion of personal privacy) did not apply to the remaining signatures of BC Hydro employees.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 12(1), 12(2), 13(1), 14, 17(1), 19(1), 21(1), 22(1), 22(4), 44(1)(b) and 44(3); *Freedom of Information and Protection of Privacy Act,* RSO 1990 c. F31 s. 12(1); *Financial Administration Act,* RSBC 1996 c. 138, s. 4(7).

INTRODUCTION

[1] An applicant made an access request to the Ministry of Energy, Mines and Low Carbon Innovation (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for a copy of the "full draft final report on the Site C project review" submitted by a special advisor to the BC Ministers of Finance and of Energy, Mines and Low Carbon Innovation on October 10, 2020.

[2] In response, the Ministry withheld the report in its entirety under multiple exceptions to disclosure under Part 2 of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision.

[3] Mediation failed to resolve the issues and the matter proceeded to inquiry.

[4] The BC Hydro and Power Authority (BC Hydro) asked to participate in the inquiry. The OIPC decided to invite BC Hydro to participate as an appropriate person under s. 54(b). BC Hydro provided submissions and evidence in this inquiry.

[5] At the inquiry, the Ministry revised its decision and released more information to the applicant.[1] The Ministry also asked to add two new exceptions to disclosure to the inquiry.[2] The OIPC approved this request. Additionally, the Ministry confirmed it was no longer relying on s. 16(1) (disclosure harmful to intergovernmental relations or negotiations) to withhold information in the report.[3]

[6] Both the Ministry and BC Hydro asked the OIPC for permission to provide portions of their submissions and evidence *in camera*. An OIPC adjudicator reviewed those requests and accepted some information *in camera.* This means that only I can see these portions; they have not been shared in open evidence between the parties. Therefore, I am not able to openly discuss the *in camera* submissions and evidence in this decision.

[7] Finally, during the course of this inquiry, the parties had an opportunity to make additional submissions on two court decisions relevant to the Ministry's application of s. 12(1) to portions of the records in dispute.

[8] First, the Supreme Court of Canada decided *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)* [*Ontario*].[4] Shortly after that, the BC Supreme Court released its decision in *British Columbia (Ministry of Public Safety) v British Columbia (Information and Privacy Commissioner)* [*Public Safety].*[5] All parties had the opportunity to comment on both decisions in relation to the s. 12(1) issue. Both BC Hydro and the Ministry provided submissions on both cases. The applicant did not make any further submissions with respect to either of these decisions.

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[1] Ministry's December 7, 2022, email.
[2] Sections 21(1) (disclosure harmful to business interests of a third party) and 22(1) (unreasonable invasion of a third party's personal privacy).
[3] Ministry's initial submissions, para 3.
[4] 2024 SCC 4 (CanLII).
[5] 2024 BCSC 345 (CanLII).

Preliminary issue – settlement privilege

[9] In its inquiry submissions, BC Hydro asserted that settlement privilege applies to information on four pages of the record in dispute.[6] It also described four types of information to which it says settlement privilege applies.[7]

[10] Settlement privilege is not an issue listed in the Notice of Inquiry, which is the document that lists the issues in dispute in this inquiry. However, BC Hydro notes that s. 14 (solicitor-client privilege) is an issue in the inquiry and says that it is clear that the Ministry is invoking settlement privilege under this provision.[8]

[11] Given BC Hydro's arguments, the first thing I must decide is whether settlement privilege is a new issue. For the reasons that follow, I find that it is.

[12] First, it is well-established that the term "solicitor-client privilege" in s. 14 does not include settlement privilege. In fact, BC Hydro itself refers to the BC Supreme Court's decision in *Richmond City v Campbell.*[9] In that decision, the Court confirmed that parties are entitled to rely on settlement privilege at common law because FIPPA does not reflect a clear intent to abrogate it, but that s. 14 of FIPPA does not include settlement privilege.[10] Accordingly, while a party may rely on settlement privilege to withhold information responsive to an access request, settlement privilege does not fall under s. 14 of FIPPA.

[13] BC Hydro also appears to be asserting that settlement privilege applies to different information than what is in dispute under s. 14.[11]

[14] The Ministry did not apply settlement privilege to any of the information in dispute, make any arguments about settlement privilege in its submissions, or even respond to BC Hydro's submissions on settlement privilege.

[15] In these circumstances, I conclude that settlement privilege is a new issue. In general, the OIPC will not consider new issues raised for the first time in a party's inquiry submission. The Notice of Inquiry advises parties that they need to request the OIPC's prior consent to add a new issue. Adding issues at this late stage of the inquiry undermines the OIPC's processes because it does not allow the parties to attempt to resolve or refine the issues through mediation.[12]

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[6] Pages 101-105 of the Report (Report PDF pages 108-112), see below.
[7] BC Hydro's initial submissions, para 57.
[8] BC Hydro's initial submissions, para 58.
[9] 2017 BCSC 331 (CanLII); BC Hydro's initial submissions at para 59.
[10] *Ibid* at paras 71-73.
[11] For example, the Ministry did not claim s. 14 over any information in dispute on page 102 of the Report (Report PDF page 109).
[12] Other OIPC Orders have said the same, for instance: Order F22-22, 2022 BCIPC 24 (CanLII) at para 10; and Order F20-44, 2020 BCIPC 53 (CanLII) at para 6.

[16] I do not need to decide whether to add settlement privilege because, as I explain below, I find that the Ministry is required to withhold the relevant information under s. 12(1). More specifically, I find that s. 12(1) applies to the types of information that BC Hydro describes as falling within the ambit of settlement privilege. Therefore, a decision on settlement privilege would not affect the outcome in this inquiry. For this reason, there is no need to consider whether settlement privilege also applies, and I decline to add it as an issue.

ISSUES

[17] At this inquiry, I must decide the following issues:

1. Is the Ministry required to refuse to disclose the information in dispute under ss. 12(1), 21(1) and/or 22(1)?
2. Is the Ministry authorized to refuse to disclose the information in dispute under ss. 13(1), 14, 17(1) and/or 19(1)?

[18] Section 57 allocates the burden of proof in the above matters. Section 57(1) puts the burden of proof on the Ministry to prove that the applicant has no right of access to the information in dispute under ss. 12(1), 13, 17(1), 19(1) and 21(1). However, under s. 57(2), it is up to the applicant to prove that disclosure of the information in dispute under s. 22(1) would not be an unreasonable invasion of a third party's personal privacy. However, the burden is on the Ministry to show that the information is personal information.[13]

BACKGROUND

[19] The Site C Clean Energy Project (Site C) is a project to build a dam and hydroelectric generating station on the Peace River in northeastern BC.[14] It is one of the largest capital projects ever undertaken in BC, with an initial budget of $8.335 billion.

[20] BC Hydro is a Crown Corporation, created to implement government energy policy. BC Hydro is responsible for Site C. The Province of BC is BC Hydro's primary lender, sole shareholder, and the guarantor of its debt.

[21] Site C construction started in 2015.

[22] In 2017, BC Hydro encountered some construction issues, which delayed the project's timeline and increased costs.[15]

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[13] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9-11.
[14] This background information is from the Ministry's initial submissions, paras 9 – 36 except where noted.
[15] Ministry's initial submissions, para 16 and Summary page 6 (Summary PDF page 12).

[23] In late 2017, the new Provincial government gave its approval to continue building Site C. In doing so, it required the creation of a new Project Assurance Board (PAB) and the appointment of an Independent Oversight Advisor, a role ultimately filled by Ernst & Young LLP (EY).

[24] Since then, BC Hydro has experienced significant issues related to cost, schedule, procurement, geotechnical and scope risks, and COVID-19.[16]

[25] Between Spring 2019 and July 2020, the Province became increasingly concerned about the issues facing Site C, how BC Hydro was managing risks, and how and when the Province received information.

[26] In late July 2020, Treasury Board directed the Minister of Energy, Mines and Low Carbon Innovation (Minister) to retain a consultant to conduct an independent review. The Ministry and the Ministry of Finance set out the scope of work in a Terms of Reference. Among other things, the Terms of Reference stipulated that the consultant was to:

- Review and assess the governance and reporting structure.
- Examine cost, schedule, geotechnical and scope risks, and assumptions associated with Site C and compare them to the assumptions and risks used to establish the project budget in January 2018.
- Examine how and when actual and forecast assumptions changed since January 2018 and compare them to updates provided to the Project Assurance Board, BC Hydro executive and Directors, the Minister responsible, and Treasury Board.
- Review and assess risk management and contract supervision.
- Prepare a draft and final report including options and recommendations to mitigate project costs and schedule risks.[17]

[27] That same month, the Minister announced that they had selected a consultant to conduct the review (the Advisor). The Advisor retained experts to help conduct the review (the Review Team).

[28] On October 10, 2020, the Advisor provided the Minister and the Minister of Finance with a draft report called “Site C Project Review”. Information in that report is the subject of this inquiry.

[29] The report was finalized on January 27, 2021. On the same day, the Advisor also provided a shorter version of the report (Summary).[18]

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[16] Ministry’s initial submissions, Summary page 7 (Summary PDF page 13).
[17] This list is paraphrased from the list disclosed on page 16 of the Report (Report PDF page 23).
[18] The Ministry provided a copy of the Summary as part of its initial submissions.

[30] On February 24, 2021, Cabinet decided that it would continue Site C and that it would accept the recommendations in the Report. Cabinet announced these decisions on February 26, 2021. It also released the Summary to the public in full.

Information at issue

[31] As I explained above, the information at issue is in a draft report titled "Site C Project Review" and 23 appendices (together, the "Report"). The Advisor sent the Report to the Ministers of Finance and of Energy Mines and Low Carbon Innovation. The Report is centred around four main topics:

- governance and oversight;
- geotechnical;
- risk management; and
- claims management.

[32] The Report, including the appendices, totals 460 pages. The Report contains 17 recommendations related to the four main topics listed above.

[33] The Ministry disclosed a significant amount of information in the Report including all 17 of the recommendations in the Report. The remaining portions comprise the information in dispute in this inquiry.

DISCUSSION

Section 14 – solicitor-client privilege

[34] Section 14 allows a public body to refuse to disclose information that is subject to solicitor-client privilege. It is well-established that, in the context of s. 14, the term "solicitor-client privilege" includes both legal advice privilege and litigation privilege. Only legal advice privilege is at issue in this inquiry.

[35] Legal advice privilege applies to communications that:

i) are between solicitor and client;
ii) entail the seeking or giving of legal advice; and
iii) are intended to be confidential by the parties.[19]

[36] In addition, legal advice privilege extends to other kinds of documents and communications that do not strictly meet the above test. For example, legal advice privilege applies to the "continuum of communications" between lawyer and client that do not specifically request or offer advice but are "part of the

[19] *Solosky v The Queen,* 1979 CanLII 9 (SCC) at page 837.

necessary exchange of information between solicitor and client for the purpose of providing advice."[20]

[37] The Ministry applied s. 14 to some information on four pages of the Report.[21] It did not provide me with this information. Instead, it provided affidavit evidence from a lawyer with direct knowledge of the relevant communications.

[38] Because of the importance of solicitor-client privilege as a substantive right, the OIPC makes an exception to its usual practice of reviewing the records in dispute when deciding whether privilege applies.[22] Rather, the party seeking to establish privilege can choose to provide affidavit evidence in support of its claim. This approach has been endorsed by the BC Supreme Court.[23] The Court also acknowledged that the use of affidavit evidence means that "some weight has to be given to the judgment of counsel when the [OIPC] is adjudicating claims of solicitor-client privilege."[24]

[39] In my view, the lawyer's evidence is sufficient to decide whether or not privilege applies.

Parties' submissions

[40] The Ministry says that the Advisor hired a lawyer to provide confidential legal advice in relation to matters raised in the Report, including claims management.[25] The Ministry's submissions include affidavit evidence from the lawyer.[26] The Advisor also provided evidence in this inquiry but not on s. 14.

[41] The lawyer deposes that he was retained by the Advisor to support his work on the Site C project review. The lawyer says that, at the relevant time, he was in a solicitor-client relationship with the Advisor.

[42] The lawyer says that he has reviewed the portions of the Report that the Ministry withheld under s. 14. He says that this information all "stems from the confidential solicitor-client relationship" that he had with the Advisor and he believes that the information is "based at least in part" on legal advice that the lawyer provided to the Advisor.[27]

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[20] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 (CanLII) at para 42.
[21] Pages 100 and 103-105 of the Report (PDF pages 107 and 110-112).
[22] For a more detailed discussion, see Order F22-34, 2022 BCIPC 38 at paras 83-85.
[23] *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner*) 2021 BCSC 266 (CanLII) [*Finance*] at para 85.
[24] *Ibid* at para 86.
[25] Ministry's initial submissions, para 127.
[26] The evidence set out below is from the affidavit provided by the lawyer in this inquiry.
[27] Lawyer's affidavit, para 11.

[43] The lawyer says that, in his capacity as legal counsel to the Advisor, he provided his legal assessment of BC Hydro's claims management processes including the timeliness and effectiveness of those processes and the risk of future claims, which are the topics addressed in the pages that contain the information that the Ministry withheld under s. 14.

[44] The applicant referenced Order F17-53, where an OIPC adjudicator said that not every communication between client and solicitor is protected by solicitor-client privilege and found that privilege did not apply to some emails in dispute.[28]

Analysis – s. 14

[45] I accept that there was a solicitor-client relationship between the lawyer and the Advisor and that the lawyer provided confidential legal advice to the Advisor about the matters addressed in the withheld portions of the Report. However, I am not satisfied that the withheld information, in the context in which it appears, is privileged.

[46] This is because legal advice privilege does not usually apply to the end product of legal advice. As the Federal Court of Appeal explained in *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner);*

> documents and actions shaped by legal advice are not necessarily themselves legal advice and do not necessarily form part of the protected continuum of communication. There are occasions where parties have moved "past the stage of seeking or providing advice," *i.e.*, beyond the protected continuum, and start to act on the advice for the purposes of conducting their regular business.[29]

[47] The Federal Court recently referred to this decision for the principle that the end product of legal advice is not privileged "except to the extent that [it] communicates the very legal advice given by counsel."[30]

[48] The lawyer's evidence that the information in dispute "stems from" and is based "at least in part" on the lawyer's legal advice leads me to conclude that the information in dispute under s. 14 was shaped by the lawyer's legal advice but does not communicate the very legal advice given from the lawyer to the Advisor. This is exactly the kind of "end product" of legal advice that is beyond the

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[28] Applicant's response submissions, para 10 citing Order F17-53, 2017 BCIPC 58 (CanLII) at paras 10 and 25.
[29] 2013 FCA 104 (CanLII) at para 33.
[30] *Canada (National Revenue) v. BMO Nesbitt Burns Inc.,* 2022 FC 157 (CanLII) at para 109 citing *ibid* at para 31.

protected continuum of communication. As such, I find that legal advice privilege does not apply to the information that the Ministry withheld under s. 14.

[49] As an evidentiary matter, I acknowledge the BC Supreme Court's comments that I owe some deference to the lawyer claiming the privilege.[31] I have carefully reviewed the lawyer's evidence with this in mind and I do not think the lawyer attests that the information in dispute is privileged. Rather, the lawyer provided evidence, which I accept, but in my view supports a finding that the information in dispute is not privileged.

[50] In summary, I find that s. 14 does not apply to the information that the Ministry withheld under this exception.

Production of the s. 14 information

[51] The Ministry also applied both ss. 12(1) and 17(1) to the information it withheld under s. 14, so I need to decide if those exceptions apply. However, as I explained above, I am unable to review that information because the Ministry did not provide it to me.

[52] For the reasons that follow, I have decided to order the Ministry to produce the information it withheld under s. 14 for the purpose of deciding whether ss. 12(1) and/or 17(1) apply to that information.

[53] Section 44(1) gives me, as the Commissioner's delegate, the power to order the Ministry to produce records for the purpose of conducting an inquiry. The relevant portions of s. 44 are:

> **44**(1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
>
> > (a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;
> >
> > (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.
>
> (2) The commissioner may apply to the Supreme Court for an order
>
> > (a) directing a person to comply with an order made under subsection (1), or

[31] *Finance supra* note 23 at para 86.

> (b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

> (2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

[54] It would not be appropriate for me to decide ss. 12(1) and 17(1) without reviewing the information in dispute. The rationale for deciding s. 14 on affidavit evidence does not apply to other exceptions. Deciding whether these provisions apply requires me to undertake a line-by-line analysis. For these reasons, I have decided it is necessary to order production of the information in dispute under s. 14 for the purpose of deciding whether ss. 12(1) and/or 17(1) apply.[32] For added clarity, that information is on pages 100 and 103-105 of the Report.[33]

[55] Once the Ministry provides the information it withheld under s. 14, I will decide whether ss. 12(1) and/or 17(1) apply in a separate order. To be clear, I did not consider this information in my analyses below with respect to ss. 12(1) and 17(1).

Section 12(1) – cabinet confidences

[56] Section 12(1) 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, a public body cannot withhold information under s. 12(1) 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.[34] To explain 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,

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[32] See Order F22-04, 2022 BCIPC 4 (CanLII) at para 66 for a similar approach.
[33] Report PDF pages 107 and 110-112.
[34] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para 41.

without fear that what they read, say or act on will later be subject to public scrutiny”.[35]

[58] Recently, the Supreme Court of Canada rendered its decision in *Ontario,* where it considered the equivalent provision in Ontario’s FIPPA.[36] Writing for the majority, Justice Karakatsanis said that, in approaching assertions of Cabinet confidentiality, administrative decision makers

> must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy’s core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic and fluid nature of executive decision making, the function of Cabinet itself and its individual members, the role of the Premier, and Cabinet’s prerogative to determine when and how to announce its decisions.[37]

[59] The Ministry withheld some information in the Report under s. 12(1) including a significant amount of information in Appendices 5, 6, 9-14, 16, 18-20, 22 and 23.

Section 12(1) – substance of deliberations

[60] The first step in the s. 12(1) analysis is to consider whether disclosure of the information in dispute would reveal the “substance of deliberations” of Cabinet or its committees. This analysis involves several parts.

i. Was Treasury Board a committee of the Executive Council?

[61] The Ministry says that the information in dispute would reveal the substance of deliberations of Treasury Board, as well as Cabinet. As s. 12(1) applies only to the substance of deliberations of Cabinet or its committees, I must first determine whether Treasury Board is a committee of the Executive Council within the meaning of this provision.

[62] Section 12(5) gives the Lieutenant Governor in Council the power to designate a committee, by regulation, for the purposes of s. 12(1). The Ministry says that, during the relevant time, Treasury Board was designated as a committee under s. 12(5) under the Committees of the Executive Council Regulation.[38] I am satisfied that Treasury Board was designated as a committee for the purpose of s. 12(1) under s. 12(5), at the relevant time.

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[35] *Babcock v Canada (Attorney General),* 2002 SCC 57 (CanLII) at para 18 citing *Singh v Canada (Attorney General),* 2002 CanLII 17100 (FCA) at paras 21-22.
[36] *Freedom of Information and Protection of Privacy Act,* RSO 1990 c. F31 s. 12(1).
[37] *Ontario supra* note 4 at para 61.
[38] BC Reg 156/2017, which was in force until June 10, 2021.

[63] The Ministry also points to s. 4(7) of the *Financial Administration Act* (FAA)*,* which states:

> (7) Section 12 of the *Freedom of Information and Protection of Privacy Act* applies in relation to a power, duty or function delegated to the chair or vice chair as if the power, duty or function were exercised or performed by the Treasury Board.[39]

[64] The Ministry says that s. 12, along with s. 4(7) of the FAA, requires that public bodies "refuse to disclose any information that would reveal the substance of deliberations of Cabinet generally, and also specifically when Cabinet is exercising a function of Treasury Board."[40]

[65] I am not persuaded that s. 4(7) of the FAA has any bearing on this inquiry. This provision is about how FIPPA applies in relation to a power, duty or function delegated to the chair or vice chair of Treasury Board.[41] The Ministry has not provided sufficient evidence that Treasury Board delegated any powers, duties or functions to its chair or vice-chair. In any case, the Ministry did not adequately explain how this provision is relevant to the information in dispute. Therefore, I am not satisfied this provision is applicable.

ii. Meaning of "substance of deliberations"

[66] In *Ontario*, the Supreme Court of Canada emphasized the need to interpret the meaning of "substance of deliberations" in the context of the constitutional conventions and traditions that govern Cabinet confidentiality and its deliberative process.[42]

[67] In the context of s. 12(1), the OIPC has long interpreted the phrase "substance of deliberations" in accordance with Justice Donald of the BC Court of Appeal's decision in *Aquasource.* That is, that the phrase "substance of deliberations" refers to the body of information that Cabinet or any of its committees considered (or would consider in the case of submissions not yet presented) in making a decision.[43] In determining whether information would reveal the substance of deliberations, Justice Donald said that the appropriate test is: "Does the information sought to be disclosed form the basis for Cabinet deliberations?"[44]

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[39] RSBC 1996 c. 138 s. 4(7).
[40] Ministry's initial submissions, para 47.
[41] Section 4(4) of the FAA allows Treasury Board to delegate any powers, duties or functions of Treasury Board under any enactment to the chair or vice-chair.
[42] *Ontario supra* note 4 at paras 21, 58.
[43] *Aquasource supra* note 34 at para 39.
[44] *Ibid* at para 48.

[68] In *Public Safety,* Justice Gomery confirmed that "*Aquasource'*s interpretation of the Cabinet confidences exception contained in s. 12(1) of FIPPA is consistent with the decision in [*Ontario*] and remains good law."[45] The Ministry notes that Justice Gomery expressly relies on Justice Donald's statement that s. 12(1) should be "read widely as protecting the Confidence of Cabinet communications."[46] The Ministry says that this is consistent with its position.

[69] In light of the above, I find there is no disagreement that the above test in *Aquasource* is the appropriate test to apply in this case.

iii. Would the information in dispute reveal the "substance of deliberations" of Cabinet or Treasury Board?

[70] The Ministry and BC Hydro submit that disclosing the withheld information in the Report would reveal the substance of Cabinet and Treasury Board's deliberations.[47]

[71] The Ministry says that the Report is essentially a Cabinet submission created at the direction of Treasury Board.[48]

[72] The Ministry provided evidence from the Records Management Officer for Cabinet Operations in the Office of the Premier (Records Officer). The Ministry says that the Records Officer's evidence shows that Cabinet considered the Report and that the Report was the basis for its decision to move forward with all the recommendations contained in the Report.

[73] The Records Officer deposes that a copy of the Report was distributed to Cabinet in advance of a February 3, 2021 meeting.

[74] The Ministry also provided evidence from the Ministry of Finance's Assistant Deputy Minister, Strategic Initiatives (Assistant Deputy Minister). The Assistant Deputy Minister says that the Report was distributed to Cabinet prior to its February 3, 2021 meeting and discussed by Cabinet at meetings on February 3, 10, and 24, 2021. The Assistant Deputy Minister says that, at those meetings, Cabinet considered the substance of the Report and whether or not to accept its findings, advice and recommendations.

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[45] *Public Safety supra* note 5, at para 69.
[46] Ministry's supplemental submissions on *Public Safety,* para 15 citing *Public Safety ibid* at para 70.
[47] The Ministry and BC Hydro both submit that the outcome of *Public Safety* has limited relevance to this inquiry because of factual differences. I agree and do not see a need to address *Public Safety* any further.
[48] In its supplemental submissions on *Ontario,* the Ministry says it has now provided more evidence than is required to discharge its burden under s. 12(1). I have still considered and written my reasons with respect to all the evidence it provided.

[75] The Assistant Deputy Minister also says that the Report was provided to Treasury Board on February 4, 2021, and that Treasury Board discussed it at two meetings that month. The Assistant Deputy Minister says that he attended each of these meetings and provided Treasury Board with analysis and advice to help inform Treasury Board deliberations.

[76] The Assistant Deputy Minister says that, on February 26, 2021, the Province announced that it intended to continue with Site C and that it had accepted all 17 recommendations in the Report.

[77] I am satisfied that the Report formed the basis of Cabinet and Treasury Board's deliberations. Specifically, the Records Officer and Assistant Deputy Minister's evidence satisfies me that the Report was provided to, and discussed by, Cabinet and Treasury Board at their respective meetings. Further, I accept that the Report was the body of information that Cabinet considered in its decision to accept the Advisor's recommendations. As such, under the approach outlined by the BC Court of Appeal in *Aquasource,* I find that the information at issue reveals the "substance of deliberations" within the meaning of s. 12(1).

[78] However, I find some of the withheld information in the Report would not "reveal" the substance of deliberations because the information is disclosed elsewhere in the Report or in the Summary or is easily inferable from information disclosed elsewhere.[49] I cannot be more specific without revealing the information in dispute. The Ministry may not refuse to disclose this information under s. 12(1).[50]

Section 12(2)

[79] The final step in the s. 12(1) analysis is to determine whether any of the information in dispute falls into the categories in s. 12(2)(a), (b) or (c). A public body cannot withhold any information falling into any of these categories. The relevant parts of s. 12(2) say:

> (2) Subsection (1) does not apply to
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> > (a) information in a record that has been in existence for 15 or more years,
> >
> > (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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[49] In my view, the fact that information has been disclosed elsewhere in the Report or Summary makes the circumstances distinguishable from where information is already in the public domain as in Order F12-07, 2012 BCIPC 10 (CanLII) at para 16.

[50] Some information on Report PDF pages 13, 18, 30, 43, 63, 64, 70, 101, 103 and Appendices PDF pages 308 and 320.

(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

(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.

[80] No party made submissions on ss. 12(2)(a) and (b) and I do not see how they would apply. However, s. 12(2)(c) is relevant to this inquiry.

[81] Section 12(2)(c) says that s. 12(1) does not apply to information the purpose of which is to present background explanations or analysis to Cabinet or its committees in the circumstances set out in s. 12(2)(c)(i), (ii) or (iii). I will first address whether s. 12(2)(c)(i), (ii) or (iii) are satisfied before turning to whether the information at issue is "background explanations or analysis."

i. Do any of the circumstances in s. 12(2)(c)(i), (ii) or (iii) apply?

[82] With respect to s. 12(2)(c)(i) (decision made public), the Ministry's evidence is that the provincial government has publicly announced that it decided to accept the recommendations in the Report.[51] However, the Ministry says that both Site C and the implementation of the Report's recommendations are ongoing. It says that, if deliberations on the issue are still ongoing, any discrete decision made may still place the item within the continuum of Cabinet's deliberations and so the focus of any analysis must be on whether a decision was made.[52]

[83] I gather that the Ministry's argument is that the "decision" with respect to s. 12(2)(c)(i) should not be framed as Cabinet's decision to accept the Advisor's recommendations in the Report because the Site C project and the implementation of the Report are still ongoing. I note that the Ministry does not explain what it thinks would constitute a "decision" with respect to Site C, or in general.

[84] There is no dispute that Cabinet publicly announced that it accepted all 17 recommendations in the Report. The issue is whether this is a "decision" within the meaning of s. 12(2)(c)(i). For the reasons that follow, I find that it is.

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[51] Affidavit of the Assistant Deputy Minister, paras 62-63 and Exhibit I.
[52] The Ministry's supplemental submissions on *Ontario.*

[85] First, I note that whether a decision has been implemented is recognized as its own separate requirement by s. 12(2)(c)(ii). Since 12(2)(c)(i), (ii) and (iii) are connected by "or" only one of these conditions needs to apply. This indicates to me that whether a decision has been made and whether it has been implemented are two different considerations with respect to s. 12(2)(c). In other words, I am satisfied that Cabinet's choice to accept the recommendations is a "decision" under s. 12(2)(c) even though all of the Report's recommendations have not been implemented.

[86] Also, in *Ontario*, the Supreme Court of Canada emphasized the importance of preserving Cabinet confidentiality *until a decision has been made and announced*, at its prerogative.[53] Viewing the "decision" in relation to s. 12(2)(c)(i) as Cabinet's decision to accept the recommendations in the Report is consistent with the Supreme Court of Canada's comments because it respects Cabinet's choices about how and when to announce that it had done so.

[87] For these reasons, I find that s. 12(2)(c)(i) is satisfied because Cabinet publicly announced its decision to accept the Advisor's recommendations in the Report. Consequently, there is no need for me to consider whether (ii) or (iii) are also satisfied. I turn to whether any of the information at issue is "background explanations or analysis."

ii. Was the purpose of the information to present background explanations or analysis?

[88] In relation to s. 12(2)(c) the OIPC has consistently said that "background explanations" "include, at least, everything factual that Cabinet used to make a decision" and that "analysis" "includes a discussion about the background explanations but would not include analysis of policy options presented to Cabinet."[54]

[89] I am also mindful of the BC Court of Appeal's comments in *Aquasource* that ss. 12(1) and 12(2)(c) must not be "read as watertight compartments" but rather should be harmonized.[55] The Court of Appeal found that the Commissioner was correct to accept that, if the purpose of the information was to provide background explanations or analysis and the information was not interwoven with any of the items listed in s. 12(1), then that information can be disclosed.[56]

[90] In its supplemental submissions on *Ontario,* the Ministry says that the Supreme Court of Canada's decision reinforces that "background explanations

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[53] *Ontario supra* note 4 at paras 29, 35 and 39.
[54] *Aquasource, supra* note 34. See also Order F18-43, 2018 BCIPC 46 (CanLII) at para 16.
[55] *Ibid* at para 50.
[56] *Ibid.*

and analysis" must be interpreted narrowly. However, the Ministry agrees that the two-part test outlined in *Aquasource* still applies.

[91] I understand the Ministry's position to be that none of the information in dispute in the Report is background explanations or analysis because all of that kind of information has already been released.[57] The Ministry also says that any information that may fall under s. 12(2)(c) is interwoven with the Advisor's recommendations and for that reason it does not form a discrete body of information that can be considered background explanation or analysis.[58]

[92] I found above that the "decision" in question under s. 12(2)(c)(i) is Cabinet's decision to accept the recommendations in the Report. Accordingly, in this case, s. 12(2)(c)(i) will apply to any of the information that Cabinet considered in deciding whether to accept the recommendations in the Report where the purpose of that information was to provide background information or analysis for Cabinet's consideration and the information is not interwoven with any advice, recommendations, or policy considerations in the Report.[59]

[93] For the reasons that follow, I find that the purpose of some of the information is to present background explanations or analysis within the meaning of s. 12(2)(c) and is not interwoven with any of the items in s. 12(1).

[94] **Body of Report -** There is some information in the risk management section of the Report that provides general information about the practice of risk management.[60] It does not appear to be specific to how BC Hydro manages Site C risks. In my view, the purpose of including this information was to present background explanations about risk management generally, for Cabinet to consider in making a decision about whether to accept the recommendations in the Report. It is not intertwined with any advice, recommendations or any of the other items listed in s. 12(1). Therefore, I find that s. 12(2)(c) applies to some of the withheld information in the risk management section of the Report.

[95] **Appendices 5, 6, 9, 10, and 11** –These appendices are:

- Appendix 5 - Statement of Work from EY to BC Hydro
- Appendix 6 - Current state assessment of BC Hydro Site C Project Controls and Risk (Assessment)[61]
- Appendix 9 - EY letter of termination

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[57] Ministry's initial submissions, para 91.
[58] Ministry's initial submissions, para 96.
[59] None of the information is draft legislation or regulations.
[60] Report PDF page 56.
[61] The Ministry withheld, under s. 12(1), the name of the case study that EY used to conduct the assessment in some places in Appendix 6 but not others. For consistency, I have considered whether s. 12(1) applies to this information in all instances where it appears in Appendix 6 even though, in some cases, it has been withheld under other FIPPA exceptions.

- Appendix 10 - BC Hydro's comments on excessive billing
- Appendix 11 - EY's response to assertions of excessive billing

[96] The Ministry withheld some information in dispute in these appendices under s. 12(1).

[97] The Ministry says that these appendices relate to the recommendation in the Report that the independent oversight function and PAB functions be reevaluated.[62] The Ministry says that these appendices relate to the breakdown of the relationship between EY and BC Hydro and that they also relate to EY's role as the Independent Oversight Advisor. As such, it says that these appendices are materially relevant to deliberations about the recommendation and Cabinet's decision to accept it.

[98] With respect to the Statement of Work, the Assistant Deputy Minister says that the withheld information informs the substance of deliberations in relation to the Report and its recommendations.

[99] I find that the history of the relationship between the parties, and the Advisor's observations about it, are a core part of the discussion leading to the governance recommendation. The appendices represent key points in the relationship between the parties. In this way, I find the purpose of including the information in these appendices was not to present "background explanations or analysis" within the meaning of s. 12(2)(c). I find that s. 12(2)(c) does not apply.

[100] **Appendices 12, 13, 14** – These appendices are:

- Appendix 12 – "Main Civil Works Change Costs Analysis September 2, 2020 (Cost Analysis)"
- Appendix 13 – "Major Changes Estimates V11 Piles Only"
- Appendix 14 – "Geotechnical Detailed Chronology"

[101] The Ministry says that this information primarily relates to the geotechnical recommendations in the Report but also to some of the recommendations about risk management and claims management.[63]

[102] In my view, s. 12(2)(c)(i) does not apply to the withheld information in Appendix 12. This appendix contains monetary amounts about concluded settlements (i.e., money that BC Hydro paid to its contractors to resolve claims and change orders). The Advisor discusses settlement amounts in some detail in the claims management portion of the Report. For this reason, I am persuaded that the information in Appendix 12 is interwoven with the advice in the Report.

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[62] Recommendation number 7, disclosed on page 13 of the Report.
[63] Ministry's initial submissions, para 84.

[103] Similarly, it seems to me that the purpose of including the chronology in Appendix 14 was not to present "background explanations or analysis." Rather, it contains specific and detailed information about substantive geotechnical issues discussed throughout the Report. In this way, I do not think it is properly categorized as "background explanations or analysis".

[104] However, I find that the information in dispute in Appendix 13 is "background explanations" within the meaning of s. 12(2)(c). I find that, as a cost breakdown, it is the kind of factual information that past orders have said constitutes background explanations. In addition, none of this information is interwoven with any advice, recommendations or policy considerations to which the appendices relate. Therefore, I find that s. 12(2)(c)(i) applies to the information in Appendix 13.

[105] **Appendices 16, 18, 19, 20 –** The Ministry withheld some information in the following appendices under s. 12(1):

- Appendix 16 - Site C Risk Management and Cost Management
- Appendix 18 - Site C Project Change Control and Contingency Memo
- Appendix 19 - Cost Risk Analysis Memo
- Appendix 20 - Additional Information Related to Cost Risk Analysis

[106] The Ministry says that this information relates to four recommendations regarding risk management.

[107] In my view, the purpose of including the information at issue in these appendices was to explain to Cabinet how BC Hydro manages risks relating to Site C. BC Hydro's risk management practices, including Cost Risk Analysis, are discussed in detail in the Report and are the subject of several recommendations. In this way, I find that the information in these appendices is interwoven with the recommendations and advice in the Report.

[108] I find that s. 12(2)(c) does not apply to the withheld information in appendices 16, 18, 19 and 20.

[109] **Appendices 22 and 23** – Each of these appendices is a report written by a construction advisor.

[110] In my view, the purpose of providing the information in these appendices was not to present background explanation or analysis within the meaning of s. 12(2)(c). I can see that the information in these appendices contains analysis relating directly to the recommendations in the Report about construction management. For this reason, I find that s. 12(2)(c)(i) does not apply to this information.

Section 12 – summary

[111] In summary, I find that, with the exception of the information disclosed elsewhere in the Report or in the Summary, disclosing the information withheld in the Report would reveal the substance of deliberations within the meaning of s. 12(1).

[112] However, I find that s. 12(2)(c)(i) applies to the withheld information in Appendix 13. Therefore, I find that this information cannot be withheld under s. 12(1).

Section 17(1) – disclosure harmful to the financial or economic interests of a public body

[113] Section 17(1) allows a public body to refuse to disclose information where disclosure could reasonably be expected to harm the financial or economic interests of a public body. The relevant parts of s. 17(1) in this inquiry are:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> ….
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[114] As set out in past orders, ss. 17(1)(a) through (f) provide examples of the kinds of information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body. Past orders have also established that it is not enough for a public body show that one of the circumstances in (a) through (f) apply; a public body must also demonstrate that disclosure could reasonably be expected to result in financial or economic harm in accordance with the opening words of s. 17(1).[64]

[64] Order F21-56, 2021 BCIPC 65 (CanLII) at paras 21 and 23.

[115] It is well-established that, when the language "could reasonably be expected to" appears in access to information statutes, the standard of proof is a "reasonable expectation of probable harm". This means that a public body must show that the likelihood of the harm occurring is "well beyond" or "considerably above" a mere possibility.[65] The amount and quality of the evidence required to meet this standard depends on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[66]

[116] Regardless of what the applicant intends to do with the information, I must make my decision on the basis that disclosure to the applicant is disclosure to the world.[67]

[117] The Ministry withheld a significant amount of information in the Report under s. 17(1). I will not consider whether s. 17(1) also applies to the information I found must be withheld under s. 12(1).

The Ministry's submissions

[118] The Ministry submits that the information it has withheld under s. 17(1), if disclosed could harm the financial interests of BC Hydro or the Province, including information about contingency or reserve figures and information about how risk is managed.[68]

[119] First, the Ministry says that, as recognized in past orders, disclosing the contingency or reserve figures would undermine BC Hydro's negotiating position.

[120] The Ministry explains that risk management is the way in which a large project is managed, controlled, monitored, and reported on. It says that risk management encompasses all aspects of a project, including safety, quality, costs, schedule, contingency, claims and changes. The Ministry says that, while there are standard components of risk management, there are many ways to approach each component. For example, as the Assistant Deputy Minister explains, at each stage of risk management, choices are made about what is relevant, what should be considered, how the inputs should be classified, what statistical model should be used and how those inputs interact. The Ministry also says that how risk is managed may need to change throughout a project. The

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[65] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para 54 citing *Merck Frosst v Canada (Health)* 2012 SCC 3 at paras 197 and 199.
[66] *Ibid* citing *FH v McDougall,* 2008 SCC 53 at para 40.
[67] Order F23-01, 2023 BCIPC 2 (CanLII) at para 22, for example.
[68] The Ministry's s. 17(1) arguments are in its initial submissions at paras 129-156 and the Assistant Deputy Minister's affidavit at paras 92-133. Where information in the Assistant Deputy Minister's affidavit is argument, I have referred to it as the Ministry's argument.

Ministry says that due to all the choices that need to be made, the way risks are managed on each project is unique.

[121] The Ministry says that disclosing information about how Site C risks are managed could adversely affect the financial interests of the Province and BC Hydro because it would allow suppliers and contractors to determine its risk management capacity. The Ministry says that, if contractors know that BC Hydro and the Province have already planned for and accounted for the risk, contractors or suppliers may try to limit their own risk and change their bid. More specifically, the Ministry says that a contractor may:

- make its bid more competitive by decreasing oversight knowing that BC Hydro's internal risk management practices will take care of that oversight for them;
- inflate its bid on an item, if the contractor knows that BC Hydro believes that item is high risk and therefore has allocated more resources, including contingency funds to that item;
- use the information to avoid BC Hydro's internal reporting and risk management; or
- create new claims, slow work or make weak claims with insufficient evidence based on weaknesses in BC Hydro's risk management practices.[69]

[122] The Ministry says that a supplier could use the risk management information to inflate their bid or contribute to price fixing, as they would be able to determine what kind of budget, reserve or contingency has been set aside.

[123] The Ministry says that, if the information is disclosed, sophisticated businesses who bid on large capital projects would be able to learn what kind of risk management practices Crown Corporations and the Province use to manage large capital projects. The Ministry says that this could then be leveraged against the Province's interest to artificially inflate bids on future work or make tenuous claims. The Ministry provided an example of this kind of harm *in camera.*[70]

[124] The Ministry also says that disclosure of risk management information could affect its credit rating.

[125] By way of background, the Ministry says that the Province is the central borrowing agent for BC Hydro.[71] The Ministry says that being the central borrowing agent means that the Province borrows funds under its own name and then relends money to BC Hydro. It says that it has lent BC Hydro $25 billion.

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[69] The Assistant Deputy Minister's affidavit at paras 99-100.
[70] Ministry's initial submissions, para 148.
[71] Under the FAA.

[126] The Ministry says that if risk management information is disclosed and the risk management practices are found to be deficient, credit rating agencies would likely downgrade the Province's credit rating. A downgraded credit rating means that lenders will require the Province to pay a higher interest rate on future loans. The Ministry explains that, as a result, the Province would have to pay more money to service its debt, which would make less money available for other programs.

[127] The Ministry also says that a downgraded credit rating would affect its position in capital (bond) markets. The Ministry explains that a downgraded credit rating may mean that investors may choose to buy bonds from competing jurisdictions. As the Province sells bonds to raise capital to finance essential services, the Ministry says that it would then have to offer its debt at a higher interest rate.

[128] The Assistant Deputy Minister says that he cannot speculate on whether and when the Province's credit rating agencies would consider a downgrade to the Province's credit rating, nor how much the rating would be downgraded.

[129] However, the Assistant Deputy Minister says that international credit rating agencies have taken a keen interest in Site C since the final investment decision was made. He provided several documents issued by international credit rating agencies that he says demonstrate how Site C impacts the Province's credit rating.[72] The Ministry says that each credit rating agency recognizes that Site C is a credit risk, given the size of the project, and the close relationship between BC Hydro and the Province.

[130] The Assistant Deputy Minister refers to the 2022/23 Budget and Fiscal Plan, which shows that a 1% increase to the interest rate would cost the Province $185 million.

[131] The Ministry provided a table summarizing how s. 17(1) applies to each portion of information in dispute. I will refer to the information in this table below in my analysis.

BC Hydro's submissions

[132] BC Hydro says that disclosure of information about contingency amounts and how it manages risks would harm its negotiating position.

[133] By way of background, BC Hydro's Director, Off Dam Site and Project Controls, Risks and Services (Director) explains that, in a major construction project, things like operational conditions can cause a delay in meeting construction milestones or increase financial costs. When this happens, the

[72] Exhibits "M" through "V" of the Assistant Deputy Minister's affidavit.

contractor may make a claim for more money or time. The Director says that BC Hydro may also request a change. In these situations, the Director explains that the contractor and BC Hydro must negotiate in accordance with their contract to determine which party is responsible for additional costs related to a change.

[134] The Director says that, because of the potential for these kinds of changes, project owners will set aside contingency amounts which can be used to resolve issues. The Director says that contingency amounts are based on the nature of the work performed and the assessed level of risk associated with each type of work. The Director says that contingency amounts are kept confidential so that no contractor uses that information as leverage against BC Hydro in a dispute.

[135] With respect to the contingency amounts, BC Hydro says that disclosure would harm its negotiating position with its contractors. It says that, if disclosed, this information would allow a contractor to gain insight into BC Hydro's internal contingency allocation formula and possible cash reserves that BC Hydro has to resolve a dispute. It says that any contractor would reasonably attempt to get as much of this information as possible in the course of negotiations. BC Hydro says that this would be like negotiating with someone when their maximum offer is known in advance.

[136] The Director says that the information in dispute about contingency funds does not include amounts already spent. Rather, the Director says the information directly correlates to work that is ongoing on the major contracts such as the Main Civil Works, the Generation Station and Spillway Civil Works and the Turbines and Generators contracts.

[137] BC Hydro also argues that disclosure of risk information, including which risks BC Hydro is most concerned about, would prejudice BC Hydro's ability to negotiate with contractors, particularly where BC Hydro's position is that certain risks are a contractor's responsibility.

[138] Further, BC Hydro says that disclosure of non-cost contingency information would reveal aspects of BC Hydro's negotiating positions and as a result, may disrupt negotiations or cause a contractor to take a different position.

[139] BC Hydro says that the information in dispute is relevant to ongoing negotiations. It provided, *in camera,* some examples of current negotiations relating to Site C that could be harmed by disclosure.[73]

[140] The Director also says that disclosure of the information in dispute could harm negotiations relating to other projects. The Director says that BC Hydro regularly undertakes capital projects that involve similar work to that being done

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[73] BC Hydro's initial submissions, paras 40-41.

on Site C. The Director says that, since BC Hydro's system is performed in a similar manner, disclosing the project and contract contingency information in the records at issue in this inquiry would reveal how BC Hydro calculates the applicable contingency based on that type of work.

[141] Overall, BC Hydro says that disclosure of the information in dispute under s. 17(1) could reasonably be expected to:

- allow future proponents to tailor bids;
- impair BC Hydro's ability to effectively procure new Site C contracts; and
- negatively affect ongoing and future negotiations with contractors.

Applicant's submissions

[142] The applicant referred to Order F08-22, where former Commissioner Loukidelis said that the threshold for harm under s. 17(1) is not a low one. In that order, the former Commissioner also said that the nature and magnitude of the outcome are factors to consider. However, the applicant did not adequately explain how that standard applies in this case.

Analysis

[143] My findings with respect to the information in dispute are as follows.

[144] **Body of the Report** – The remaining information in dispute in the body of the Report under s. 17(1) is information that has been disclosed elsewhere in the Report or in the Summary.[74] I do not see how disclosing this information again could reasonably be expected to harm BC Hydro or the Province's financial or economic interests. Therefore, I find s. 17(1) does not apply to this information.

[145] **Appendix 13 –** This appendix is called "RB Major Changes Estimate V11 Piles Only."

[146] The Director describes Appendix 13 as a cost estimate for "Right Bank Foundation Enhancement."[75]

[147] The Ministry says that this appendix contains "specific figures relating to claims/settlement/anticipated additional costs."[76] It says that disclosing this information would harm BC Hydro's financial interests, including negotiation.

[148] I find that s. 17(1) applies to the estimated amounts in Appendix 13. I accept that, if contractors knew what BC Hydro and the Province expect certain

[74] Report PDF pages 18 and 101.
[75] Director's affidavit at para 28(f).
[76] Ministry's initial submissions, para 156.

costs to be, it would undermine their negotiating position with respect to any claims that may arise regarding those costs.

[149] However, the Ministry has withheld some of the line items (i.e., verbal descriptions of what the amounts are for) on one page of this appendix. The Ministry did not adequately explain why the verbal descriptions, if disclosed, could reasonably be expected to harm its or BC Hydro's financial or economic interests. Without more, I find that s. 17(1) does not apply to the descriptions.

[150] **Appendices 15 – 21 –** These appendices are:

- Appendix 15 - Site C Risk Management Plan
- Appendix 16 - Site C Risk Management and Cost Management
- Appendix 17 - Response from BC Hydro regarding relationship between Risk Register and Cost Pressure and Watch Lists
- Appendix 18 - Site C Project Change Control and Contingency Memo
- Appendix 19 - Cost Risk Analysis Memo
- Appendix 20 - Additional Information Related to Cost Risk Analysis
- Appendix 21 - Correspondence between EY and responses from BC Hydro

[151] The Ministry has disclosed the titles, headings, tables of contents, some introductory information, and some other basic information in these appendices. It has withheld the vast majority of the substantive information in these appendices under s. 17(1).[77]

[152] Some of the withheld information in these appendices would reveal contingency amounts.[78] With respect to the contingency amounts, several past orders have found that s. 17(1) applies to BC Hydro's contingency amounts with respect to Site C.[79] More specifically, past adjudicators have accepted that contractors could use knowledge of the contingency amounts to negotiate higher settlements with BC Hydro.[80] I find these past orders extremely persuasive given that the type of information is the same. I make the same finding here.

[153] I am also persuaded that information that reveals how BC Hydro assesses risks would harm its financial or economic interests. Specifically, I accept that knowing how BC Hydro manages risk would allow current and future contractors, many of whom are large and sophisticated, to change their negotiating position with respect to how much risk they agree to take on. In addition, past orders have

[77] The Ministry only withheld a small amount of the information in dispute in Appendix 17 under s. 17. The majority is in dispute under s. 13, which I will address below.
[78] For example, Appendices PDF pages 287, 290, 315.
[79] Order F23-01, BCIPC 2 (CanLII); Order F23-12, 2023 BCIPC 14 (CanlII); Order F18-51, 2018 BCIPC 55 (CanlII); and Order F20-20, 2020 BCIPC 23 (CanLII).
[80] See Order F23-12, 2023 BCIPC 14 (CanLII) at para 35.

found that information that would reveal how a public body assesses risk could reasonably be expected to harm the public body's negotiating position.[81] The information in dispute in this case is of a similar nature and I find the reasoning to be persuasive. Therefore, I accept that disclosure of risk management information could reasonably be expected to harm BC Hydro's financial interests.

[154] Further, I also accept the Ministry's evidence with respect to the impact that disclosing information about how BC Hydro manages Site C risks could have on the Province's credit rating. More specifically, I accept that international credit rating entities are paying attention to how BC Hydro is managing Site C risks, and that perceived deficiencies could reasonably be expected to cause these entities to downgrade the Province's credit rating. In making this finding, I am also mindful of the significant magnitude of the harm alleged. Specifically, I accept that adjustments to the Province's credit rating could cost the Province tens or hundreds of millions of dollars.

[155] For these reasons, I accept that s. 17(1) applies to the following types of information in appendices 15-21 because it would reveal or allow accurate inferences to be made about BC Hydro's risk management practices with respect to Site C:

- how risks are identified and categorized;[82]
- risk management roles and responsibilities;[83]
- risk management processes and workflows;[84] and
- specific details about the risks identified and/or options for managing those risks.[85]

[156] However, there is some information that I find does not reveal how BC Hydro manages risks, namely:

- high-level introductory information;[86]
- definitions in Appendix 15;[87]
- explanatory notes in Appendix 16; [88] and
- information that is already disclosed in the Report or the Summary.[89]

[157] I find that s. 17(1) does not apply to this information because it does not reveal how BC Hydro manages Site C risks.

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[81] Order F10-34, 2010 BCIPC 50 (CanLII) at para 24.
[82] For example, Appendices PDF pages 229-238.
[83] For example, Appendices PDF pages 224-225, 297.
[84] For example, Appendices PDF pages 224-225.
[85] For example, Appendices PDF pages 296, 326-329.
[86] Appendices PDF pages 240, 243, 259, 263, 307, 320.
[87] Appendices PDF Pages 245-251.
[88] Appendices PDF page 272, 273, 282, 294, 300.
[89] Appendices PDF page 260, 265-266, 268, 269, 305, 307, 308, 320.

Section 17(1) – conclusion

[158] For the reasons above, I am satisfied that s. 17(1) applies to some, but not all, of the information in Appendices 13, 15, 16, 17, 18, 19, 20 and 21.

Section 13(1) – advice or recommendations

[159] Under s. 13(1), a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.[90]

[160] The term "advice" is broader than "recommendations"[91] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[92] "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[93] Section 13(1) also encompasses information that would allow an individual to make accurate inferences about any advice or recommendations.[94]

[161] The Ministry withheld a significant amount of information under s. 13(1). However, I will not consider whether s. 13(1) applies to the information that I have already found the Ministry is required to withhold under ss. 12(1) or 17(1). Therefore, I am considering whether s.13(1) applies to a small amount of information in the body of the Report and some information in appendices 13, 15, 16, 17, 18 and 20. I will start with the information in the body of the Report.

Information in the body of the Report

[162] The information in dispute under s. 13(1) in the body of the Report is:

- background information;[95] and
- information that was disclosed elsewhere.[96]

[163] I do not see how information disclosed elsewhere in the Report or the Summary is capable of revealing advice or recommendations under s. 13(1).

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[90] *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025 at para 52.
[91] *John Doe v Ontario (Finance)* 2014 SCC 36 [*John Doe*] at para 24.
[92] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113.
[93] *John Doe supra* note 91 at para 23.
[94] Order F19-28, 2019 BCIPC 30 at para 14.
[95] Report PDF page 56.
[96] Report PDF pages 63, 64, and 101.

[164] I am also not persuaded that the background information is advice or recommendations within the meaning of s. 13(1). It is general information about the practice of risk management that does not appear to be about how BC Hydro manages risks.

Appendices

[165] BC Hydro made no submissions specifically addressing whether the information at issue is advice or recommendations. I have addressed the Ministry's arguments below.

[166] **Appendix 13 –** This appendix is titled "RB Major Estimate VII Piles Only". With regards to whether s. 13(1) applies, the Ministry says that it is a "selection of information for case studies."[97]

[167] The remaining information in dispute in this appendix is verbal descriptions of some of the items. I do not see how this information, if disclosed, would reveal advice or recommendations.

[168] **Appendices 15, 16, 18, and 20 –** These appendices are about BC Hydro's risk management practices with respect to Site C. The information that remains in dispute in these appendices is:

- high-level introductory information;[98]
- definitions in Appendix 15; [99]
- headings and a diagram in Appendix 16;[100]
- explanatory notes in Appendix 16;[101]
- information that is disclosed elsewhere in the Report or in the Summary;[102]

[169] I do not see how this information, if disclosed, would reveal advice or recommendations under s. 13(1). For example, this information is not about a suggested course of action.

[170] **Appendix 17 -** this appendix is a one-page document titled "Response from BC Hydro regarding the relationship between the Risk Register and Cost Pressure and Watch Lists."

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[97] Ministry's initial submissions, page 32.
[98] Appendices PDF pages 240, 243, 259, 263, 307.
[99] Appendices PDF pages 245-251.
[100] Appendices PDF page 274.
[101] Appendices PDF pages 272, 273, 282, 294, 300.
[102] Appendices PDF pages 260, 265-266, 268, 269, 305, 307, 308, 320.

[171] In my opinion, the information in dispute is not advice or recommendations. It does not suggest a course of action that can be accepted or rejected by a decision-maker. Rather, it contains instructions on what to include in the cost pressure and watch lists. Many past orders have concluded that instructions are not advice or recommendations within the meaning of s. 13(1).[103] I make the same finding here.

"selected and compiled by an expert"

[172] Finally, the Ministry argued that all of the information withheld under s. 13(1) is advice or recommendations because it was selected and compiled by the Advisor as relevant to his advice or recommendations.

[173] While the Ministry did not say, I gather that in making this argument it relies on the following portion of the BC Supreme Court's decision in *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*:

> It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert's "advice" or the deliberative process at hand would constitute "factual material" under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body or if the expert's advice can be inferred from the work product it falls under s. 13(1) and not under s. 13(2)(a). As I held earlier, these compilations do not exist separately and independently from the opinions and advice in the reports. Rather, the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert's advice and informs the decision-making process. Based on the principles articulated in Physicians, the documents created as part of a public body's deliberative process are subject to protection.[104]

[174] In my view, these comments do not stand for the proposition that everything selected and compiled by an expert is advice or recommendations. Rather, this discussion is in reference to whether information of a factual nature is "factual material" within the meaning of s. 13(2)(a) or is itself "advice or recommendations" within the meaning of s. 13(1). I find that none of the information that remains at issue in s. 13(1) is the kind of factual information integral to an expert's advice to which s. 13(1) applies.

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[103] See for example, Order F23-57, 2023 BCIPC 78 (CanLII) at para 18; F22-16, 2022 BCIPC 18 (CanLII) at para 60.
[104] 2013 BCSC 2322 (CanLiIl) at para 94.

Summary – advice or recommendations

[175] In summary, I find that s. 13(1) does not apply to any of the information remaining in dispute under this exception to disclosure because none of it is advice or recommendations.

Section 19(1) – disclosure harmful to individual or public safety

[176] Under s. 19(1) a public body may refuse to disclose information, including personal information about the applicant, if the disclosure could reasonably be expected to:

> (a) threaten anyone else's safety or mental or physical health, or
>
> (b) interfere with public safety.

[177] The standard of proof for s. 19(1) is the same as I have explained above in relation to s. 17(1).

[178] The Ministry withheld the names of some BC Hydro employees under s. 19(1), as well as two signatures. Though the Ministry did not specify, I understand from the parties' submissions that only s. 19(1)(a) is at issue.

[179] Past orders have found that disclosure could reasonably be expected to threaten an individual's mental health where the disclosure could reasonably be expected to cause serious mental distress or anguish; it is not enough that disclosure may cause a person to feel upset, inconvenienced, or unpleasant.[105]

Parties' submissions

[180] BC Hydro says that disclosure of the withheld names of its employees could threaten their safety, mental or physical health.

[181] BC Hydro says that Site C has been the focus of contentious public debate. It says that, while there have been peaceful protests and debate, there have also been alarming displays of physical and threatened violence. Based on the evidence of its Security Project Manager and Security Lead (Site C) (Security Lead),[106] and its Director of Safety and Security for Site C (Security Director),[107] BC Hydro points to the following examples:

- At a July 16, 2015, meeting in Dawson Creek, a protestor terrified BC Hydro staff by ripping down display maps, overturning two tables and screaming obscenities at staff. A witness called 9-1-1. When police

[105] Order F20-03, 2020 BCIPC 3 at para 21.
[106] Security Lead's June 20, 2018, affidavit at paras 11-13.
[107] Security Director's affidavit, para 10.

arrived, they encountered a different individual wearing a mask who was holding a switchblade and threatening the police. The police shot and killed him. Following this, a rally against Site C was canceled over fears it could become violent.

- On November 28 and 29, 2015, a speedboat dangerously encircled a working excavator, attempting to splash a contractor's employee and disrupt their work. The occupants of the boat were aggressive and shouted obscenities at BC Hydro's and its contractor's employees.
- Members of the public have made veiled threats of future violence by using such phrases as "watch your back" and "blow them up."
- In October 2017, BC Hydro employees discovered two bullet holes in a stop sign that was not publicly accessible. This was upsetting to BC Hydro employees who perceived this as a "warning shot." Around the same time, BC Hydro employees discovered that another sign had been shot at several times.
- In March 2018, two individuals verbally harassed and video recorded a security guard. Around the same time, an individual photographed security employees and departed immediately when he realized security personnel had seen him.
- In October 2018, a BC Hydro employee discovered that someone had vandalized their vehicle by putting grease under their door handle.
- In April 2019, at a community consultation office, two individuals became angry and raised their voices at a BC Hydro employee. The employee reported to security staff that she felt shaken by the incident.
- In September 2019, an individual drove through a work area and loudly expressed his disagreement with Site C. He subsequently raised his middle finger at Site C workers.
- In November 2019, an individual posted on a publicly available social media page that Site C needs to stop, "even if it takes killing people."
- On February 26, 2021, the water feature outside the Vancouver BC Hydro offices was vandalized with messages critical of Site C.
- In May 2021, a moderator removed comments from an online article about Site C because the comments implied violence.
- In February 2022, there was a violent attack at the Coastal GasLink work camp near Houston BC. Site C workers felt distressed because of the similarities between the projects. Around the same time, a social media post appeared to encourage a blockade of a turbine enroute to Site C. This caused significant anxiety among workers.
- In May 2022, an opponent of Site C tried to gain entry to the Site C viewpoint during an interview with the Minister. The opponent was denied access but later made a post about the security on a social media site. Because of the opponent's aggressive demeanour and the proximity of his vehicle, security officers felt there was a risk the opponent would ram a security vehicle.

[182] BC Hydro says that the verbal abuse, violence, threats, and the ongoing discord is emotionally unnerving to many of its Site C employees. The Security Lead says that overall, these comments and actions have made BC Hydro employees feel vulnerable, apprehensive, and threatened.[108]

[183] BC Hydro says that it has taken several steps to protect its employees, including refusing to release names of Site C employees who are not part of Site C's "public face". It says that it also does not publish Site C office information on employees' business cards. Further, BC Hydro says it has increased security measures throughout its operations and provides training to employees working on Site C on active threat preparedness, personal safety, and violence in the workplace.

[184] In this context, BC Hydro submits that the disclosure of its employees' names will put them at risk for targeted violence by extreme opponents to Site C.

[185] BC Hydro also submits that the disclosure of its employees' names will increase the risk to its employees' mental wellbeing and mental health. It says that, currently, the names at issue are not publicly associated with the project.[109] I gather BC Hydro's argument is that publicly revealing its employees' names could reasonably be expected to harm their mental health.

[186] It says that these concerns are reasonably held because of the violence and threats that already surround Site C. BC Hydro also says that the OIPC has consistently held that s. 19(1)(a) applies to the names of its employees in this context.[110]

[187] The Ministry did not make arguments about s. 19(1)(a) except to say that it agrees with BC Hydro's submissions.

[188] The applicant says that the Ministry fails to provide evidence that can be independently verified and so its harms argument must fail. The applicant also says some parallels can be drawn to Order F14-22, where the adjudicator found that the names and other information about employees of the Civil Forfeiture Office could not be withheld under s. 19(1)(a).

[189] In reply to the applicant's submissions, BC Hydro says that the standard of proof is not whether the evidence is "independently verifiable." Rather, the test is whether disclosure of the information could reasonably be expected to result in harm.

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[108] Security Lead's affidavit at para 14.

[109] BC Hydro's Director, Off Dam Site and Project Controls, Risks and Services (Director) says that none of the individuals' whose names have been withheld have roles which would put them before the media or the public; Director's affidavit, para 8.

[110] In Order F20-03 and F20-54, for example.

[190] Further, BC Hydro says that the applicant's submissions are a collateral attack on OIPC Orders F20-03 and F20-54, in which adjudicators found that s. 19(1)(a) applied to the names of BC Hydro employees associated with Site C. It says there is no lawful justification for the Commissioner to depart from findings that have already been made on the very same issues and it would be an error of law to do so.

Section 19(1)(a) – analysis and findings

[191] As BC Hydro points out, in Orders F20-03 and F20-54, the OIPC found that s. 19(1)(a) applied to the names of BC Hydro employees associated with Site C. While past orders are not binding on me, fairness requires that parties can expect consistent and predictable results from the OIPC's adjudication process.

[192] In this case, the information in dispute is the exact type of information that the OIPC found could be withheld in Orders F20-03 and F20-54. Further, the evidence in this case considerably overlaps with the evidence provided by BC Hydro in those two inquiries.[111] In these circumstances, I find the precedent set by those orders to be very persuasive.

[193] Considering all the above, I accept that disclosure of the BC Hydro employee's names and signatures could reasonably be expected to threaten their mental health. In my view, BC Hydro has provided ample evidence of serious incidents that have taken place over many years. I accept that these incidents have made its employees feel vulnerable, apprehensive, and threatened. In my view, there is a direct link between disclosure of the names and signatures of BC Hydro employees and harm to their mental health.

[194] In conclusion, I find that s. 19(1)(a) applies to the information that Ministry has withheld from the records under this exception.

Section 21 – harm to business interests of a third party

[195] Section 21(1) says that the head of a public body must refuse to disclose to an applicant information that could reasonably be expected to harm the business interests of a third party.

[196] The Ministry applied s. 21(1) to a significant amount of information in the Report. I have found that much of that information can be withheld under other exceptions to disclosure, so there is no need to determine whether s. 21(1) also applies to this information. What remains in dispute under s. 21(1) is:

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[111] See Order F20-54, 2020 BCIPC 63 (CanLII) para 38.

- EY's hourly rates;[112] and
- Information in Appendix 6, which is a "Current State Assessment" on Site C's Project Controls and Risk (Assessment) about EY's methodology.[113]

[197] Section 21(1) is divided into three parts, ss. 21(1)(a), (b) and (c), and the public body has the onus to show that each part is met. I will address each in turn.

Section 21(1)(a) – commercial or technical information, trade secrets

[198] The first step in the s. 21(1) analysis is to determine whether the information at issue would reveal any of the following types of information specified in s. 21(1)(a):

(i) trade secrets of a third party, or
(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

[199] The Ministry argued that the methodology information, if disclosed, would reveal both commercial information and trade secrets. It argued that disclosure of EY's hourly rates would reveal EY's financial and commercial information. I will first address whether the methodology information is "commercial information."

i. Would disclosing the methodology information reveal commercial information?

[200] Past orders have found that the processes and methods used by a third party to deliver its services are "commercial information."[114] In my view, the information in dispute, which describes EY's methodology in conducting the Assessment, is the commercial information of EY. I am satisfied that s. 21(1)(a) applies.

[201] It is unnecessary for me to also determine whether this information is "trade secrets".

ii. Would disclosing EY's hourly rates reveal its "financial information" or "commercial information"?

[202] The Ministry says that, consistent with past orders, EY's hourly rates are both "financial information" and "commercial information".

[112] Appendices PDF pages 33-34.
[113] Appendices PDF pages 52, 53, 61, 62 and 118.
[114] Order F23-46, 2023, BCIPC 54 (CanLII) at para 29-30, for example.

[203] Many past orders have said that a third party's hourly rates are both commercial and financial information of that third party.[115] I find this persuasive and make the same finding here.

[204] In summary, both the methodology information and EY's hourly rates meet the requirements of s. 21(1)(a).

Section 21(1)(b) – supplied in confidence

[205] Section 21(1)(b) asks whether the information in dispute was supplied, implicitly or explicitly, in confidence. I will first determine whether the information was supplied and if so, whether it was supplied "in confidence".

i. Was the information "supplied"?

[206] Information is considered "supplied" within the meaning of s. 21(1)(b) if it is "provided or furnished" to the public body.[116] Past orders indicate that information is not considered to be "supplied" when it is created or generated by a public body or it has been negotiated between a third party and a public body, such as in a contract.[117] However, where information in a negotiated agreement is not susceptible to change, such "immutable" information can be considered "supplied".[118]

[207] **Methodology information -** In this case, it is clear that the methodology information was provided from EY to BC Hydro. It is evident from the Assessment itself that EY conducted the Assessment and provided it to BC Hydro. This information clearly originated from EY and it was not negotiated. Therefore, I find that EY supplied this information.

[208] **EY's hourly rates –** The Ministry says the following about the hourly rates:

> None of the s. 21 information appears in records that are contracts. However, to the extent that contractual information appears in the records, it is immutable and was supplied. For example, EY's hourly rates were supplied and not negotiable.[119]

[209] The Advisor says that these figures were not negotiable.

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[115] Order F14-58, 2014 BCIPC 62 (CanLII) at para 16; Order F20-46, 2020 BCIPC 55 (CanLII) at para 24, for example.
[116] Order F23-86, 2023 BCIPC 102 (CanLII) at para 32; Order 01-20, 2001 CanLII 21574 (BC IPC), at para 93.
[117] Order F18-20, 2018 BCIPC 23 (CanLII) at para 26, for example.
[118] Order 01-39, 2001 CanLII 21593 (BC IPC) at para 45.
[119] Ministry's initial submissions, para 170.

[210] BC Hydro did not address whether the hourly rates were "supplied." BC Hydro did provide an affidavit from a Partner in the Business Consulting practice at EY (Partner).[120] The Partner asserts that the information was "supplied in confidence" but does not address whether the information was negotiated, and if it was, if it was immutable.

[211] I can see that the hourly rates are part of a Statement of Work from EY to BC Hydro. The Statement of Work details, among other things, the scope of services provided and confidentiality provisions. The disclosed portion of the Statement of Work says that it is deemed to be part of another agreement between EY and BC Hydro. Taking into account this context and the very nature of the information itself, I find that the hourly rates were part of a negotiated agreement between BC Hydro and EY. Based on the submission I quoted above, it seems to me that the Ministry also thinks EY's hourly rates were part of a negotiated agreement.

[212] The next question is whether EY's hourly rates are immutable, that is, not susceptible to negotiation.

[213] Based on the Advisor's evidence, the Ministry has argued that the information was immutable and not subject to change.[121] However, the Advisor does not adequately explain on what basis he believes this to be the case. Nothing he says suggests that he was involved in the negotiations relating to the Statement of Work or the underlying agreement and he does not identify the source of his belief. For these reasons, I place very little weight on the Advisor's assertions.

[214] In Order 01-39, the adjudicator said that immutable information could include fixed costs, such as overhead or labour costs already set out in a collective agreement.[122] Many past orders have adopted this approach and I do the same here.

[215] Nothing in the Statement of Work itself indicates that EY's hourly rates were fixed and not susceptible to negotiation. For example, there is no indication that EY's hourly rates were set as a result of a collective agreement. As a result, I am not persuaded that EY's hourly rates were "supplied" in the way that past orders have interpreted this term. Rather, I find that the hourly rates were the negotiated rates that BC Hydro agreed to pay EY for its services.

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[120] I considered inviting EY as an appropriate person under s. 54(b). However, the Partner says that they understand a request was made to the Ministry for the Report and that s. 21 of FIPPA is in issue. The Partner addressed both the hourly rates and the methodology information by both content and page number. I find that EY had notice that s. 21(1) was the issue in dispute and had a sufficient opportunity to address it. On this basis, I see no need to invite EY.
[121] Ministry's initial submissions, para 170.
[122] Order 01-39, 2001 CanLII 21593 (BC IPC) at para 45.

[216] Since all three parts of the test must be proven, it is not necessary for me to determine whether the hourly rates meet the rest of the s. 21(1) test.

ii. Was the methodology information supplied "in confidence"?

[217] Under s. 21(1)(b), a public body must show that the information at issue was supplied in confidence, either implicitly or explicitly. The information must have been supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was supplied.[123]

[218] The Advisor deposes that the Assessment was provided to BC Hydro explicitly in confidence.

[219] BC Hydro says that the information was supplied to BC Hydro in confidence. It says that it is a market expectation that the confidential methodology developed by consultants and deployed in their reports will remain confidential. I understand that BC Hydro is arguing that the Assessment was implicitly supplied in confidence.

[220] The Partner says that the information detailing EY's project approaches and methodologies and the information about EY's hourly rates was supplied in confidence to BC Hydro.

Analysis

[221] First, I find the Advisor's evidence about EY's and BC Hydro's expectations to be unreliable. The Advisor does not work for BC Hydro or EY and does not explain on what basis he would be able to accurately speak to the expectations of those parties. I place very little weight on the Advisor's evidence in this respect.[124]

[222] However, I am persuaded by the Partner's evidence that the information was supplied in confidence, implicitly. As an employee of EY in its business consulting practice, I am satisfied that the Partner has the requisite knowledge and experience to be able to reliably speak to EY's expectations. I note that the Partner's evidence is consistent with BC Hydro's position that both parties expected the information to remain confidential. I note that disclosed information in the Assessment refers to EY's methodology as proprietary, which in my view, further supports the parties' positions that they did not expect the methodology information to be shared.[125]

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[123] Order F11-05, 2011 BCIPC 5 (CanLII) at para 41.
[124] My analysis in this paragraph also applies to the Advisor's assertions that certain harms may occur from disclosure.
[125] Disclosed information on Appendices PDF page 44.

[223] As a result, I am persuaded that the methodology information was supplied in confidence from EY to BC Hydro.

Section 21(1)(c) – reasonable expectation of harm

[224] The last part of the s. 21(1) analysis is to determine whether there is a reasonable expectation of any of the harms listed in ss. 21(1)(c)(i) through (iv).

[225] The Ministry argued that disclosure of the information in dispute could reasonably be expected to result in the following harms listed in s. 21(1)(c):

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party

(iii) result in undue financial loss or gain to any person or organization

[226] The standard of proof is a reasonable expectation of probable harm, which is the same standard I have described above in relation to s. 17(1) and also applies to s. 19(1).

Undue financial loss or gain – s. 21(1)(c)(iii)

[227] The Ministry argues that disclosure of EY's methodologies would result in undue gain for EY's competitors because they would receive the competitive advantage of EY's methodologies without the associated costs and effort.

[228] BC Hydro says that past orders have held that, if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information for effectively nothing, the gain to the competitor will be "undue." BC Hydro says that this was the case in Order F15-30, where the Adjudicator found that disclosure of the information would enable competitors to replicate a third party's financial model.

[229] BC Hydro says that this is the case here. It says that disclosure of EY's confidential methodologies would allow competitors to gain insight into EY's proprietary methods of analysis. It says that, by acquiring this information for nothing, disclosure could reasonably be expected to result in undue financial gain to EY's competitors.

[230] The Partner says that the methodology outlined in the Assessment was tailored from EY's previous work experience. The Partner says that if it is disclosed, EY's competitors could duplicate EY's method, which would result in loss of EY's future business opportunities.

[231] The applicant referred to former Commissioner Loukidelis' comments in Order F08-22 including that "businesses who contract with public bodies must

have some understanding that those dealings are necessarily more transparent than purely private transactions."[126]

Analysis

[232] For the reasons that follow, I am persuaded that disclosure could reasonably be expected to result in undue financial gain to EY's competitors.

[233] Past orders have repeatedly said that if disclosure would give a competitor an advantage effectively for nothing, the gain to a competitor will be "undue."[127]

[234] I can see that the information in dispute details the method that EY used in conducting the Assessment. It is also clear from the other information at issue in this inquiry that the entire Assessment is centered around the method described in the information in dispute. In short, I am satisfied that the method forms the foundation of the service that EY provided to BC Hydro when it conducted the Assessment. I am persuaded that disclosing this model would effectively be giving away at least part of EY's product to its competitors for free. I find that disclosure could reasonably be expected to result in an undue financial gain to EY's competitors.

[235] As a result, I am persuaded that s. 21(1)(c)(iii) is met. I need not also consider s. 21(1)(c)(i) with respect to the methodology information.

Conclusion – s. 21(1)

[236] I conclude that s. 21(1) applies to the information in dispute detailing EY's methodology but not to EY's hourly rates.

Section 22 – unreasonable invasion of a third party's personal privacy

[237] The remaining information in dispute under s. 22 is four signatures withheld from Appendix 1, which is a statement of objectives prepared by BC Hydro.[128] The Ministry disclosed the associated individual's names.

[238] Despite asking for permission to add it as a late issue, the Ministry did not make argument about s. 22(1) or otherwise explain its decision to withhold the signatures.

[239] BC Hydro made submissions on s. 22(1) but not in reference to the signatures. The applicant says that s. 22(1) is not meant to prevent an invasion

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[126] Order F08-22, CanLII 70316 (BCIPC) at para 49.
[127] For example, Order F19-50, 2019 BCIPC 56 (CanLII) at para 67; Order F19-39, 2019 BCIPC 44 (CanLII) at para 91.
[128] Appendices PDF page 10.

of personal privacy, rather, its purpose is to prevent invasions of privacy that are unreasonable.

Are the signatures "personal information"?

[240] Section 22 applies only to personal information. Therefore, the first step in the analysis is to determine whether the information is "personal information" as FIPPA defines that term.

[241] Schedule 1 of FIPPA says that "personal information" means recorded information about an identifiable individual other than contact information.

[242] FIPPA also says that "contact information" means:

> 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

[243] I find that the signatures are about an identifiable person because the associated individual's names have been disclosed and appear next to the withheld signature. They are not contact information because the purpose of the signatures is not to enable an individual at a place of business to be contacted. Therefore, I find that the signatures are "personal information" as FIPPA defines that term.

Section 22(4)

[244] The next step in the s. 22 analysis is to determine whether any of the circumstances in s. 22(4) apply. If any personal information falls into any of the categories in s. 22(4), disclosing the personal information is not an unreasonable invasion of a third party's personal privacy.

[245] While no party argued it, I find that s. 22(4)(e) is relevant. Under this provision, disclosure of personal information about a 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 is not an unreasonable invasion of a third party's personal privacy.

[246] Past orders have found that a third party's signature provided in the normal course of performing their job duties is information that falls into s. 22(4)(e).[129]

[129] See for example, Order F22-62, 2022 BCIPC 70 at paras 26-28.

[247] From the context in which they appear, it seems to me that the BC Hydro employees signed the statement of objectives in the normal course of performing their job duties. Consistent with past orders, I find that s. 22(4)(e) applies.

Section 22(1) - conclusion

[248] In conclusion, I find that the signatures are personal information but that disclosing them would not be an unreasonable invasion of a third party's personal privacy because s. 22(4)(e) applies to them.

CONCLUSION

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

1. Subject to item 4 below, I require the Ministry, in part, to refuse access to the information in dispute under ss. 12(1) and 21(1).

2. Subject to item 4 below, I confirm, in part, the Ministry's decision to refuse access to the information in dispute under s. 17(1).

3. I confirm the Ministry's decision to refuse access to the information in dispute under s. 19(1).

4. I require the Ministry to give the applicant access to the information I have found cannot be withheld under ss. 12(1), 13(1), 17(1), 21(1) and/or 22(1). The Ministry must give the applicant access to information highlighted in orange on the following pages in the copy of the records sent to the Ministry along with this order:

    a. Report PDF pages 13, 18, 30, 43, 56, 63, 64, 70, 101, 103.
    b. Appendices PDF pages 10, 33, 34, 188, 240, 243, 245-251, 259, 260, 263, 265-266, 268, 269, 272-274, 282, 294, 300, 305, 307, 308, and 320.

5. 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 4 above.

[250] In accordance with s. 59(1) of FIPPA, the public body is required to comply with the above orders by June 19, 2024.

[251] In addition, under s. 44(1)(b) of FIPPA, I order the Ministry to produce to me unsevered pages 100 and 103-105 of the Report (Report PDF Pages 107, 110-112) for the purpose of conducting this inquiry. In accordance with s. 44(3) of FIPPA, the Ministry is required to comply with this order by May 22, 2024.

May 7, 2024

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F21-86265