Order F24-101

BRITISH COLUMBIA UTILITIES COMMISSION

Carol Pakkala
Adjudicator

December 17, 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 all communications between two of its named commissioners and certain named energy companies. BCUC refused access to the responsive records on the basis that the *Administrative Tribunals Act* (ATA) and various sections of FIPPA applied. The adjudicator confirmed BCUC's decision under s. 13(1), in part, and ordered it to disclose the remaining information.

Statutes Considered: *Administrative Tribunals Act*, [SBC 2004] c. 45, ss. 61(1), 61(2)(d), 61(2)(e); *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, 13(1), 13(2)(a), 13(2)(k), 13(3), 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 was for all communications between two named BCUC commissioners and any representatives or employees of three named energy companies.

[2] BCUC initially withheld the records in their entirety pursuant to ss. 61(2)(c) and 61(2)(d) of the *Administrative Tribunals Act*[1] (ATA) and s. 13 of FIPPA.[2] BCUC later asserted its additional reliance on ss. 12(1) (cabinet confidences), 15(1)(l) (harm to the security of a property or system), 16(1)(a) (harm to intergovernmental relations), 17(1) (harm to public body's financial or economic interests), and 21(1) (harm to third-party business interests). Richmond claimed

[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.

s. 25(1)(b) applied on the grounds that disclosure of the records is clearly in the public interest.

[3] Richmond asked the Office of the Information and Privacy Commissioner (OIPC) to review BCUC's decision to refuse access to the records. OIPC's investigation process did not resolve this matter and Richmond requested that it proceed to an inquiry.

Preliminary matters

Matters outside the scope of this inquiry

[4] Both BCUC and Richmond's submissions include arguments about whether there was a reasonable apprehension of bias on the part of BCUC commissioners, involved, or alleged by Richmond to be involved, in a particular inquiry conducted by BCUC. This issue is outside of my jurisdiction. As the Commissioner's delegate, my role is limited to deciding the issues identified in OIPC's Notice of Inquiry. Although I have read the parties' entire submissions, I will only refer to those submissions where it is relevant to the issues that I will decide in this inquiry.

Province of British Columbia invited as an appropriate person under ss. 54(b) and 56(3)

[5] The combination of ss. 54(b) and 56(3) allow for the participation of "appropriate persons" in an inquiry. At several points in its submissions, BCUC says that the government of British Columbia should be given the opportunity to participate in the inquiry to make submissions regarding s. 16(1)(a).[3]

[6] Section 16(1)(a) authorizes public bodies to withhold information if the disclosure could reasonably be expected to harm the conduct by the government of British Columbia of relations between that government and any of the entities listed in s. 16(1)(a), including the government of a foreign state. Despite having chosen to apply s. 16(1)(a) to the records, BCUC said it was "not able to provide evidence respecting a rational connection between disclosure of the [records] and the harm that will allegedly result."[4] It said that information should be sought from the governments of British Columbia and Washington State.

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[3] BCUC's initial submission at para 71. At para 45, BCUC says the government of BC should be invited to speak to s. 21. At para 11 of its reply submission, BCUC says it should be invited to speak to s. 12.

[4] BCUC's initial submission at para 71.

[7] Richmond responded that involving a third party at the inquiry stage is inappropriate because Richmond would have no opportunity to reply.[5] BCUC replied that it would support Richmond having that opportunity.[6]

[8] In deciding whether to invite the Province and/or Washington State to participate in this inquiry, I considered the factors recently identified by the BC Court of Appeal as relevant to such a decision.[7] These factors include the nature of the records at issue, the number of potentially affected third parties, the practical logistics of providing notice (including any alternatives), and any potential institutional resource issues.

[9] I could see that some of the records in dispute related to the Province's relations with a variety of agencies and with the government of the state of Washington. I concluded the Province was in the best position to speak to any potential harm to those relations that could come from disclosure of the disputed records under s. 16(1).

[10] I could see no factors weighing against inviting the Province. Richmond's concern about being able to respond was easily addressed by providing it with that opportunity.

[11] For the above reasons, I found that the Province was an "appropriate person" in this inquiry and invited it to provide submissions.[8] The Province identified its Ministry of Energy, Mines and Low Carbon Innovation (Ministry) as the appropriate ministry to speak to the interests of the Province. The Ministry provided submissions and an affidavit. I gave BCUC and Richmond the opportunity to respond to the Ministry's submissions and affidavit, which they did.

Sections 12(1), 15, 16, 17, and 21(1) no longer in dispute

[12] Before responding to Richmond's access request, BCUC consulted with the Ministry about whether to withhold any information in the responsive records. The Ministry recommended to BCUC that some of the information in the records be withheld under ss. 12, 13, 15, 16, 17, and 21.[9] However, in its submissions as an appropriate person in this inquiry, the Ministry says it reconsidered its original advice to BCUC and is no longer of the view that ss. 12(1), 16, or 21(1) applies.[10] After receiving the Ministry's submissions, BCUC reconsidered its position and withdrew its reliance on ss. 12(1), 16, and 21(1) and gave Richmond access to

[5] Richmond's submission at para 71.
[6] BCUC's reply submission at para 13.
[7] *The Office of the Information and Privacy Commissioner for British Columbia* v. *Airbnb Ireland UC*, 2024 BCCA 333 at paras 51-52.
[8] OIPC's October 18, 2024 s. 54(b) letter.
[9] Exhibit D to the Affidavit of BCUC's Secretary.
[10] Ministry's submission at para 8.

the information that it previously withheld under those sections. I consider those sections no longer at issue and will not consider them further.[11]

[13] Also, in its submission for this inquiry, Richmond says that it is no longer seeking access to information withheld under ss. 15 and 17 that consists of teleconferencing or Webex access codes, dial-in numbers, moderator access codes or moderator dial-in lines. Richmond says that it does, however, want access to any names and email addresses withheld under ss. 15 and 17.[12]

[14] I find that the information withheld from the responsive records under ss. 15 and 17 are access codes and dial-in numbers and lines, not names and email addresses.[13] There is no other information being withheld under ss. 15 and 17. I conclude therefore that ss. 15 and 17 are no longer in dispute in this inquiry.

ATA sections in dispute

[15] As explained above, BCUC initially applied ss. 61(2)(c) and (d) of the ATA to the records in dispute. However, during the inquiry, BCUC requested permission from the OIPC to rely on ss. 61(2)(d) and (e) of the ATA instead of ss. 61(2)(c) and (d). Richmond consented, and the OIPC granted BCUC's request.[14]

ISSUES AND BURDEN OF PROOF

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

1. Some of the records are outside the scope of FIPPA pursuant to ss. 61(2)(d) and (e) of the *Administrative Tribunals Act*.
2. BCUC is required to disclose any information in the records pursuant to s. 25(1)(b).
3. BCUC is authorized by s. 13(1) to refuse to disclose any information in dispute.

[17] There is no statutory burden of proof with respect to scope issues, such as s. 61(2) of the ATA, or 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.[15]

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[11] BCUC's reply to the Ministry's submission at para 3.
[12] Richmond's submission at para 76.
[13] Working Group Records at pp. 2, 13, 47, 94, 95, 99, 1012, 105, 106, 109, 109, 111, 112, 114, 115, 365, 366, 373, 387, 388, 394, 395, 398,399, 405, 406, 407, 408, 409, 411 412, 413, 414, 415, 417, 418, 420, 421, 422, 426, 428, 429, and 430; Named Records at pp. 1, 3, 5, 7, 9, and 13.
[14] June 5, 2024 email exchange between the OIPC and the parties.
[15] See for example: Order F24-50, 2024 BCIPC 58 at para 7, Order 02-38, 2002 BCIPC 38 (CanLII) and Order F07-23, 2007 BCIPC 38 (CanLII).

[18] Under s. 57(1), BCUC has the burden of proving that Richmond has no right of access to a record or part of a record withheld under s. 13(1).

DISCUSSION

Background

[19] BCUC regulates British Columbia's energy utilities. BCUC conducted an inquiry into the regulation of municipal energy utilities (Municipal Inquiry). The issue in the Municipal Inquiry was whether BCUC should, for regulatory purposes, treat subsidiary companies that provide energy utility services for a municipality as if they are the municipality.

[20] Richmond provides energy utility services to its residents through its own wholly owned subsidiary company. 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 maintained 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[16] and to its decision that energy companies wholly owned by a municipality are subject to regulation.

[21] Richmond disagreed with BCUC's decisions in the Municipal Inquiry and sought leave from the BC Court of Appeal (BCCA) to appeal, including on the issues of reasonable apprehension of bias. The BCCA denied leave on the reasonable apprehension of bias issues on the grounds that they were without merit.[17] Richmond says the records at issue in this inquiry may allow it to bring an application to re-open the bias issues at the BCCA based on new evidence it believes may be contained in the records.[18]

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[16] 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.

[17] *North Vancouver (City)* v. *British Columbia (Utilities Commission)*, 2023 BCCA 203 (CanLII). In addition to bias issues, Richmond also sought leave to appeal the municipal exclusion decision. 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*.

[18] Richmond's submission at para 10.

[22] The access request under review in this current inquiry was one of eight inter-related requests[19] which Richmond says it made "in support of its efforts to ensure that BCUC is independent, transparent, free from bias and accountable for its actions and decisions in relation to the [Municipal] Inquiry."[20] This request is for all communications between two named BCUC commissioners (commissioners) and any representatives or employees of three named energy companies. Richmond says both commissioners should be disqualified from any involvement in the Municipal Inquiry.[21]

[23] One of the two commissioners identified in Richmond's access request was the chair of the panel of the Municipal Inquiry. The other commissioner was BCUC's appointed representative[22] to an intergovernmental (BC and Washington) working group tasked with developing a clean grid action plan (Working Group).[23]

Records in dispute

[24] There are approximately 373 pages of records in dispute. The records consist of email communications and document attachments and are organized into three separate packages. The parties refer to the first two packages by the names of the two commissioners whose communications are the subject of the access request. To protect the identities of those commissioners, I will instead refer to those two packages collectively as the Named Records. The parties refer to the third package as the "Working Group Records" because those records were generated by the Working Group.[24] I will do the same.

Outside scope, ss. 61(2)(d) and (e) ATA

[25] BCUC applied s. 61 of the ATA to the Named Records in their entirety. It did not apply s. 61 to any of the Working Group Records. The relevant portions of s. 61 are as follows:

> 61 (2) The *Freedom of Information and Protection of Privacy Act*, other

[19] In addition to this order, the OIPC has issued five orders related to these access requests: F23-94, 2023 BCIP 110 (CanLII); F24-14, 2024 BCIPC 20 (CanLII); F24-64, 2024 BCIPC 74; F24-70, 2024 BCIPC 80 (CanLII); and Order F22-18, 2022 BCIPC 20 (a fee dispute). There is another inquiry still to be adjudicated (OIPC files F21-87465 and F21-89094). Finally, one other inquiry (OIPC files F21-86585 and F21-89098) was cancelled because Richmond withdrew its request for the inquiry after reading BCUC's initial submission.
[20] Richmond's submission at para 7.
[21] Richmond's submission at para 8.
[22] Secretary's affidavit at para 11.
[23] Affidavit of Senior Director, ESG & Digital Trust, Energy Resources Division, Ministry of Energy, Mines and Low Cabon Innovation (Senior Director) at para 3.
[24] Senior Director's affidavit a para 4 and Secretary's affidavit at para 11. These records were captured by Richmond's access request for all communications of the BCUC commissioner who was the appointed representative to the Working Group.

> than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:
> …
>
> (d) a transcription or tape recording of a tribunal proceeding;
>
> (e) a document submitted in a hearing for which public access is provided by the tribunal;
>
> …

Parties' submissions, s. 61(2) of the ATA

[26] BCUC says s. 61(2) of the ATA excludes certain types of records from the scope of FIPPA because the material is covered by existing access mechanisms or is already publicly available.[25] BCUC says it unnecessary and redundant to disclose documents that are already part of the public record.[26]

[27] BCUC's Secretary attests that certain records in dispute in this inquiry, namely, certain power point documents (Power Point Documents) were filed as exhibits[27] in BCUC proceedings and are publicly available online.[28] BCUC provided a copy of the Power Point Documents that were publicly available for me for comparison purposes.[29] BCUC says that s. 61(2)(e) therefore applies.[30]

[28] Richmond says BCUC has not met its burden because BCUC's evidence is that the records "relate to" rather than "are" the publicly available Power Point Documents.[31] Richmond says s. 61(2)(e) cannot be interpreted to encompass all documents that "relate to" publicly accessible documents submitted in a hearing. Richmond further says the wording and intent of the section is clear: the document itself must constitute "a document submitted in a hearing for which public access is provided by the tribunal."[32]

Analysis, s. 61(2) of the ATA

[29] For the reasons that follow, I find that s. 61(2)(e) of the ATA applies to the Power Point Documents.[33]

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[25] BCUC's initial submission at para 16.
[26] BCUC's initial submission at para 18.
[27] Specifically, Exhibits B-9 and B-13.
[28] Secretary's affidavit at paras 8 and 9.
[29] The Power Point Documents were attached to BCUC's reply submission.
[30] BCUC also says s. 61(2)(d) applies because the presentations were also read into the record and the transcripts are publicly available.
[31] Richmond's submission at para 15.
[32] Richmond's submission at para 16.
[33] Pages 5-66 and 15-67 of the two packages of Named Records.

[30] First, I find that BCUC is a tribunal for the purposes of s. 61of the ATA.[34] Further, I find that the Power Point Documents were submitted in a BCUC hearing and the BCUC already provided public access to them. I acknowledge that BCUC says in its submissions that the publicly accessible documents "relate" to the Power Point Documents. I have reviewed the Power Point Documents and I find that they are the same as the publicly available documents filed as exhibits in proceedings before BCUC.

[31] I conclude that the Power Point Documents are excluded from the scope of FIPPA under s. 61(2)(e) of the ATA. As a result, is not necessary for me to consider whether s. 61(2)(d) also applies to those records.

[32] The Power Point Documents account for most of the pages in the Named Records. The remaining pages are email communications.[35] The emails are not transcriptions or tape recordings of a tribunal proceeding, nor are they documents submitted in a hearing for which public access is provided by a tribunal. BCUC has not adequately explained, and I cannot see, how ss. 61(2)(d) or (e) might apply to these emails.

[33] I conclude that ss. 61(2(d) and (e) of the ATA do not apply to the emails in the Named Records, so they are not excluded from the scope of FIPPA. Other than the information BCUC severed under s. 15, which Richmond no longer seeks to access, BCUC did not rely on any exceptions to disclosure under FIPPA to withhold those emails. I conclude therefore that, other than the s. 15 information, BCUC is not authorized to withhold those emails.

Public interest disclosure, s. 25

[34] Richmond says that BCUC should disclose all of the information in dispute under s. 25(1)(b) of FIPPA. The relevant parts of s. 25 state:

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> …
>
> (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.

[34] This finding has previously been made by this office in Order F22-41, 2022 BCIPC 46 (CanLII) at para 30 and Order F24-14. 2024 BCIPC 20 (CanLII) at para 21.
[35] Pages 1-4 and 1-14of the two packages of Named Records.

[35] Previous orders have found that because s. 25 overrides all other provisions in FIPPA, [36] it applies in only the clearest and most serious situations.

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

[36] 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.[37]

[37] 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.[38] 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.

[38] Disclosing information in the "public interest" is not about satisfying a general interest or curiosity.[39] 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.[40]

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

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[36] 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.
[37] 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) at para 14.
[38] Investigation Report F16-02, 2016 CanLII Docs 4591 at p. 27.
[39] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC) at para 33.
[40] Order 00-16, 2000 BCIPC 7714 (CanLII), p. 14.

[39] Richmond says its access request relates to its concerns about the Municipal Inquiry including lack of independence, lack of transparency, regulatory capture, reasonable apprehension of bias, and conflict of interest.[41]

[40] Richmond says that a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure of the records responsive to its access request is plainly and obviously in the public interest.

[41] Richmond further says the release of the records would contribute in a substantive way to the limited body of available information and would meaningfully contribute to holding the BCUC accountable for its actions and decisions.[42]

[42] Richmond says that its concerns outlined above are shared by four interveners in the Municipal Inquiry as well as the BC Solar Commission.[43] Richmond also says existing social media commentary about the Municipal Inquiry demonstrates that it has generated public discussion and debate.[44]

[43] 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.[45] 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.

[44] 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 the Municipal Inquiry.[46] BCUC says there is nothing in the disclosure of these records that would advance the dialogue,[47] assist the public in making informed political decisions, or hold BCUC to account for the alleged bias or lack of independence.[48]

[45] BCUC relies on previous orders where the OIPC considered whether the public interest is engaged in the context of Richmond's concerns about the Municipal Inquiry. BCUC says the same reasoning ought to apply here.[49]

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[41] Richmond's submission at para 26.
[42] *Ibid* at para 24.
[43] *Ibid* at para 27.
[44] *Ibid* at para 25.
[45] BCUC's initial submission at para 26.
[46] *Ibid* at para 30.
[47] *Ibid* at para 31.
[48] *Ibid* at para 33.
[49] BCUC's reply submission at para 10.

Analysis, s. 25(1)(b)

[46] For the reasons that follow, I find that s. 25(1)(b) does not require BCUC to disclose the records.

[47] 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.

[48] Previous orders have examined whether the public interest is engaged by Richmond's concerns about a reasonable apprehension of bias in BCUC's Municipal Inquiry. In three previous orders, the OIPC found the public interest is not engaged in those circumstances.[50]

[49] The analysis in previous orders highlighted 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 adopt this same analysis here.

[50] I find that the concerns raised by Richmond are not systemic in nature. Instead, these concerns are about a discrete and isolated inquiry. As with the previous orders, I see no evidence of systemic concerns about BCUC's appointments to other inquiries. Richmond's submissions do not persuade me that this matter is clearly in the public interest.

[51] 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 though, I examined the withheld information[51] and find this information is not even related to the Municipal Inquiry. In my view, this information would not contribute meaningfully to public policy discussions about independence, transparency, regulatory capture, reasonable apprehension of bias, or conflict of interest. Further, it would not add in a substantive way to the body of information that is already available about those topics.

[52] I find that s. 25(1)(b) does not require BCUC to disclose any of the records.

[53] I will now consider whether s. 13 authorizes BCUC to refuse to disclose any of the remaining information in dispute.

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[50] F23-94, 2023 BCIPC 110 (CanLII) at paras 18-24; F24-64, 2024 BCIPC 74 (CanLII) at paras 54-61; and F24-70, 2024 BCIPC 80 (CanLII) at paras 25-30.
[51] I did not consider the application of s. 25(1) to the Named Records because no FIPPA exceptions (other than s. 15) were applied to those records.

Advice or recommendations, s. 13

[54] BCUC applied s. 13 to the following information in the Working Group Records:

- entire drafts of a document about the clean grid initiative that was prepared by the Working Group (Clean Grid Initiative Drafts);
- entire minutes of the meetings of the Working Group (Minutes); and
- entire terms of reference document (Terms of Reference).

[55] 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. 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.[52]

[56] The terms "advice" and "recommendations" are not defined in FIPPA but the courts have interpreted those terms and the OIPC has routinely adopted those interpretations in the s. 13(1) analysis. I adopt those same interpretations here:

- "Recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.
- "Advice" has a broader meaning than recommendations[53] and includes:
  - opinions that involve the exercise of judgment and skill in weighing the significance of matters of fact on which a public body must make a decision for future action;[54]
  - factual information that is integral to advice or recommendations because it was "compiled and selected by an expert, using [their] expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or … the expert's advice can be inferred from the work product".[55]

[57] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences to be drawn about advice or recommendations.[56]

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[52] *John Doe* v. *Ontario (Finance)*, 2014 SCC 36 at paras 45-51 [*John Doe*].
[53] *John Doe ibid* at para 24.
[54] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113 [*College*].
[55] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at para 94 [*PHSA*].
[56] *John Doe supra* note 47 at para 24.

[58] The first step in the s. 13(1) analysis is to decide if the information in dispute would reveal advice or recommendations. If it would, then I must decide whether the information falls into any of the categories listed in s. 13(2) or whether it has been in existence for more than 10 years under s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, that information cannot be withheld under s. 13(1).

Parties' submissions, s. 13(1)

[59] BCUC says 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.[57] BCUC says that the information withheld under s. 13 relates to recommendations relating to the clean grid initiative between the governments of British Columbia and Washington State.[58] It says that some of the information withheld under s. 13 is recommendations developed by or for "the minister."[59] BCUC does not specify what "minister" the recommendations were developed by or for.

[60] Richmond says BCUC has not explained how the information withheld under s. 13 relates to any particular recommendation. Richmond further says BCUC has not provided any evidence showing that the material relates to a suggested course of action that will ultimately be accepted or rejected by the governments of British Columbia or Washington State.[60]

[61] The Ministry says s. 13 applies to the entirety of the Clean Grid Initiative Drafts, Minutes, and to emails in the Working Group Records. The Ministry says that the advice or recommendations are contained directly in the records, in comment boxes, or in tracked changes in Microsoft Word. In support of its position, the Ministry cites a number of previous OIPC orders that have found that s. 13(1) applies to editorial advice and recommendations.[61]

[62] In reply to the Ministry's submissions, Richmond says even considering the broader application of s. 13(1) authorized by prior OIPC decisions as summarized by the Ministry, the presence of material subject to s.13(1) within an individual draft does not inherently make the entirety of that draft subject to section 13(1). Richmond says the background and factual information within the

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[57] BCUC's initial submission at para 52.
[58] *Ibid* at at para 54.
[59] *Ibid* at para 55.
[60] Richmond's submission at para 60.
[61] Ministry's submission at para 25 relying on Order 03-37, 2003 CanLII 49216 (BC IPC) at para 57; Order F14-44, 2014 BCIPC 47 (CanLII) at para 32; Order 04-15, 2004 CanLII 7271 (BC IPC) at para 15; Order F18-38, 2018 BCIPC 41 (CanLII) at para 18; and Order F15-26, 2015 BCIPC 28 (CanLII) at para 29.

drafts that does not reveal advice and recommendations is subject to disclosure and BCUC is required to undertake a line-by-line review.[62]

Analysis, s. 13(1)

[63] For the reasons that follow, I find that s. 13(1) applies to some, but not all, of the information withheld under that section. As mentioned above, BCUC withheld the Clean Grid Initiative Drafts, Minutes, and Terms of Reference in their entirety under s. 13(1). BCUC does not seem to have applied a line-by-line review as required by FIPPA. I did conduct a line-by-line review.

[64] For the Minutes[63] and the Terms of Reference,[64] I cannot see, and neither BCUC nor the Ministry adequately explain, how s. 13(1) applies to any information in those records. Specifically, I do not see how the information in those records reveals advice or recommendations developed by or for a public body. I find that none of the information in the Minutes and Terms of Reference is advice or recommendations within the meaning of s. 13(1).

[65] For the reasons that follow, I am satisfied that all of the information in the Clean Grid Initiative Drafts does qualify as advice and recommendations under s. 13(1). To be clear at the outset of this analysis, I am not suggesting that s.13(1) applies to the Clean Grid Initiative Drafts in the blanket manner proposed by BCUC and the Ministry. I conducted a line-by-line review before coming to my conclusion that s. 13(1) authorizes BCUC to withhold the Clean Grid Initiative Drafts. This conclusion is very specific to the expert deliberative process visible to me on the face of these records.

[66] The Working Group that generated and edited the Clean Grid Initiative Drafts was composed of industry experts from both the public and private sector.[65] The purpose of this Working Group was to provide industry experts an opportunity to develop and give advice and recommendations about a clean grid initiative to the government of British Columbia via Premier Horgan and to the Minister of Energy, Mines and Low Carbon Innovation at the time (the "Minister"), as well as to the government of Washington.[66] It is clear to me that the Clean Grid Initiative Drafts were used as a forum for the deliberations and discussion of that Working Group.

[67] The Clean Grid Initiative Drafts are all different versions of one document. There are 27 versions of this document that appear throughout the Working Group Records. These versions contain many variations of the same information

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[62] Richmond's reply to the Ministry's submissions at paras 7-8.
[63] Working Group Records, pp. 51-52, 90-91, 96-97, 420-423, 432-433 and 440-444.
[64] Working Group Records, pp. 53-56 and 61-72.
[65] Senior Director's affidavit *supra* note 23 at para 5.
[66] Senior Director's affidavit *supra* note 23 at para 5.

as well as differing information. They also contain extensive suggested edits in tracked changes as well as editorial comments and replies to comments. There is no straight line from version "A" to version "Z". What I mean by this is that information that was subtracted from, added to, or moved around in one version does not appear in the same manner in other versions. It appears to me that the experts involved in contributing to the development of the drafts were not all always working from the same version.

[68] I find that disclosing the withheld drafts and draft wording suggestions that accompany them would reveal advice and recommendations[67] prepared for the Minister and Premier. Many experts were involved in developing these drafts. The drafts reveal their discussions, recommendations, advice, and opinions about a clean grid action plan, including what such a plan should say and how it should operate.[68]

[69] I can also see there are facts contained in the Clean Grid Initiative Drafts. I find these facts are intermingled with, and an integral part of, the advice and recommendations.[69] I find that these intermingled background facts and expert opinions are advice within the meaning of s. 13(1).

[70] The other part of the s. 13(1) analysis is to decide if the advice and recommendations were prepared for or by a public body. I accept the affidavit evidence of the Ministry's Senior Director in this regard. She says that the purpose of the Working Group, as reflected in the Working Group Records, was to provide industry experts an opportunity to develop and give advice and recommendations to the government of British Columbia via the Premier and the Minister. She also says that the Premier received the final version resulting from the Drafts.[70] Public bodies under FIPPA include any ministry of the government of British Columbia, including the Office of the Premier.

[71] For the reasons above, I find all of the information within the Clean Grid Initiative Drafts is advice and recommendations prepared for two public bodies, specifically the Minister and the Office of the Premier.

Sections 13(2) and 13(3) exceptions to disclosure

[72] The next step in the s. 13(1) analysis is to consider whether any of the circumstances under ss. 13(2) and (3) apply to the information I found would reveal advice or recommendations. Subsections 13(2) and (3) identify certain

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[67] For a similar analysis, see Order F20-37, 2020 BCIPC 43 (CanLII) at para 34.
[68] *Ibid* at para 36.
[69] *Insurance Corporation of British Columbia* v. *Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) at paras 52-53.
[70] Senior Director's affidavit at paras 5-6.

types of records and information that a public body may not withhold under s. 13(1). The parties raise ss. 13(2)(a) and 13(2)(k).

Section 13(2)(a) – factual material

[73] Section 13(2)(a) says a public body must not refuse to disclose any factual material. The term "factual material" is not defined in FIPPA. However, in distinguishing it from "factual information" which may be withheld under s. 13(1), the courts have interpreted "factual material" to mean "source materials" or "background facts in isolation" that are not necessary to the advice provided.[71] Thus, where facts are an integral component of advice and recommendations, they are not "factual material" within the meaning of s. 13(2)(a).

[74] Some of the information in the Clean Grid Initiative Drafts is factual in nature. However, I find that the facts in the Drafts are integral to the expert opinions of members of the Working Group that are expressed in the Clean Grid Initiative Drafts. As a result, I find that this information is not the kind of distinct source material or isolated background facts that courts have found to be "factual material." Accordingly, I find that none of information at issue is "factual material" within the meaning of s. 13(2)(a).

Section 13(2)(k) – report of a task force, committee, council or similar body

[75] Section 13(2)(k) says the head of a public body must not refuse to disclose under s. 13(1) "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body." Past OIPC orders have defined the term "report" under s. 13(2)(k) as "a formal statement or account of the results of the collation and consideration of information"[72] and "an account given or opinion formally expressed after investigation or consideration."[73]

[76] In my view, the final version of the Clean Grid Initiative Drafts might very well be subject to s. 13(2)(k) but that final version is not in the responsive records. The Drafts are not, in my view, the formal result required for s. 13(2)(k) to apply.

[77] I have considered the other exceptions in s. 13(2) and I find that none apply.

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[71] *PHSA* supra note 55 at para 94.
[72] Order F17-33, 2017 BCIPC 35 (CanLII) at para 17.
[73] Order F17-39, 2017 BCIPC 43 (CanLII) at para 46 adopting the *Canadian Oxford Dictionary* (2nd ed.), Toronto: Oxford University Press definition of "report".

Section 13(3)

[78] Finally, s. 13(3) says that a public body cannot withhold under s. 13(1) any information in a record that has been in existence for 10 or more years. The records in dispute here are not that old, so s. 13(3) does not apply.

CONCLUSION

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

1. Subject to item 2 below, I confirm, in part, BCUC's decision that s. 61(2)(e) of the *Administrative Tribunals Act* applies to the Named Records.

2. Sections 61(2)(d) and (e) do not apply to the email communications in the Named Records and I require BCUC to disclose those records to Richmond.[74]

3. I confirm BCUC's decision that it is not required under s. 25(1)(b) to disclose any of the information in the responsive records.

4. Subject to item 5 below, I confirm, in part, BCUC's decision to refuse access under s. 13(1) to information in the Working Group Records.

5. BCUC is not authorized under s. 13(1) to withhold the Minutes[75] or the Terms of Reference[76] in the Working Group Records. I require BCUC to give Richmond access to this information.

6. BCUC must concurrently copy the OIPC registrar of inquiries on its cover letter to Richmond, together with a copy of the records described at items 2 and 5 above.

Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by January 31, 2025.

December 17, 2024

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

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[74] Pages 1-4 in the 66-page package and pages 1-14 in the 67-page package.
[75] Working Group Records, pp. 51-52, 90-91, 96-97, 420-423, 432-433 and 440-444
[76] Working Group Records, pp. 53-56 and 61-72