Order F24-70

BRITISH COLUMBIA UTILITIES COMMISSION

Carol Pakkala
Adjudicator

July 24, 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 its communications with the Province of British Columbia related to the establishment of BCUC's Inquiry into the Regulation of Municipal Energy Utilities. BCUC refused access under various sections of FIPPA. The adjudicator finds the records are not required to be disclosed under s. 25(1)(b) (public interest override); information was properly withheld under s. 13 (advice or recommendations); and that information was not properly withheld under s. 14 (solicitor client privilege). The adjudicator orders BCUC to disclose the information it withheld under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 13, 14, and 25(1)(b).

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 included BCUC communications with any Ministry of the Province of British Columbia (Province) related to BCUC's "Inquiry into the Regulation of Municipal Energy Utilities" (Municipal Inquiry).

[2] BCUC initially withheld the records in their entirety under s. 61(2)(a) of the *Administrative Tribunals Act*[1] (ATA) and s. 12(1) (cabinet confidences) of FIPPA.[2] BCUC later released responsive records to Richmond with some information severed under ss. 12(1), 13 (advice or recommendations), 14 (solicitor client privilege), 15 (harm to law enforcement), 17 (harm to public body's financial or

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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.

economic interests), and 22 (unreasonable invasion of a third party's personal privacy).

[3] Richmond asked the Office of the Information and Privacy Commissioner (OIPC) to review BCUC's decision to deny access to the records. Richmond also claimed s. 25(1)(b) applied on the grounds that disclosure of the records is clearly 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]

[4] Both BCUC and Richmond's submissions include arguments about 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 its 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.

[5] 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]

[6] The apprehension of bias issues are outside of my jurisdiction and have already been decided by the BCCA. I will not further consider what the parties say about them except insofar as it is directly relevant to the FIPPA issues before me.

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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 decision of the Municipal Inquiry 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 reply submission at para. 11.

Matters no longer at issue

[7] In their submissions, the parties agree that s. 61(2)(a) of the ATA is no longer at issue. In its submissions, Richmond says it no longer pursuing the release of the information withheld pursuant to sections 15, 17, and 22.[6] Based on the foregoing, I will not consider s. 61(2)(a) of the ATA or ss. 15, 17, or 22 in this inquiry. As a result, only ss. 12(1), 13, 14, and 25(1)(b) remain in dispute.

ISSUES AND BURDEN OF PROOF

[8] The issues to be decided in this inquiry are whether:

1. BCUC is required to disclose any information contained in the records pursuant to s. 25(1)(b).
2. BCUC is authorized to refuse to disclose any information contained in the records pursuant to ss. 13 and or 14.
3. BCUC is required to refuse to disclose any information contained in the records pursuant to s. 12(1).

[9] There is no statutory burden of proof with respect to the application of s. 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.[7]

[10] 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. 12(1), 13 or 14.

DISCUSSION

Background[8]

[11] 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.

[12] Richmond challenged BCUC’s statutory authority to undertake the Municipal Inquiry and argued it was an intrusion into the exclusive jurisdiction of

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[6] Richmond’s reply submission at para. 30.
[7] See for example: Order 02-38, 2002 BCIPC 38 (CanLII) and Order F07-23, 2007 BCIPC 38 (CanLII).
[8] These background details are from the submissions of both parties and are not in dispute.

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.

[13] 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.[9]

[14] The request in this present inquiry is for all BCUC's communications with the Province relating to:

- the Municipal Inquiry; and
- Richmond's request to the Province's Lieutenant Governor in Council and Executive Council about the Municipal Inquiry.[10]

Records at issue

[15] There are 50 pages of email communications from which information has been withheld. Of those 50 pages, the information that remains at issue appears on five pages.

Public interest disclosure, s. 25

[16] Section 25 requires disclosure without delay in certain circumstances. The parts of s. 25 that are relevant to this inquiry are the following:

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

[9] Order F23-94, 2023 BCIPC 110 (CanLII); Order F24-14, 2024 BCIPC 20 (CanLII); and Order F24-64 2024 BCIPC 74 (CanLII).

[10] Richmond does not explain what it means by "its request to the Lieutenant Governor in Council and Executive Council" and the request was not submitted in evidence.

[17] Previous orders have found that because s. 25 overrides all other provisions in FIPPA,[11] 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)

[18] 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.[12]

[19] 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.[13] 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.
    - 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.

[20] Disclosing information in the "public interest" is not about satisfying a general interest or curiosity.[14] 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.[15]

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[11] However, a recent BC Court of Appeal decision clarifies that s. 25 does not contain the kind of clear, explicit, and unequivocal language required to override solicitor client privilege in s. 14: *British Columbia (Children and Family Development)* v. *British Columbia (Information and Privacy Commissioner)*, 2024 BCCA 190 at para. 63.

[12] 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.

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

[14] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC) at para. 33.

[15] Order 00-16, 2000 BCIPC 7714 (CanLII), p. 14.

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

[21] 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.[16] Richmond says the records at issue will contribute in a meaningful way to holding BCUC accountable for its decisions and actions.[17]

[22] Richmond says the requested communications could bring into question the truthfulness of the statements made by BCUC commissioners about their past employment history thereby supporting Richmond's claim of a reasonable apprehension of bias.[18]

[23] BCUC says the threshold for triggering s. 25(1)(b) is high and that that the duty under s. 25 only exists in the clearest and most serious of situations. BCUC acknowledges 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 questions whether the factual basis raised by Richmond is sufficient to establish there is a clear public concern about bias or lack of independence in BCUC's exercise of its administrative function to commence the Municipal Inquiry.[19]

[24] BCUC says there is nothing in the disclosure of these records to suggest that communications with any Ministry of the Province regarding the Municipal Inquiry would assist the public in making informed political decisions or in holding BCUC to account for the alleged bias or lack of independence.[20]

Analysis, s. 25(1)(b)

[25] 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.

[26] In Order F24-64[21] involving an access request made by Richmond to BCUC, also for records related to the Municipal Inquiry, I considered whether there is a public interest in Richmond's concerns about the Municipal Inquiry.

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[16] Richmond's reply submission at para. 14.
[17] Richmond's reply submission at para. 21.
[18] Richmond's reply submission at para. 18.
[19] BCUC's initial submission at para. 11.
[20] BCUC's initial submission at para. 15.
[21] Order F24-64 2024 BCIPC 74 (CanLII). This issue was also considered by another adjudicator in Order F23-94, 2023 BCIPC 110 (CanLII) at paras. 18-24.

Richmond raises those same concerns raised here. I found there that those concerns do not engage the public interest within the meaning of s. 25(1)(b).

[27] In Order F24-64, I found that while questions or concerns about bias and independence within the administrative law system can engage the public interest, this interest is only triggered if such concerns are systemic in nature. I concluded that the concerns raised by Richmond were about a discrete and isolated inquiry and that there was no evidence of systemic concerns about BCUC's appointments to any other inquires. I further found that 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 saw no basis to question that finding.[22]

[28] I see no additional evidence or argument in the present inquiry to cause me to depart from my findings in Order F24-64 and I decline to do so. 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.

[29] 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 completeness, I examined the withheld information 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 the concerns raised by Richmond.

[30] I find that s. 25(1)(b) does not apply to these records.

Solicitor client privilege, s. 14

[31] The information BCUC withheld under s. 14 appears in an email chain.

[32] Section 14 allows a public body to refuse to disclose information that is subject to solicitor client privilege.

[33] For information to be protected by solicitor client 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.[23]

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[22] Order F24-64 2024 BCIPC 74 (CanLII) at paras. 56-58.
[23] *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.

[34] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied, then privilege applies.[24] A communication does not, however, satisfy this test merely because it was sent to a lawyer.[25]

[35] The courts have established the following principles, among others, for deciding if 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.[26]
- 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.[27]

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

Parties' submissions, s. 14

[37] BCUC outlines the established law regarding s. 14 and claims solicitor client privilege over one page of the records. Richmond does not say anything about s. 14 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. 14

[38] For the reasons that follow, I find solicitor client privilege does not apply to the information at issue under s. 14.

[39] BCUC provided the email chain at issue for my review in this inquiry. BCUC offered no other evidence about this email chain.[28] The first part of the email chain is an exchange between two individuals. The second part of the email chain forwards that email exchange. I can see BCUC withheld the headings of four emails and the substantive content of three emails.[29]

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[24] *Ibid* at p. 829.
[25] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81.
[26] *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.
[27] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 (CanLII) at paras. 22-24.
[28] BCUC's evidence in this inquiry is contained in an affidavit from its Secretary. However, this affidavit addresses records that are the subject of a *different* inquiry as opposed to the records in dispute here. The affidavit does not address this email chain.
[29] Records, p. 25.

[40] For the first part of the email chain, I can see from the email signature blocks and addresses, that the communications are between BCUC's internal legal counsel and an employee of the Province's Ministry of Municipal Affairs and Housing. BCUC does not explain this exchange of emails between these two individuals. Specifically, BCUC does not say how this exchange is a communication between a solicitor and client. Therefore, I am not persuaded that these emails are between a solicitor and client (or their agent).

[41] Additionally, from the content of the first part of the email chain, I can see that the email exchange is not about seeking or providing legal advice nor does it appear intended to be a confidential communication. Therefore, I find that this first part of the email chain does not meet the test for legal advice privilege.

[42] In the second part of the email chain, BCUC's legal counsel forwards the first part to three individuals. From elsewhere in the responsive records, I can see that one of those individuals is a BCUC employee. However, I cannot tell who the other two individuals are, and BCUC's submissions and affidavit evidence do not explain. Their email addresses are not shown in the chain, so I cannot conclude anything about their place of employment. As a result, I am not persuaded that the second part of the email chain is a communication between a solicitor and client (or their agent).

[43] In any event, the content of the forwarding email from BCUC's internal legal counsel does not appear to be about seeking or providing legal advice or to be confidential, and BCUC's submissions and evidence do not explain. I considered whether this email formed part of a continuum of communications between lawyer and client, but I am not persuaded that it even relates to legal advice.

[44] For these reasons, I find that s. 14 does not apply to the email chain.

Advice or recommendations, s. 13

[45] The information BCUC withheld under s. 13 appears in emails.

[46] 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.

[47] 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.[30]

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[30] *John Doe* v. *Ontario (Finance)*, 2014 SCC 36 at paras 45-51 [*John Doe*].

[48] 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:

- "Advice" has a broader meaning than "recommendations"[31] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[32] Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.[33]
- "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."[34] 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.
- "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.[35]
- 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.[36]

[49] 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.

[50] 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)

[51] 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

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[31] *Ibid* at para. 24.
[32] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 113 [*College*].
[33] *Ibid* at para. 103.
[34] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para. 94.
[35] *John Doe supra* note 30 at para. 23.
[36] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.

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)

[52] The information at issue under s. 13 includes information exchanged between BCUC and the Province and information shared internally among senior BCUC management staff. This information includes issues for consideration and recommendations on process steps. Broadly speaking, this information forms the basis of deliberations around BCUC's decision making around the Municipal Inquiry. The information reveals the exercise of judgment and skill and the weighing of matters of fact and material relating to suggested courses of action that would ultimately be accepted or rejected by BCUC.

[53] I find that some of this information is advice and some of it is recommendations and some of it is information that would allow someone to accurately infer advice or recommendations. Some of the information was developed *by* BCUC, and the remainder *for* BCUC.

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

[54] 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 would reveal advice and recommendations have not been in existence for 10 or more years.

[55] Turning to s. 13(2), I considered all the circumstances listed in that section and find they do not apply to the information I found above would reveal advice or recommendations if disclosed. BCUC specifically identifies s. 13(2)(a) and says it does not apply. For the reasons below, I agree.

Analysis, s. 13(2)(a)

[56] 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". The compilation of factual information and weighing the significance of matters of fact is an integral component of advice and informs the decision-making process. If facts are compiled and selected, using expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of the public body,

then the facts are not "factual material" under s. 13(2)(a).[37] The difference is whether the information is background facts that form the fabric of the advice and recommendations.[38] If it is not, then the information is "factual material" and s. 13(2)(a) applies.

[57] I find that none of the information I found 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.

Summary, s. 13

[58] I find BCUC has established that disclosing the information it withheld under s. 13(1) would reveal advice or recommendations developed by or for BCUC. I find ss. 13(2) and (3) do not apply to this information, so BCUC may withhold it under s. 13(1).

Cabinet and local public body confidences, s. 12(1)

[59] BCUC withheld information under s. 12(1) that I found above was properly withheld under s. 13 so I need not consider s. 12(1).[39]

CONCLUSION

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

1. Section 25(1)(b) does not require BCUC to disclose the information at issue.
2. I confirm BCUC's decision to refuse access to the information it withheld under s. 13.
3. BCUC is not authorized by s. 14 to withhold page 25 of the Records.

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[37] PHSA *supra* note 34 at paras. 91-94.
[38] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 53.
[39] BCUC applied ss. 12(1) and 13 to the same information. Richmond says s. 12(1) does not extend protection to this type of information because it relates to BCUC decision making, not to the deliberation of Executive Council or any or its committees (Richmond's additional submissions at para. 8). Richmond's submission further supports my conclusion regarding the applicability of s. 13 because it acknowledges the information relates to BCUC decision making.

4. I require BCUC to give Richmond access to the information described in item 3 above. BCUC must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order.

[61] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by September 6, 2024.

July 24, 2024

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File Nos.: F21-86483 & F21-89097