Order F25-03

BRITISH COLUMBIA UTILITIES COMMISSION

Carol Pakkala
Adjudicator

January 13, 2025

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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 the communications of two of its named commissioners over a three year period. 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, in part, BCUC's decisions under s. 61(2)(a) (application of FIPPA) of the ATA and s.13(1) (advice or recommendations) of FIPPA. The adjudicator confirmed, in full, BCUC's decision under s. 14 (solicitor client privilege) of FIPPA. The adjudicator ordered BCUC to disclose the remaining information to Richmond.

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

INTRODUCTION

[1] The City of Richmond (Richmond) requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records held by the British Columbia Utilities Commission (BCUC). The request was for all communications between two named BCUC commissioners and six other named individuals[1] over a three year period. In response to the request, BCUC identified 29,831 pages of responsive records consisting of emails, some of which included attachments.

[2] BCUC withheld the records in their entirety under s. 61(2)(a) of the *Administrative Tribunals Act* (ATA).[2] To the extent that the ATA does not apply, BCUC says, in the alternative, the records are outside the scope of FIPPA under

[1] Other BCUC commissioners and its secretary. The request included all of the communications these commissioners were copied on.
[2] [SBC 2004] c. 45.

s. 3(3)(e)[3] or excepted from disclosure by ss. 13(1) (advice or recommendations), 14 (solicitor client privilege), and 22 (unreasonable invasion of third party personal privacy) of FIPPA.[4] Richmond claims s. 25(1)(b) applies to these records on the grounds that their disclosure 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 and mediation process did not resolve this matter and Richmond requested that it proceed to an inquiry.

Procedural history of this inquiry

[4] Given the substantial OIPC resources that would be required to adjudicate the volume of responsive records, I made several attempts to have the parties narrow the scope of records for review. Those attempts included the following:

- February 2024: As the parties' initial submissions indicated they agreed the ATA would apply to BCUC's substantive decision-making records I asked them to negotiate with a view to eliminating such records from the scope of this review. I set the context for my request as being mindful of the principles of the economy of adjudicative resources, consistency, finality, and the integrity of the administration of justice. I expressed my view that narrowing what is actually in dispute in this inquiry would allow for a more effective, thorough, and sound review and analysis.[5] The parties' negotiations were unsuccessful and no records were removed from the scope of this review as a result of this first attempt.
- June 2024: I asked the parties for submissions on the OIPC's discretion to reduce the number of pages for review using a sampling approach.[6] Richmond's submissions convinced me that it could not meaningfully identify an appropriate sample. No records were removed from the scope of this review as a result of this second attempt.
- September 2024: Given the lack of any forward movement toward making the volume of records to adjudicate manageable, I wrote to the parties asking for their submissions on whether the inquiry should be cancelled.[7] During the course of that submission phase, Richmond narrowed [8] its access request from "all" communications of the named commissioners to only their communications related to a specific matter. The narrowing of Richmond's access request resulted in BCUC identifying a new responsive records package of 322 pages.

[3] See below for comment on s. 3(1)(b) renumbered to 3(3)(e).
[4] From this point forward, when I refer to sections, I am referring to sections of FIPPA unless I indicate otherwise.
[5] Adjudicator's February 7, 2024 letter to the parties.
[6] Adjudicator's June 18, 2024 letter to the parties.
[7] Adjudicator's September 19, 2024 letter to the parties.
[8] Richmond's additional submissions dated October 17, 2024 at para 20.

Preliminary Matters

Matters outside the scope of this inquiry

[5] 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 they are relevant to the issues that I must decide in this inquiry.

Section 22 no longer in dispute

[6] Section 22 is listed in the OIPC's Notice of Inquiry. I did not see any s. 22 redactions in the new 322-page records package. BCUC confirmed that it did not withhold any information from those 322 pages under s. 22. Consequently, I find that s. 22 is no longer at issue and will not consider it further.

Section 19

[7] While s. 19 is not listed in OIPC's Notice of Inquiry, BCUC makes submissions about it and some information in the records is marked as withheld under s. 19. BCUC says it withheld the name of an individual whose personal safety is at risk if their name becomes public. Richmond says it is not seeking the information withheld under s. 19, to the extent that it only contains references to the individual whose personal safety is at risk if their name becomes public.[9] I find that the only information withheld under s.19 is the name of the individual. For this reason, I find that BCUC's decision to refuse access to this name under s. 19 is not an issue in this inquiry and I will not consider it further.

Section 3(1)(b) of FIPPA renumbered

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

[9] December 17, 2024 email response from the parties to an OIPC inquiry about the application of s. 19.

ISSUES AND BURDEN OF PROOF

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

1. The records are outside the scope of FIPPA pursuant to s. 61(2)(a) of the *Administrative Tribunals Act*.
2. The records are outside the scope of FIPPA pursuant to s. 3(3)(e).
3. BCUC is authorized by s. 14 to refuse to disclose any information in dispute.
4. BCUC is required to disclose any information in the records pursuant to s. 25(1)(b).
5. BCUC is authorized by s. 13(1) to refuse to disclose any information in dispute.

[10] 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 ss. 3(3)(e) or 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.[10]

[11] 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 ss. 13(1) or 14.

DISCUSSION

Background

[12] 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. Richmond provides energy utility services to its residents through its own wholly owned subsidiary company.

[13] At the outset of the Municipal Inquiry, Richmond objected to the composition of its panel on the grounds of a reasonable apprehension of bias.[11] Richmond also disagreed with the decision of the Municipal Inquiry that energy companies which are wholly owned by a municipality are subject to regulation. Richmond maintained the Municipal Inquiry lacked independence and clear separation between BCUC and certain energy companies that it regulates and

[10] 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).

[11] 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 maintained its Deputy Chair was not involved in the Municipal Inquiry.

that it intruded on the exclusive jurisdiction of municipalities over the provision of energy utility services.

[14] Richmond sought leave from the BC Court of Appeal (BCCA) to challenge both the composition of the Municipal Inquiry panel and its decision. The BCCA denied leave on the reasonable apprehension of bias issues on the grounds that they were without merit.[12] 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.[13]

[15] The access request under review in this current inquiry was one of eight inter-related requests[14] 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."[15]

[16] In this access request, Richmond seeks all communications of two named BCUC commissioners and six other named individuals over a three year period, in relation to the Municipal Inquiry.[16] One of the two commissioners identified in Richmond's access request was the chair of the Municipal Inquiry panel. Richmond alleges the other commissioner was improperly involved in decisions related to the Municipal Inquiry. Richmond says both commissioners should be disqualified from any involvement in the Municipal Inquiry.[17]

Records in dispute

[17] There are approximately 322 pages of records in dispute. The records consist of email communications and document attachments. BCUC withheld the records in their entirety.

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[12] *North Vancouver (City)* v. *British Columbia (Utilities Commission)*, 2023 BCCA 203 (CanLII). The Municipal Inquiry decided that local government corporations, wholly owned and operated by a local government and providing energy utility services exclusively within its boundaries, are public utilities and are not excluded from regulation under the *Utilities Commission Act*.
[13] Richmond's July 13, 2023 reply submission at para 10.
[14] In addition to this order, the OIPC has issued six 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); Order F24-101, 2024 BCIPC 115 (CanLII); and Order F22-18, 2022 BCIPC 20 (fee dispute). The 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.
[15] Richmond's July 13, 2023 reply submission at para 8.
[16] "In relation to the Municipal Inquiry" is the modification to the access request agreed to by Richmond in its October 17, 2024 submission at para 20.
[17] Richmond's July 13, 2023 reply submission at paras 9-10.

Outside scope, ss. 61(2)(a) of the ATA

[18] BCUC applied s. 61(2)(a) of the ATA to all of the records. The ATA governs certain administrative tribunals in British Columbia, including BCUC. The parts of s. 61 of the ATA that are relevant in this case state:[18]

> 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; […]

[19] Therefore, if s. 61(2)(a) of the ATA applies to the records at issue, FIPPA does not apply and there is no right of access to those records under s. 4 of FIPPA.

[20] I previously considered the application of s. 61(2)(a) of the ATA to the records held by BCUC in Order F24-14. In that order, 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 is broader in meaning;[19]
- extends to more than records where a person is acting in a judicial or quasi-judicial capacity in relation to the record in question;[20]
- does not exclude all records of administrative tribunals from FIPPA;[21]
- codifies the common law principle of deliberative secrecy[22] and applies to exclude communications to which deliberative secrecy applies.[23] Deliberative secrecy prevents disclosure of how and why decision-makers make their decisions and extends to the administrative aspects of the decision making process which directly affect adjudication.[24]

[21] I applied the above interpretation of s. 61(2)(a) of the ATA to the records at issue in F24-14 and concluded that the principle of deliberative secrecy, as

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[18] 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.
[19] Order F24-14, 2024 BCIPC 20 (CanLII) at para 26.
[20] *Ibid* at para 27.
[21] *Ibid* at para 28
[22] *Ibid* at para 30.
[23] *Ibid* at para 32.
[24] *Ibid* at para 30.

codified by s. 61(2)(a) of the ATA, extends to information about the appointment of the panel members to the Municipal Inquiry.[25] I also applied this interpretation to records held by BCUC in Order F24-64.[26] In that order, I concluded that the use of the word "of" in s. 61(2)(a) of the ATA means that a personal note, communication, or draft decision must have been authored by one of these individuals, not just sent or copied to them, for it to apply to that record.

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

[22] BCUC says s. 61(2)(a) of the ATA protects or codifies the common law principle of deliberative secrecy.[27] BCUC further says the purpose of protecting deliberative secrecy is to ensure public confidence in impartial and independent decision making by providing peace of mind to decision-makers.[28]

[23] Richmond says 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.[29] Richmond further says it is not possible that every communication it requested falls within this category.

Analysis, s. 61(2)(a) of the ATA

[24] BCUC withheld the entire records package under s. 61(2)(a) of the ATA. These records consist of email communications and document attachments. For organizational purposes, I have grouped the emails into three categories: BCUC commissioner emails, BCUC staff emails, and BCUC lawyer emails.

[25] 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."

[26] The OIPC has previously considered whether BCUC is a tribunal within the meaning of s. 61(1) of the ATA.[30] For the reasons identified in those orders, I am satisfied that BCUC is a "tribunal" within the meaning of s. 61(1) of the ATA.

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[25] *Ibid* at para 31.
[26] Order F24-64, 2024 BCIPC 74 (CanLII) at para 28.
[27] BCUC uses the terms deliberative privilege and deliberative secrecy interchangeably. For consistency, I use deliberative secrecy throughout this order.
[28] BCUC's initial submission at para 18 citing *Kosko c. Bijimine*, 2006 QCCA 671 at para 40, citing *Valente v. the Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at 689.
[29] Richmond's July 13, 2023 reply submission at para 31.
[30] For example, Orders F24-14 and F24-64 discussed above and Order F22-41, 2022 BCIPC 46 (CanLII) at para 30.

[27] BCUC relies on various provisions of the *Utilities Commission Act*[31] (UCA) to say that its commissioners are tribunal members and therefore are decision makers for the purposes of s. 61(2)(a) of the ATA.[32] I agree. I find the chair and commissioners of the BCUC are tribunal members for the purposes of s. 61 of the ATA.

[28] The affidavit evidence provided by BCUC identifies its commissioners and chair for the time period covered by Richmond's access request.[33] Consistent with my previous orders, 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.

BCUC commissioner emails

[29] Many of the emails in the records are communications authored by BCUC commissioners. I am satisfied that these communications are about what, how, and why those commissioners made decisions. In other words, I am satisfied that deliberative secrecy applies to prevent disclosure of these communications and they are therefore excluded from the scope of FIPPA by s. 61(2)(a) of the ATA.

BCUC staff emails

[30] Other communications in the records are emails that were either addressed or copied to the BCUC commissioners by a BCUC staff member. I find that these emails are not communications "of" BCUC commissioners.[34]

[31] Most of the BCUC staff emails were authored by one particular staff member[35] whose signature block indicates they are a regulatory analyst. While the definition of decision maker in s. 61(1) of the ATA includes "other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process," I find there is insufficient evidence to conclude the regulatory analyst meets that part of the definition.

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[31] RSBC 1996, c. 473.
[32] BCUC's initial submission at paras 10-11.
[33] Affidavit of BCUC's secretary (Secretary) at paras 4-5.
[34] This finding is consistent with Order F24-64, 2024 BCIPC 74 at para 28.
[35] Records at pp. 5, 6, 10, 17, 21, 22, 23, 24, 26, 27, 29, 30, 32, 33, 36, 37, 38, 45, 46, 47, 48, 49, 50, 53, 60, 63, 67, 68, 70, 72, 73, 74, 75, 76, 78, 79, 80, 82, 91, 92, 93, 95, 96,106, 112, 116, 119, 120, 121, 125, 126, 128, 135, 135, 137, 138, 145, 146, 148, 155, 161, 162, 163,164, 167, 168, 169, 175, 176, 177, 178, 182,183, 201, 202, 203, 204, 205, 206, 207, 208, 210, 211, 212, 214, 219, 220, 229, 230, 233, 236, 237, 240, 241, 242, 243, 244, 245, 246, 247, 249, 250, 251, 253, 256, 257, 258, 259, 263, 264, 275, 278, 280, 281, 283, 284, 285, 293, 294, 296, 301,302, 306, 307, 308, 309, 310, 311, 312.

[32] The other staff emails do not include a position title in the signature block.[36] My review of the content of those emails indicates the authors are not decision makers within the meaning of s. 61(1). Consequently, I find that none of the staff emails are communications of a decision maker, so s. 61(2)(a) of the ATA does not apply to exclude them from disclosure.

[33] Given that s. 61(2)(a) does not apply to the BCUC staff emails, FIPPA applies. BCUC also refused access to these emails under ss. 3(3)(e) and 13(1) so I will consider them in that context below.

BCUC lawyer emails

[34] There are emails in the records package that I refer to here as BCUC lawyer emails. These emails are: 1) emails from BCUC commissioners to BCUC's lawyer; and 2) emails from BCUC's lawyer to BCUC's commissioners.

[35] For the first category, I can clearly see the BCUC commissioners are communicating in their capacity as decision makers and these emails are about their decision-making duties. I find that these emails are captured by the principle of deliberative secrecy and, therefore, s. 61(2)(a) of the ATA applies to them.

[36] For the second category, I find these emails are communications "of" the lawyer, and not communications "of" a "decision maker" as that term is defined by s. 61(1). Therefore, s. 61(2)(a) of the ATA does not apply to these emails of the lawyer. BCUC also applied ss. 3(3)(e), 13, and 14 to these emails so I consider them further below.

Document attachments

[37] BCUC applied s. 61(2)(a) of the ATA to draft decisions of BCUC's commissioners and to a planning tool document attached to the emails discussed above. I found above that the BCUC commissioners are decision makers. I find the draft decisions in the records package are the draft decisions of BCUC commissioners, so they are clearly captured by s. 61(2)(a) of the ATA.

[38] The planning tool document sets out information related to BCUC commissioners' decision making duties, including specific details about matters in progress. I am satisfied that deliberative secrecy applies to this document because it is a communication about the administrative aspects of the decision making process which directly affects adjudication. I find s. 61(2)(a) of the ATA applies to the planning tool document.

[36] Records at pp. 55, 56,57, 59, 81,98, 99, 101, 102, 104, 105, 186, 188,189, 190, 192,193, 224, 225, 226, 228, 260, 261, and 262.

[39] In conclusion, I find that s. 61(2)(a) of the ATA applies to most of the records and, as a result, they are excluded from the scope of FIPPA. However, I find that s. 61(2)(a) of the ATA does not apply to the emails *from* BCUC staff and the BCUC lawyer *to* the BCUC commissioners, so FIPPA applies to them.

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

[40] BCUC also applied s. 3(3)(e) to the entire records package. I only consider here those pages that I found were not excluded from the scope of FIPPA by s. 61(2)(a) of the ATA.

[41] 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;
> …

[42] The BC Supreme Court commented on the purpose of this section[37] 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.[38]

[43] 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.[39]

[44] 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:

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[37] Section 3(3)(e) is the same as the former s. 3(1)(b). It was re-numbered as previously noted.
[38] 2004 BCSC 1597 at para 70.
[39] 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).

> 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.
>
> (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?
>
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative.[40]

[45] The application of the above principles establishes that 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.[41]

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

[46] BCUC says the scope of s. 3(3)(e) is narrower than that of s. 61(2)(a) of the ATA in that its application involves a consideration of both the general circumstances in which the tribunal operates, and the specific way the decision maker acted.[42]

[47] BCUC asks that I depart from a previous finding of former Commissioner Loukidelis in Order 00-16[43] where he concluded that while communications from tribunal members to staff are captured by s. 3(3)(e), communications from staff to panel members are not.[44] BCUC disagrees with that finding saying if the response from staff is disclosed, one could easily discern what the panel member is asking the staff member. I understand BCUC to say that this approach defeats

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[40] *M.N.R.* v. *Coopers and Lybrand,* 1978 CanLII 13 (SCC), [1979] 1 S.C.R. 495, pp. 7-8.
[41] Order F14-44, 2014 BCIPC 47 (CanLII) at para. 13-16.
[42] BCUC's initial submission at para 65.
[43] Order 00-16, 2000 CanLII 7714 (BC IPC).
[44] BCUC's initial submission at para 59.

the purpose of protecting deliberative secrecy which it says could not have been intended by the legislature.[45]

[48] Richmond says BCUC has not met its burden to prove that s. 3(3)(e) applies to the records.[46] Richmond says it is an absurdity to suggest that all communications are exempt from FIPPA. Richmond stresses that s. 3(3)(e) only applies where a person is actually acting in a judicial or quasi-judicial capacity in respect of the record at issue and is engaged in the deliberative processes that are protected by the section. Richmond points out that although BCUC may disagree with Order 00-16, the OIPC has repeatedly relied on it and cites orders to that effect.[47]

[49] BCUC responds to Richmond's position by saying it relies on the principle of "deliberative privilege", a term which I understand they use interchangeably with "deliberative secrecy". BCUC says, "Where deliberative privilege exists, applicants seeking disclosure of the decision-maker's records have the burden to establish a breach of natural justice or some other impropriety requiring disclosure. Where a *prima facie* case is not established then the privilege remains, and disclosure cannot be ordered." [48] BCUC asserts deliberative privilege over the Records and says Richmond has failed to establish a *prima facie* case.[49]

Analysis, s. 3(3)(e)

[50] As noted above, 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.

[51] The records that remain at issue under s. 3(3)(e) are those that I have already found are the communications from BCUC staff and BCUC's lawyer to BCUC's commissioners.

[52] 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.

[53] BCUC has not convinced me there is a valid reason to depart from the logic applied in Order 00-16 to find that while communications from tribunal

[45] BCUC's initial submission at para 61.
[46] Richmond's July 13, 2023 reply submission at para 23.
[47] Richmond's July 13, 2023 reply submission at para 27 referencing Order 00-21, 2000 CanLII 10451 (BC IPC), Order F10-09, 2010 BCIPC 14 (CanLII), Order F10-35, 2010 BCIPC 53 (CanLII), and Order F14-44, 2014 BCIPC 47 (CanLII).
[48] BCUC's July 27, 2023 reply submission at para 8.
[49] BCUC's July 27, 2023 reply submission at para 8.

members to staff are captured by s. 3(3)(e), communications from staff to panel members are not.

BCUC staff emails

[54] As set out above, my review of the emails from BCUC staff to the commissioners shows that the majority are about administrative issues. These emails do not reflect the author of the emails acting in any kind of judicial or quasi-judicial capacity. For this reason, these emails are not captured by s. 3(3)(e).

[55] Other BCUC staff emails are more substantive than administrative in nature. Despite their more substantive content, these emails do not reflect the author acting in a judicial or quasi-judicial capacity. To the contrary, these emails communicate information to BCUC commissioners to enable *them*, not the authors, to exercise judicial or quasi-judicial functions.

[56] In conclusion, I find that communications *from* staff *to* BCUC commissioners are not the communications "of a person who is acting in a judicial or quasi-judicial capacity", so s. 3(3)(e) does not apply.

BCUC lawyer's emails

[57] I find that s. 3(3)(e) also does not apply to the communications from BCUC's lawyer to its commissioners. The lawyer was clearly communicating in their capacity as BCUC's lawyer, not as a BCUC decision maker.

[58] In conclusion, I find that s. 3(3)(e) does not apply to any the emails the BCUC staff and the BCUC lawyer authored, so those emails are subject to FIPPA.

[59] The parties dispute the application of ss. 13, 14, and 25 to the records, so I consider those provisions next.

Solicitor client privilege, s. 14

[60] BCUC applied s. 14 to the emails from BCUC's lawyer to its commissioners. BCUC provided these emails for my review in this inquiry.

[61] 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.[50] BCUC

[50] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner), 2002 BCCA 665* at para 26.

relies on legal advice privilege.

[62] For information to be protected by legal advice privilege it must be 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, opinion or analysis.[51]

[63] Not every communication between a solicitor and their client is privileged, but if the conditions above are satisfied, then legal advice privilege applies to the communication.[52]

[64] The courts have established that privilege also applies to information that, if disclosed, would reveal, or allow an accurate inference to be made about, privileged information, e.g., internal client communications that transmit or comment on privileged communications with lawyers.[53] Further, 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]

[65] I adopt the above test and principles in making my decision.

Parties' submissions, s. 14

[66] BCUC says that information withheld under s. 14 is protected by solicitor client privilege.[55] BCUC says privilege attaches to a continuum of communications.[56] BCUC further says it is in the public interest that the free flow of legal advice be encouraged because without that "access to justice and the quality of justice in this country would be severely compromised."[57]

[67] Richmond does not address s. 14 in its submission.

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[51] *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837 [*Solosky*].
[52] *Solosky* at p. 829.
[53] *Solosky* at p. 834.
[54] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 at para 83 and *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority, 2011 BCSC 88* at para 42.
[55] BCUC's initial submission at para 107.
[56] BCUC's initial submission at para 105 citing *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)* 2021 BCSC 266 which BCUC says adopted *Maranda v. Richer,* 2003 SCC 67.
[57] BCUC's initial submission at para 101.

Analysis, s. 14

[68] For the reasons that follow, I am satisfied that legal advice privilege applies to the emails from BCUC's lawyer to its commissioners.

[69] On the face of the records, I can see that these emails are communications between BCUC's lawyer and BCUC commissioners intended by both to be confidential. I can also see they are about providing legal advice, opinion, and analysis.

[70] I find that the emails from BCUC's lawyer to its commissioners are protected by legal advice privilege. For this reason, I find s. 14 authorizes BCUC to refuse to disclose those emails.

Public interest disclosure, s. 25

[71] Richmond says that BCUC should disclose all of the information in dispute under s. 25(1)(b) of FIPPA. However, s. 25 cannot apply to the pages of the records that I found above are outside the scope of FIPPA due to s. 61(2)(a) of the ATA. Further, s. 25 cannot apply to the records I found BCUC may refuse to disclose under s. 14 because the BC Court of Appeal has recently said s. 25 does not override solicitor client privilege.[58] Therefore, what remains in dispute under s. 25 are the BCUC staff emails which I found above are subject to FIPPA.

[72] 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.

[73] Previous orders have found that because s. 25 overrides all other provisions in FIPPA,[59] it applies in only the clearest and most serious situations.

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[58] *British Columbia (Children and Family Development)* v. *British Columbia (Information and Privacy Commissioner)*, 2024 BCCA 190 at para 63. The court said s. 25 does not contain the kind of clear, explicit, and unequivocal language required to override solicitor client privilege and s. 14.

[59] However, it does not override s. 14 as per note 59, *Ibid*.

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

[74] 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.[60]

[75] In OIPC Investigation Report F16-02, former Commissioner Denham provided guidance for how to decide if the disclosure of specific information is clearly in the public interest.[61] 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.

[76] Disclosing information in the "public interest" is not about satisfying a general interest or curiosity.[62] 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.[63]

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

[77] Richmond says its access request relates to its concerns about the Municipal Inquiry including lack of independence and transparency, bias, conflict of interest and regulatory capture.[64]

[78] Richmond says the requested records relate to matters that are clearly in the public interest, as they will contribute in a meaningful way to holding BCUC

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[60] 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.
[61] Investigation Report F16-02, 2016 CanLII Docs 4591 at p. 27.
[62] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC) at para 33.
[63] Order 00-16, 2000 BCIPC 7714 (CanLII), p. 14.
[64] Richmond's submission at para 12.

accountable for its decisions and actions and will ensure that the fundamental principles of integrity, transparency and independence demanded of BCUC are not ignored.[65] Richmond says that its concerns were shared by four interveners in the Municipal Inquiry as well as by the BC Solar Commission.[66]

[79] 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.[67] BCUC acknowledges that, in the abstract, questions about an administrative body's jurisdiction, bias, and lack of independence are undoubtedly matters of public interest.[68]

[80] 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.[69] BCUC says there is nothing in the disclosure of these records that would advance the dialogue on those subjects.[70]

Analysis, s. 25(1)(b)

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

[82] The first step in a s. 25(1)(b) analysis is to determine whether the information concerns a matter that engages the public interest. For instance, is the matter the subject of widespread debate in the media, the Legislature, or by officers of the Legislature or oversight bodies? Does the matter relate to a systemic problem rather than to an isolated situation? 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 high threshold for disclosure.

[83] Four recent OIPC orders have concluded that records that Richmond requested from BCUC about the Municipal Inquiry do not concern a matter that engages the public interest as required by s. 25(1)(b).[71] The analysis in those 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 make the same finding here because the concerns raised by Richmond about the Municipal Inquiry are about a discrete and isolated inquiry. As with the previous

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[65] *Ibid* at para 21.
[66] *Ibid* at paras 13-14.
[67] BCUC's initial submission at para 77.
[68] *Ibid* at para 81.
[69] *Ibid*.
[70] *Ibid* at para 83.
[71] Order F23-94, 2023 BCIPC 110 (CanLII) at paras 18-24; Order F24-64, 2024 BCIPC 74 (CanLII) at paras 54-61; Order F24-70, 2024 BCIPC 80 (CanLII) at paras 25-30, and Order F24-101, 2024 BCIPC 115 (CanLII) at paras 46-52.

orders, I see no evidence of systemic concerns about BCUC's appointments to other inquiries such that the public's interest would be engaged in the way s. 25(1)(b) requires. Richmond's submissions do not persuade me otherwise.

[84] 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[72] and find 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.

[85] In conclusion, I find that disclosing the information in the BCUC staff emails is not clearly in the public interest, so s. 25(1)(b) does not require BCUC to disclose that information.

Advice or recommendations, s. 13

[86] BCUC also applied s. 13 to refuse access to the BCUC staff emails discussed above.

[87] 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.[73]

[88] 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[74] and includes:

[72] 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.
[73] *John Doe* v. *Ontario (Finance)*, 2014 SCC 36 at paras 45-51 [*John Doe*].
[74] *John Doe ibid* at para 24.

- 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;[75]
- 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".[76]

[89] 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.[77]

[90] 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)

[91] 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.[78] BCUC says that the information withheld under s. 13 are communications among commissioners, the commission secretary, and staff regarding advice or recommendations developed by or for the public body and is therefore protected by this permissive exemption.[79]

[92] Richmond does not address s. 13(1) in its submission.

Analysis, s. 13(1)

[93] For the reasons that follow, I find that most of the BCUC staff emails do not reveal advice or recommendations, so BCUC is not authorized to refuse access to them under s. 13(1). These emails are the ones I describe above as administrative in nature. They contain information that reveals actions/steps that are underway or soon to be commenced, the topic being discussed, and summaries of what was said/done about a topic, but not advice or

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[75] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113 [*College*].
[76] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at para 94 [*PHSA*].
[77] *John Doe supra* note 47 at para 24.
[78] BCUC's initial submission at para 96.
[79] *Ibid* at para 98.

recommendations about the topic. This type of information cannot be withheld under s. 13(1).[80]

[94] I find that other BCUC staff emails, described above as more substantive in nature, do reveal advice and recommendations developed by BCUC staff for BCUC commissioners. The information in these emails sets out options and recommendations for BCUC commissioners to decide upon.

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

[95] 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 above would reveal advice or recommendations. Subsections 13(2) identifies certain types of records and information that a public body may not withhold under s. 13(1). I have considered the exceptions in ss. 13(2) and I find that none apply. I have also considered s. 13(3) and find that it does not apply because the records have not been in existence for more than 10 years.

CONCLUSION

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

1. Subject to item 3 below, I confirm, in part, BCUC's decision that s. 61(2)(a) of the *Administrative Tribunals Act* applies to the records, and that Richmond has no right to access them under FIPPA.

2. Subject to item 3 below, I confirm, in part, BCUC's decision that it is authorized under s. 13(1) of FIPPA to withhold some of the BCUC staff emails.

3. I require BCUC to disclose the portions of email chains authored by BCUC staff at pages:

   5, 6, 10, 17, 21, 22, 23, 24, 26, 27, 29, 30, 32, 33, 36, 37, 38, 45, 46, 47, 48, 49, 50, 53, 55, 56,57, 59, 60, 63, 67, 68, 70, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 91, 92, 93, 95, 96, 98, 99, 101, 102, 104, 105, 106, 112, 116, 119, 120, 121, 125, 126, 128, 135, 135, 137, 138, 145, 146, 148, 155, 161, 162, 163,164, 167, 168, 169, 175, 176, 177, 178, 182,183, 186, 188, 189, 190, 193, 201, 202, 203, 204, 205, 206, 207, 208, 210, 211, 212, 214, 219, 220, 224, 225, 226, 228, 229, 230, 233, 236, 237, 240, 241, 242, 243, 244, 245, 246, 247, 249, 250, 251, 253, 256, 257, 258, 259, 260, 261, 262, 263, 264, 275, 278, 280, 281, 283, 284, 285, 293, 294, 296, 301,302, 306, 307, 308, 309, 310, 311, 312.

[80] See for example Order F22-11, 2022 BCIPC 11 (CanLII) at para 67.

4. I confirm BCUC's decision under s. 14 to withhold the emails from BCUC's lawyer to its commissioners.

5. When BCUC complies with item 3 above, it must concurrently provide the OIPC registrar of inquires with a copy of the records and any accompanying cover letter sent to the applicant.

Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by February 25, 2025.

January 13, 2025

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File No.: F21-87465 F21-89094