Order F24-64

BRITISH COLUMBIA UTILITIES COMMISSION

Carol Pakkala
Adjudicator

July 16, 2024

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Summary: The City of Richmond requested the British Columbia Utilities Commission (BCUC) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to the establishment of BCUC's Inquiry into the Regulation of Municipal Energy Utilities. BCUC refused to disclose the records on the basis that they are excluded from the scope of FIPPA, some pages by s. 3(3)(e) of FIPPA and others by s. 61(2)(a) of the *Administrative Tribunals Act* (ATA). BCUC claimed, in the alternative, that ss. 13 and 14 of FIPPA apply to some of the information in the records. The adjudicator finds that some pages are excluded from FIPPA's scope by s. 61(2)(a) of the ATA. The adjudicator also finds that: other pages are not excluded from FIPPA's scope by s. 3(3)(e); are not required to be disclosed under s. 25(1)(b); and only some are properly withheld under ss. 13 and 14. The adjudicator orders BCUC to disclose the information to which ss.13 and 14 do not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 3(3)(e), 13, 14, and 25(1)(b); *Administrative Tribunals Act*, [SBC 2004] c. 45, ss. 61(1), 61(2)(a); *and Utilities Commission Act*, [RSBC 1996] c. 473, s. 4.

INTRODUCTION

[1] The City of Richmond (Richmond) requested records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) from the British Columbia Utilities Commission (BCUC). The request was for records related to the establishment of BCUC's "Inquiry into the Regulation of Municipal Energy Utilities" (Municipal Inquiry). BCUC withheld the records in their entirety under s. 61(2)(a) of the *Administrative Tribunals Act*[1] (ATA) and ss. 3(1)(b), 13, 14, and 22 of FIPPA.[2]

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[1] [SBC 2004] c. 45.
[2] From this point forward, when I refer to sections, I am referring to sections of FIPPA unless I indicate otherwise.

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

Preliminary matters

Allegations of a reasonable apprehension of bias[3]

[3] Both BCUC and Richmond make substantial submissions on the issue of a reasonable apprehension of bias on the part of BCUC Commissioners in the Municipal Inquiry. At the outset of the Municipal Inquiry, Richmond asked that the chair recuse himself on the grounds of a reasonable apprehension of bias and the chair refused to do so. Richmond also asked that BCUC's Deputy Chair be disqualified from any involvement in the Municipal Inquiry on the same grounds. BCUC has maintained its Deputy Chair was not involved in the Municipal Inquiry.

[4] Richmond disagreed with BCUC's decision on the bias issues and sought leave from the BC Court of Appeal (BCCA) to appeal these decisions.[4] The BCCA denied leave on the reasonable apprehension of bias issues on the grounds that they were without merit. Richmond says the records at issue in this inquiry may allow it to bring an application to re-open these issues at the BCCA based on new evidence it believes may be contained in the records.[5]

[5] The apprehension of bias issues are outside of my jurisdiction and have already been decided by the BCCA. I will not consider the parties' submissions on these issues any further except insofar as they are directly relevant to the FIPPA issues before me.

Section 3(1)(b) of FIPPA renumbered

[6] I am reviewing BCUC's decision to refuse access to records under s. 3(1)(b). However, after BCUC made its decision, FIPPA was amended and s. 3(1)(b) was renumbered to s. 3(3)(e). There were no other changes to the

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[3] These facts are described in the parties' submissions and evidence and are addressed in the decision of the BC Court of Appeal: *North Vancouver (City)* v. *British Columbia (Utilities Commission)*, 2023 BCCA 203 (CanLII).
[4] In addition to the bias issues, Richmond also sought leave to appeal the Municipal Inquiry's decision about the municipal exclusion. This decision was that local government corporations, wholly owned and operated by a local government and providing energy utility services exclusively within the boundaries of that local government, are public utilities and are not excluded from regulation under the *Utilities Commission Act*.
[5] Richmond's submissions at para. 13.

provision. BCUC's submissions refer to the relevant section of FIPPA as s. 3(3)(e), so for the sake of consistency and clarity I will do the same in the rest of this order.

Section 61(2)(e) of the Administrative Tribunals Act

[7] Section 61(2)(e) of the ATA is not listed on OIPC's Notice of Inquiry or Fact Report but BCUC marked it on some pages of the records concurrently with s. 61(2)(a) of the ATA.[6] BCUC did not request permission from the OIPC to add s. 61(2)(e) of the ATA as an issue to this inquiry.[7] BCUC did not explain its notation of s. 61(2)(e) of the ATA on the relevant pages and did not address that section in its submissions. I will therefore only consider the application of s. 61(2)(a), not of s. 61(2)(e).

FIPPA sections not at issue

[8] In its table of records and in notations on pages of the records themselves, BCUC identifies some information as being withheld under ss. 12 and 15. These sections are not identified in the Notice of Inquiry or Fact Report, no request was made to the OIPC to add these sections, and no submissions were made on these sections. Based on this, I will not consider ss. 12 or 15 in this inquiry.

[9] Richmond says it received 91 pages of responsive records from BCUC with some information redacted from those pages under s. 22 which it does not dispute.[8] I find that the only information BCUC withheld under s. 22 is on those 91 pages. Therefore, given that severing is not in dispute, I do not need to consider whether BCUC was required to withhold any information under s. 22 and I decline to do so.

ISSUES AND BURDEN OF PROOF

[10] There are four issues to be decided in this inquiry:

1. Are the requested records excluded from the scope of FIPPA due to s. 61(2)(a) of the ATA?
2. Are the requested records excluded from the scope of FIPPA due to s. 3(3)(e) of FIPPA?
3. If the records are within the scope of FIPPA, is BCUC required to disclose any information contained in them under s. 25(1)(b) of FIPPA?

[6] Records, pp. 115-168 and 465-519.
[7] Previous orders and decisions have regularly said that a party may only introduce a new issue into an inquiry if the OIPC grants permission to do so. For instance, see Order F21-21, 2021 BCIPC 26 (CanLII) at para. 8 as well as the cases cited there.
[8] Richmond's reply submission at para. 3.

4. If the records are within the scope of FIPPA, is BCUC authorized to withhold any information from them under ss. 13 or 14 of FIPPA?

[11] There is no statutory burden of proof with respect to the application of s. 61(2)(a) of the ATA or ss. 3(3)(e) or 25(1)(b) of FIPPA. In the case of ss. 3(3)(e) and 25(1)(b), previous orders have indicated that it is in the interests of both parties to provide the adjudicator with evidence and argument supporting their positions, and I will apply that same approach.[9] In my view, the same principle applies to s. 61(2)(a) of the ATA.

[12] Section 57(1) places the burden on the public body to prove an applicant has no right of access to a record or part of a record withheld under ss. 13 or 14.

DISCUSSION

Background[10]

[13] BCUC regulates British Columbia's energy utilities and conducts related inquiries, including the Municipal Inquiry. Richmond provides energy utility services to its residents through its own wholly owned subsidiary company. The issue in the Municipal Inquiry was whether BCUC should treat such subsidiary companies as if they are the municipality for regulatory purposes. Richmond participated in the Municipal Inquiry.

[14] Richmond challenged BCUC's statutory authority to undertake the Municipal Inquiry and argued it was an intrusion into the exclusive jurisdiction of municipalities over the provision of energy utility services. Richmond maintains the Municipal Inquiry lacked independence and clear separation between BCUC and certain energy companies that it regulates. Richmond objected to the composition of the Municipal Inquiry's panel and to its decision that energy companies wholly owned by a municipality are subject to regulation by BCUC. Richmond has made multiple requests to BCUC for access to records related to the Municipal Inquiry, some of which have been previously adjudicated by the OIPC.[11]

[15] The request in the present inquiry is for all records in BCUC's custody or under its control which relate to the establishment of BCUC's Municipal Inquiry. In that context, Richmond further identified it has a specific interest in questions

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[9] For s. 3(3)(e), see for example: Order F14-44, 2014 BCIPC 47 (CanLII) at para. 3, relying on Order F10-09, 2010 BCIPC 14 (CanLII). For s. 25, see for example: Order 02-38, 2002 BCIPC 38 (CanLII) and Order F07-23, 2007 BCIPC 38 (CanLII).

[10] These background details are from the submissions of both parties and are not in dispute.

[11] BCUC's March 31, 2023, letter to the OIPC summarizes these requests. As of writing this current order reviews of the requests indicate: #1 resulted in Order F23-94, 2023 BCIPC 110 (CanLII); #2 in Order F24-14, 2024 BCIPC 20 (CanLII); #s 3, 4, and 7 are in process; #5 and 8 were closed; and #6 is the subject of the current inquiry.

and complaints regarding either the need for regulation of municipal energy providers or matters of interpretation and paramountcy in legislation.

Records at issue

[16] There are 487 pages of records remaining in dispute between the parties.[12] From my review, I can see that these records include emails, letters, memoranda, complaints, submissions, orders (and drafts), and excerpts from an academic text.

Administrative Tribunals Act, s. 61(2)(a)

[17] BCUC applied s. 61(2)(a) of the ATA to most of the records in dispute.[13] The parts of s. 61 of the ATA that are relevant in this case say the following:[14]

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

[18] In Order F24-14;[15] I considered the application of s. 61(2)(a) of the ATA. and concluded that it extends to communications about the appointment of administrative decision makers to particular cases before a tribunal. In coming to that conclusion, I interpreted s. 61(2)(a) of the ATA and found it:

- works in harmony with s. 3(3)(e) of FIPPA but means something different and has a broader meaning;
- extends to more than only those records where a person is acting in a judicial or quasi-judicial capacity in relation to the record in question;
- does not exclude all records of administrative tribunals from FIPPA; and
- codifies the common law principle of deliberative secrecy and applies to exclude communications to which deliberative secrecy applies.

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[12] The records package consists of 578 pages but BCUC disclosed 91 pages of these records with s. 22 redactions not disputed by Richmond, leaving 487 pages at issue.
[13] BCUC claims s. 61(2)(a) of the ATA applies to pages 96-527.
[14] Section 61(2) references ss. 44(1)(b), (2), (2.1) and (3) which are about the Commissioner's powers to order production of records to review them for the purposes of conducting investigations, audits or inquiries. These powers are not at issue in this inquiry.
[15] F24-14, 2024 BCIPC 20 (CanLII).

[19] Given that Order F24-14 was issued after the deadline for submissions in the present inquiry, I provided the parties with the opportunity to make further submissions on the impact of that order.

Parties' submissions, s. 61(2)(a)

[20] BCUC says s. 61(2)(a) of the ATA protects or codifies the common law principle of deliberative secrecy.[16] BCUC further says the purpose of protecting deliberative secrecy is to ensure public confidence in impartial and independent decision making. BCUC says Richmond is seeking to lift the veil of deliberative secrecy to allow for a review of the thought process of BCUC decision makers.[17]

[21] Richmond says the exclusion from FIPPA's scope in s. 61(2)(a) of the ATA is only triggered when a person is actually acting as a decision maker in respect of the records at issue and is engaged in the deliberative processes that are intended to be protected by the section.[18] Richmond further says it is simply not possible that every internal communication at the BCUC falls within this category.

[22] In response to my invitation for additional submissions on the impact of Order F24-14, BCUC says Richmond's request seeks to go behind the decision-making process underlying the formation of the Municipal Inquiry. BCUC says this process is precisely what the principle of deliberative secrecy is meant to protect. BCUC further says that "in the same way that the OIPC found that section 61 of the ATA codified deliberative secrecy, the subject Records ought to be excluded because they explain the how and why the chair commenced the Municipal Inquiry."[19]

[23] In response to my invitation for additional submissions on the impact of Order F24-14, Richmond says deliberative secrecy cannot reasonably extend to each of the 487 pages of records in dispute.[20] Richmond says the principle of deliberative secrecy cannot extend to documents that preceded the appointment of the panel members for the Municipal Inquiry, because at that point in time, there were no decision makers appointed to engage in deliberations aimed at making "a decision in an application or an interim or preliminary matter" or a "facilitated settlement process" within the meaning of section 61(1) of the ATA.[21]

[16] BCUC uses the terms deliberative privilege and deliberative secrecy interchangeably. For consistency, I use deliberative secrecy throughout this order.
[17] BCUC's initial submission at para. 16.
[18] Richmond's reply submission at para. 28.
[19] BCUC's additional submission at para. 5.
[20] Richmond's further submission at para. 15.
[21] Richmond's further submission at para. 10.

Analysis, s. 61(2)(a)

[24] Section 61(2)(a) applies to personal notes, communications, and draft decisions of a "decision maker" which is defined in s. 61(1) to include a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.

[25] As I found in Order F24-14, I am satisfied that BCUC is a "tribunal" within the meaning of s. 61(1) of the ATA. This finding is also consistent with a previous OIPC order involving BCUC and the application of s. 61 of the ATA which found as follows:

> First, I am satisfied that the BCUC is a "tribunal" because of what the UCA [*Utilities Commission Act*] and the ATA say. The ATA is legislation that governs administrative tribunals. The ATA defines the term "tribunal" as "a tribunal to which some or all of the provisions of this Act are made applicable". Section 2.1 of the UCA expressly says that parts of the ATA apply to the BCUC, including many of the provisions regarding hearings…[22]

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

[27] I understand Richmond's position to be that a person cannot be a BCUC decision maker prior to being appointed to a panel. I disagree. In my view, the definition of "decision maker" in s. 61(1) of the ATA can extend to BCUC's tribunal members prior to their appointment to a particular panel, with respect to interim or preliminary matters or facilitated settlement processes. I find that decisions about establishing the Municipal Inquiry are "preliminary matters" within the meaning of s. 61(1) of the ATA.

[28] BCUC cites s. 4 of the *Utilities Commission Act*[23] (UCA) to say that the only people with the authority to make decisions on behalf of the BCUC include the chair and the commissioners.[24] On this basis, I find the chair and commissioners of the BCUC are tribunal members for the purposes of s. 61 of the ATA. The affidavit evidence provided by BCUC identifies its commissioners and chair at the relevant time.[25] Therefore, I find that s. 61(2)(a) applies to the personal notes, communications, and draft decisions "of" those persons identified as a chair or commissioner in BCUC's affidavit evidence or in the records themselves. I find use of the word "of" means that a personal note, communication, or draft decision must have been authored by one of these

[22] Order F22-41, 2022 BCIPC 46 (CanLII) at para. 30.
[23] RSBC 1996, c. 473.
[24] BCUC's initial submission at para. 13.
[25] Affidavit of BCUC's secretary (Secretary) at paras. 4-5.

individuals, not just sent or copied to them, for s. 61(2)(a) of the ATA to apply to that record.

[29] Based on my review of the records withheld under s. 61(2)(a) of the ATA I find that many of them are precisely the type of communications that this section is meant to exempt from FIPPA's scope. They are internal emails and draft letters exchanged among the chair and the commissioners about the considerations involved in establishing the Municipal Inquiry. On this basis, I find that those records are outside the scope of FIPPA.

[30] The records withheld under s. 61(2)(a) also include drafts of the decision of a commissioner leading up to the order establishing the Municipal Inquiry. I find these draft decisions are part of the preliminary matters leading to the final order that established the Municipal Inquiry. I find that s. 61(2)(a) of the ATA also excludes these draft decisions from the scope of FIPPA.

[31] However, I find that BCUC has not provided sufficient evidence to establish that some of the records withheld come within the scope s. 61(2)(a) of the ATA. I find that these records are:

1. Correspondence (emails and letters) from BCUC's Secretary (Secretary's correspondence).

2. Legal opinion memoranda.

3. A written submission from a third party for what appears to be a proceeding in 2015 (Third Party submission).[26]

4. An excerpt from what appears to be the second edition of a textbook (Textbook excerpt).[27]

[32] It is not clear to me that any of these records are a personal note, communication or draft decision "of" a decision maker because there is nothing to suggest that they were authored by a "decision maker" as required for s. 61(2)(a) of the ATA to apply to them. Further, I find that BCUC, which is best placed to argue this point, has not provided sufficient evidence or persuasive argument establishing that they were. Therefore, I find s. 61(2)(a) of the ATA does not apply to the four classes of records listed above. BCUC claims, in the alternative, that ss. 13 and or 14 apply to some pages, so I consider them further below.

[26] This written submission appears in two places in the records.
[27] The Textbook excerpt also appears in two places in the records.

Scope of FIPPA, s. 3(3)(e)

[33] BCUC applied s. 3(3)(e) to different pages of the records than those to which it applied s. 61(2)(a) of the ATA. Like s. 61(2)(a) of the ATA, the application of s. 3(3)(e) is also a threshold issue meaning if it applies, then the other provisions of FIPPA do not apply.

[34] Section 3(3)(e) provides:

> 3(3) This Act does not apply to the following:
> ...
> (e) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;
> …

[35] The BC Supreme Court commented on the purpose of this section[28] in *British Columbia (Attorney General)* v. *British Columbia (Information and Privacy Commissioner)*:

> All are agreed that the purpose of s. [3(3)(e)] is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.[29]

[36] Previous orders have recognized that s. 3(3)(e) does not capture every record created by a person carrying out the activities of a judicial or quasi-judicial body. Rather, the section recognizes that employees of public bodies – including members of administrative tribunals – may discharge multiple functions, only some of which are of a judicial or quasi-judicial nature.[30]

[37] Further, in *M.N.R. v. Coopers and Lybrand*, the Supreme Court of Canada provided criteria for identifying whether a decision or order is of a judicial or quasi-judicial nature, stating:

> It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

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[28] Section 3(3)(e) is the same as the former s. 3(1)(b). It was re-numbered as previously noted.
[29] 2004 BCSC 1597, at para. 70.
[30] Order Order 00-16, 2000 CanLII 7714 (BC IPC), p. 7. See also: Order F14-44, 2014 BCIPC 47 (CanLII) at para. 14; Order 00-21, 2000 CanLII 10451 (BC IPC); Order F10-09, 2010 BCIPC 14; and Order F10-35, 2010 BCIPC 53 (CanLII).

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
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> These are all factors to be weighed and evaluated, no one of which is necessarily determinative.[31]

[38] Based on the foregoing, the exclusion under s. 3(3)(e) is only triggered when a person is:

- carrying out a judicial or quasi-judicial, not administrative, function in respect of the record in issue; and
- engaged in the deliberative processes that s. 3(3)(e) is intended to protect.[32]

Parties' submissions, s. 3(3)(e)

[39] BCUC claims deliberative secrecy applies to exclude the records from FIPPA either under s. 61(2)(a) of the ATA or under s. 3(3)(e). BCUC does not explain why it applied s. 3(3)(e) to some pages of the records and s. 61(2)(a) of the ATA to other pages.

[40] Richmond says BCUC has not met its burden to prove that s. 3(3)(e) applies to the records.[33] Richmond says it is an absurdity to suggest that all internal correspondence at BCUC is exempt from FIPPA. It says that to do so conflates *occupying* a judicial or quasi-judicial role with *acting* in a judicial or quasi-judicial capacity.[34] BCUC responds to Richmond's position by saying it does not argue that all communications between BCUC employees would be exempt from FIPPA under s. 3(3)(e).[35]

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[31] *M.N.R.* v. *Coopers and Lybrand,* 1978 CanLII 13 (SCC), [1979] 1 S.C.R. 495, pp. 7-8.
[32] Order F14-44, 2014 BCIPC 47 (CanLII) at para. 13-16.
[33] Richmond's submission at para. 21.
[34] Richmond's submission at para. 26.
[35] BCUC's reply submission at para. 9. BCUC goes on to cite an example that does not pertain to these records.

Analysis, s. 3(3)(e)

[41] As noted, s. 3(3)(e) excludes from FIPPA's scope personal notes, communications, or draft decisions of a person who, in respect of the record at issue, is acting in a judicial or quasi-judicial capacity. For the reasons that follow, I find that while the records withheld under s. 3(3)(e) are clearly communications, I have insufficient evidence to conclude they are "of" a person who was acting in a judicial or quasi-judicial capacity with respect to that communication.

[42] The records at issue under s. 3(3)(e) are email communications authored by many different people (authors). In addition to the records themselves, BCUC's evidence is contained in an affidavit from the Secretary. However, this affidavit addresses records that are the subject of a *different* inquiry as opposed to the records in dispute here. When contacted by the OIPC to query whether the affidavit was submitted in error for this inquiry, counsel for BCUC confirmed it was the correct affidavit and was meant to provide background information about BCUC.[36] This evidence was sufficient in that regard to provide the background information necessary for my s. 61(2)(a) of the ATA analysis above because of the content of those specific pages.

[43] For the s. 3(3)(e) records, while the affidavit evidence identifies the chair and commissioners of BCUC, only one of the communications withheld under s. 3(3)(e) is identifiable as being authored by the chair.[37] While I accept that the chair likely has some adjudicative functions, the communication at issue here is, in my view, administrative, as opposed to adjudicative, in nature.

[44] For the other communications withheld under s. 3(3)(e), I have insufficient evidence before me as to the positions and functions of their authors. With only a few exceptions – when the titles "regulatory analyst" and "communications coordinator" appear – the records do not include job titles or other information about the scope of responsibility of the relevant individuals and BCUC does not provide supplementary information on this point. Therefore, I find I have insufficient evidence before me to conclude that these individuals were acting in judicial or quasi-judicial capacity in authoring the communications at issue.

[45] For all of the above reasons, I conclude that the records withheld under s. 3(3)(e) are not communications of a person carrying out a judicial or quasi-judicial function made while actively engaged in the deliberative processes s. 3(3)(e) protects. As such, I find that FIPPA applies to all of the records BCUC has withheld under s. 3(3)(e).

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[36] Email communication to the OIPC, June 5, 2024.

[37] Other persons identified as commissioners in the Secretary's affidavit are copied on some communications.

Public interest disclosure, s. 25

[46] Section 25 requires disclosure without delay in certain circumstances. This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.

[47] The parts of s. 25 that are relevant to this inquiry are:

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

[48] Previous orders have found that because s. 25 overrides all other provisions in FIPPA, it applies in only the clearest and most serious situations. Richmond says that s. 25(1)(b) applies to all of the records at issue in this case.

Clearly in the public interest, s. 25(1)(b)

[49] Section 25(1)(b) sets a high threshold for application, such that the duty to disclose only exists in the clearest and most serious of situations where the disclosure is unmistakably in the public interest.[38]

[50] In an OIPC Investigation Report, former Commissioner Denham provided guidance for how to decide if the disclosure of specific information is clearly in the public interest.[39] Factors identified in that report include:

- whether the subject matter involves a systemic problem rather than an isolated event;
- whether the subject matter generates widespread public debate, i.e., in the media, the Legislature, other Offices of the Legislature or oversight bodies;
- the effect of disclosure in light of the potential benefit to the public, i.e., that disclosure would:
    - contribute to educating the public about the matter.

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[38] Order 02-38, at paras. 45-46, citing Order No. 165-1997, 1997 BCIPC 22 (CanLII), p. 3. See also Order F23-94, 2023 BCIPC 110 (CanLII) at para. 10 and Order F18-26, 2018 BCIPC 29 (CanLII), para. 14.

[39] Investigation Report F16-02, 2016 CanLII Docs 4591 at p. 27.

- add, in a substantive way, to the body of information that is already available about the matter;
- enable or facilitate the expression of public opinion or enable the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

[51] Disclosing information in the "public interest" is not about satisfying a general interest or curiosity.[40] Similarly, the general "public interest" in holding public bodies accountable does not mean that s. 25(1)(b) is an investigative tool to look into their affairs. Section 25(1)(b) is only triggered for specific information, the disclosure of which is clearly in the public interest.[41]

Parties' submissions, s. 25(1)(b)

[52] Richmond says its access request relates to its concerns about: the Municipal Inquiry including lack of independence, transparency, and jurisdiction; regulatory capture; a reasonable apprehension of bias; and conflict of interest. Richmond further says that four of the interveners in the Municipal Inquiry supported its position in raising these concerns.[42] Richmond says the records at issue will contribute in a meaningful way to holding BCUC accountable for its decisions and actions.[43]

[53] BCUC agrees with Richmond that in the abstract, questions of administrative jurisdiction, reasonable apprehension of bias, or lack of independence on the part of an administrative body are undoubtedly matters of public interest. BCUC says, however, that the information sought in this inquiry is not the kind that might reasonably contribute to public dialogue on those subjects.[44]

Analysis, s. 25(1)(b)

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

[55] The question of whether there is public interest in allegations of a reasonable apprehension of bias within the specific context of the Municipal

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[40] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC) at para. 33.
[41] Order 00-16, 2000 BCIPC 7714 (CanLII), p. 14.
[42] Richmond's reply submission at paras. 14-15.
[43] Richmond's reply submission at para. 17.
[44] BCUC's initial submission at paras. 33-34.

Inquiry has already been considered in a previous OIPC order.[45] The adjudicator there held that these concerns are not clearly a matter of public interest. While the records are different in this inquiry, I make a similar finding here that the overall matter does not engage the public interest.

[56] I agree with the parties that as a matter of principle, questions or concerns about bias and independence within the administrative law system can engage the public interest. In my view, this interest is only triggered if such concerns are systemic in nature. Here, Richmond's concerns about a reasonable apprehension of bias are about the Municipal Inquiry which is a discrete and isolated inquiry.

[57] Richmond submitted evidence from two independent bodies that support its position on the reasonable apprehension of bias concern in BCUC's Municipal Inquiry.[46] There is, however, no evidence before me of systemic concerns about BCUC's appointments to any other inquiries. Further, even if the concerns around a single inquiry were sufficient to trigger the public interest, the BC Court of Appeal has held that the alleged reasonable apprehension of bias issues in the Municipal Inquiry lack merit and I see no basis to question that finding.[47]

[58] There is no evidence before me that concerns about a reasonable apprehension of bias or a lack of independence of BCUC officials is an issue of recent public debate. The only evidence before me is the concerns expressed by Richmond and two other parties that were unhappy with the appointment of the Chair of the Municipal Inquiry.

[59] For these reasons, I find that the Richmond has failed to establish that the information at issue relates clearly to a matter of public interest.

[60] Since the first part of the test under s. 25(1)(b) decides the matter, I need not decide if the nature of the withheld information itself meets the threshold for disclosure. For the sake of expediency, I examined the information within the scope of FIPPA and, in my view, it would not contribute meaningfully to public policy discussions. Further, it would not add, in a substantive way, to the body of information that is already available about reasonable apprehension of bias issues.

[61] I find that s. 25(1)(b) does not apply.

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[45] Order F23-94, 2023 BCIPC 110 (CanLII) at paras. 18-24.
[46] Appendices to Richmond's reply submission.
[47] *North Vancouver (City)* v. *British Columbia (Utilities Commission)*, 2023 BCCA 203 (CanLII).

Solicitor-client privilege, s. 14

[62] Next, I consider the information BCUC withheld under s. 14.[48] This information appears in email communications between BCUC and individuals who identify themselves in their signature blocks as being lawyers, as well as in internal BCUC staff communications, and in legal opinion memoranda.

[63] Section 14 allows a public body to refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.[49] BCUC says that legal advice privilege applies to the records it withheld under s. 14. The purpose of legal advice privilege is to allow clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[50]

[64] For information to be protected by legal advice privilege it must be contained in a communication that was:

- between a solicitor and client (or their agent);
- intended by the solicitor and client to be confidential; and
- made for the purpose of seeking or providing legal advice.[51]

[65] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied, then privilege applies.[52] A communication does not, however, satisfy this test merely because it was sent to a lawyer.[53]

[66] The courts have established the following principles, among others, for deciding if legal advice privilege applies:

- Privilege extends beyond the actual requesting or giving of legal advice to the "continuum of communications" between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.[54]

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[48] This analysis does not include information I found falls outside FIPPA's scope pursuant to s. 61(2)(a) of the ATA.
[49] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 113 [*College*] at para. 26.
[50] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.
[51] *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.
[52] *Ibid* at p. 829.
[53] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81.
[54] *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 42.

- Internal client discussions about the implications of legal advice provided by a lawyer are privileged because revealing these communications would reveal the substance of the privileged legal advice.[55]

[67] I adopt the above principles in making my decision.

Parties' submissions, legal advice privilege

[68] BCUC outlines the established law regarding s. 14 and claims legal advice privilege over certain pages of the records. Richmond does not say anything about s. 14 except to make a general statement about how the discretionary exceptions to disclosure in FIPPA trigger the s. 4(2) obligation to sever records and provide any information that is not specifically exempted from disclosure.

Analysis, legal advice privilege

[69] For the reasons that follow, I find legal advice privilege applies to some of the information in dispute under s. 14.

[70] I find the records in dispute under s. 14 include emails and legal opinion memoranda. The legal opinion memoranda clearly contain legal advice. For the emails, I can see that some are between BCUC and its lawyer and some are amongst BCUC staff. I find that some emails contain legal advice in the sense that BCUC requested the lawyers provide their professional opinion and expertise on a given matter and these emails contain those opinions (or would allow a reader to draw an accurate inference regarding the substance of those opinions).

[71] Other emails contain information that I find is part of the continuum of communications that pertains directly to the seeking, formulating or giving of legal advice. This information includes internal BCUC emails where BCUC employees discussed whether and when to request legal advice and how to incorporate received legal advice into their workflow regarding the matters on which the legal advice was sought.

[72] I am also satisfied, from the nature of the information itself, that all of these communications were intended to be confidential. Therefore, I find that s. 14 applies to these emails as well as to the legal opinion memoranda. I also find that the information they contain cannot reasonably be severed under s. 4(2).

[73] However, I find some emails were not properly withheld under s. 14. I find that these emails do not reveal communications between a solicitor and client

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[55] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 (CanLII) at paras. 22-24.

and are not part of the continuum of communications in which legal advice was sought and received. Rather, I find that these emails are strictly administrative in nature (scheduling, editing, commenting on non-legal matters) and relate to BCUC's own internal operations as opposed to the matters on which BCUC sought legal advice. I find that s. 14 does not apply to these emails.[56]

Advice or recommendations, s. 13

[74] BCUC also applied s. 13 to some pages of the records.[57] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body.

[75] The purpose of s. 13(1) is to allow for full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative processes of decision and policy making were subject to excessive scrutiny.[58]

[76] Past OIPC orders and court decisions have established the following principles for the application of s. 13(1) and I adopt these same principles in making my decision:

- To "reveal" advice or recommendations means that s. 13(1) does not apply to information that has already been disclosed.[59]
- "Advice" has a broader meaning than "recommendations"[60] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[61] Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.[62]
- "Advice" also includes factual information "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."[63] This compilation of factual information and weighing of the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

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[56] Records, pp. 18-20, 23-24, 27, 30, 33, 72-73, 78,81-82, and 85.
[57] This analysis does not include information I found falls outside FIPPA's scope pursuant to s. 61(2)(a) of the ATA. Where BCUC applied both ss. 13 and 14, I only considered s. 13 for the remaining information I found was not properly withheld under s. 14.
[58] *John Doe* v. *Ontario (Finance)*, 2014 SCC 36 at paras. 45-51 [*John Doe*].
[59] See for examples: Order F23-41, 2023 BCIPC 59 at para. 96; Order F20-32, 2020 BCIPC 38 at para. 36; Order F13-24, 2013 BCIPC 21 at para. 19; Order F12-15, 2012 BCIPC 21 at para. 19.
[60] *John Doe supra* note 58 at para. 24.
[61] *College supra* note 49 at para. 113.
[62] *Ibid* at para. 103.
[63] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para. 94.

- "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.[64]
- Section 13(1) applies to information that *would reveal* advice or recommendations. Therefore, it applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[65]

[77] The first step in a s. 13 analysis is to determine whether disclosing the withheld information would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether ss. 13(2) or 13(3) apply to that information.

[78] Section 13(2) sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1), even if that information would reveal advice or recommendations. Section 13(3) states that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years.

Parties' submissions, s. 13(1)

[79] BCUC says that the s. 13 analysis is informed by the need for deliberative secrecy and highlights the chilling effect inherent in subjecting the deliberative process to public scrutiny. Richmond does not say anything about s. 13 except to make a general statement about the discretionary exceptions to disclosure in FIPPA triggering the s. 4(2) obligation to sever records and provide any information that is not specifically exempted from disclosure.

Analysis, s. 13(1)

[80] The information in dispute under s. 13 includes the Secretary's correspondence as well as other emails and memoranda, the Third Party submission, and the Textbook excerpt. I am satisfied that the Secretary's correspondence as well as the other emails and memoranda contain both advice and recommendations. This information includes draft terms of reference, an outline of issues for consideration, and recommendations on process steps, all of which I find are the kind of information clearly covered by s. 13(1).

[81] However, I find the Third Party submission does not contain advice or recommendations developed by or for a public body. The Third Party submission appears to be from a proceeding which occurred in 2015 and represents the position of a participant in those proceedings. I do not see, and BCUC does not explain, how the information in the Third Party submission constitutes advice or recommendations.

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[64] *John Doe supra* note 58 at para. 23.
[65] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.

[82] I also find that the Textbook excerpt does not contain advice or recommendations by or for a public body. The Textbook excerpt is from a 2nd edition of a text that appears to me to have been written for a general audience, not for a specific public body. I have no further evidence before me about the Textbook excerpt and find BCUC has not established that s. 13 applies to it.

Sections 13(2) and (3) - exceptions to s. 13(1)

[83] The next step in the s. 13 analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice or recommendations developed by or for a public body or minister. In the first place, I find that s. 13(3) does not apply because the records containing information I found to be advice and recommendations have not been in existence for 10 or more years.

[84] Turning to s. 13(2), BCUC says that the exception in s. 13(2)(a) does not apply to documents which incidentally use or reference background facts where those documents otherwise come within s. 13(1) but does not otherwise address s. 13(2). Richmond does not address s. 13(2).

[85] Having considered s. 13(2), I do not find that any of the other circumstances listed in that section could conceivably apply to the information I found above would reveal advice or recommendations if disclosed. Therefore, I will only consider whether s. 13(2)(a) applies to that information.

Analysis, s. 13(2)(a)

[86] Section 13(2)(a) says that a public body must not refuse to disclose any factual material under s. 13(1). The term “factual material” is not defined in FIPPA. Factual “material” is distinct from factual “information”.[66] The difference is whether the information is background facts that form the fabric of the advice and recommendations.[67] If it is not, then the information is “factual material” and s. 13(2)(a) applies.

[87] I find that none of the information I found above is or would reveal advice or recommendations is “factual material”. Although there are some passing references to information that might be described as “factual”, in my view, this information is incidental and forms a necessary and integrated part of the advice and recommendations. Therefore, I find s. 13(2)(a) does not apply.

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[66] PHSA *supra* note 63 at para. 91.

[67] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 53.

Summary, s. 13

[88] I find BCUC has failed to establish that disclosing most of the remaining information it withheld under s. 13(1) would reveal advice or recommendations developed by or for BCUC. For the emails I found do contain advice and recommendations, ss. 13(2) and (3) do not apply to that information, so BCUC may withhold them under s. 13(1). I also find that the information they contain cannot reasonably be severed under s. 4(2).

CONCLUSION

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

1. Section 61(2)(a) of the ATA applies to exclude the records at pages 244 to 464 so FIPPA does not apply to them.
2. Section 3(3) does not apply to any of the records and therefore those records are subject to FIPPA. BCUC is not authorized to withhold the pages it withheld under s. 3(3) alone.
3. Section 25(1)(b) does not apply to the records.
4. Subject to item 5 below, I confirm BCUC’s decision to refuse access to the information it withheld under ss. 13 and 14.
5. BCUC is not authorized by ss. 13 or 14 to withhold pages 2-12, 16, 18-20, 23-24, 27-35, 39-48, 55, 62, 68-69, 72-73, 76, 78-79, 81-82, 84-87, 94-95, 115-176, and 465-527.
6. I require BCUC to give Richmond access to the information described in item 5 above. BCUC must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order.

[90] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **August 28, 2024**.

July 16, 2024

ORIGINAL SIGNED BY

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Carol Pakkala, Adjudicator

OIPC File Nos.: F21-86922 & F21-89096