OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F06-16

MINISTRY OF ENVIRONMENT

David Loukidelis, Information and Privacy Commissioner

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Summary: The applicant and the provincial government participated in energy regulation hearings in the United States and Canada about an energy project the applicant had proposed. The applicant made an access request to the Ministry for records about the proposed energy project when the US hearings, but not the Canadian hearings, had concluded. The Ministry was slow in responding to the access request, did not comply with conditions of a time extension this Office granted the Ministry under s. 10(1)(c), and failed to respond in time, effectively taking an unsanctioned time extension. The Ministry eventually released three disclosure packages over six months, from which it withheld some information under various of the Act's exceptions. The Ministry was authorized to refuse to give access to the information that it withheld under s. 13(1) or s. 14, but it is ordered under s. 58(3)(c) to refund 50% of the fees charged to the applicant.

Key Words: advice or recommendations—solicitor-client privilege—fee waiver—delay.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 14 and 58(3)(c).

Authorities Considered: B.C.: Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order F05-21, [2005] B.C.I.P.C.D. No. 29; Order F05-22, [2005] B.C.I.P.C.D. No. 30; Order F05-23, [2005] B.C.I.P.C.D. No. 31; Order 02-54, [2002] B.C.I.P.C.D. No. 55; Order 03-32, [2003] B.C.I.P.C.D. No. 32.

Cases Considered: *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1 (C.A.), [2002] B.C.J. No. 2779;

Blank v. Canada (Minister of Justice) (2004), 244 D.L.R. (4th) 80 (F.C.A.); *Ed Miller Sales & Rentals v. Caterpillar Tractor Co.*, [1988] A.J. No. 810 (C.A.); *Alberta (Treasury Branch) v. Ghermezian*, [1999] A.J. No. 624 (Alta. Q.B.); *Whitehead v. Braidnor Construction Ltd.* (2001), 304 A.R. 72 (Q.B.); *Three Rivers District Council and others v. Governor and Company of the Bank of England (2004)*, [2004] UKHL 48; *Re L. (a minor),* [1997] A.C. 16 (H.L.); *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] S.C.J. No. 31.

1.0 INTRODUCTION

[1] This inquiry concerns an access request under the *Freedom of Information and Protection of Privacy Act* ("Act") that legal counsel for Sumas Energy 2 Inc. ("SE2") made to the Ministry of Environment ("Ministry") (then the Ministry of Water, Land and Air Protection) for the following:

> …copies of all documents in the possession of the Ministry of Water, Land & Air Protection relating to a 660 MW combined cycle electric generating facility (the S2GF) proposed by SE2 for Sumas, Washington from or dated from April 23, 2001 to the present. Without limiting the generality of the above request, we particularly request that you provide us with copies of all correspondence, internal memoranda and studies, reports, health and environmental assessments, calculations, handwritten notes and all other records filed with the Washington State Energy Facility Site Evaluation Council and all other records and documents dealing in any way with any human health impact analysis of the S2GF.

[2] About a month after the request, the Ministry assessed a fee of $8,618.75 for copying 22,475 pages of records (at 25¢ per page and 100 hours of preparation time) of which $4,500.00 was payable as a deposit. SE2 promptly paid the deposit, the Ministry took a 30-day extension, under s. 10(1)(b) of the Act, of the time for responding and then requested and received from this Office a further 45-day extension under s. 10(1)(c).

[3] When the extension under s. 10(1)(c) expired in November 2002, SE2 asked this Office to review the Ministry's failure to respond to the access request and to review the fees that the Ministry charged. SE2 had in the meantime promptly paid all the fees and the Ministry eventually released disclosure packages in January, May and June 2003, from which it withheld some information under various of the Act's exceptions.

[4] SE2 requested a review of the Ministry's decision to withhold some information under s. 13(1) and s. 14 and of the Ministry's release of disclosure packages well outside any permitted response time in the Act, which SE2 said had frustrated its usefulness to SE2 in scheduled National Energy Board of Canada ("NEB") hearings. SE2 did not take issue with other exceptions applied by the Ministry, *i.e.*, ss. 16, 21 and 22.

[5] Because mediation by this Office was not successful—though the Ministry did disclose some further information during mediation—a written inquiry was held under Part 5 of the Act.

2.0 BACKGROUND

[6] SE2 is an American company that sought to build a gas-fired electric generation facility ("S2GF") in the United States, near the Canadian border at Sumas, Washington. In 1999, it applied to the Washington State Energy Facility Site Evaluation Council ("EFSEC"), a statutory body responsible for assisting Washington's Governor in deciding the suitability of proposed locations for large new energy facilities, for certification to construct and operate the S2GF. SE2 submitted revised applications to the EFSEC over the following two years. In 1999, 2000 and 2001, SE2 also filed applications and revised applications to the NEB for authorization to construct an international power line that would give it access to a power grid in British Columbia.

[7] In November 2000, SE2 made a large access request to the Ministry for records relating to S2GF from January 1999 to November 2000. The Ministry responded in April 2001. That same month, the British Columbia government ("British Columbia") decided to aggressively oppose the S2GF in order to protect air quality in the Fraser Valley. British Columbia retained legal counsel and applied for and was granted intervener status in the EFSEC proceedings concerning the S2GF. Relying on the testimony of several witnesses, British Columbia participated in the EFSEC hearings. On May 24, 2002, EFSEC recommended approval of SE2's application and in August 2002 the Governor of Washington approved the construction of S2GF. British Columbia appealed the State of Washington air emission permit to the US Environmental Protection Agency which issued British Columbia's appeal was denied in March of 2003.

[8] In January 2001, British Columbia filed a notice to participate in the NEB hearings, which were adjourned the next month pending a decision on S2GF by the State of Washington. Late in 2002 the NEB decided to consider not just the effects of construction of the international power line, but also the environmental effects of S2GF. The main NEB hearings were held from May to September 2003. British Columbia participated as an intervener—in conjunction with two local governments, the City of Abbotsford and the Fraser Valley Regional District—to oppose S2GF. British Columbia relied on the testimony of several witnesses in support of its intervention.

[9] In March 2004, the NEB rejected SE2's application for authorization to construct an international power line[1] and in November of 2005 the Federal Court of Appeal denied SE2's legal challenge to the NEB's decision.[2]

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[1] *Sumas Energy 2, Inc.* (March 2004), EH-1-2000 (National Energy Board).
[2] [2005] F.C.J. No. 1895 (C.A.).

3.0 ISSUES

[10] The issues in this inquiry are as follows:

1. Is the Ministry authorized to refuse to disclose the information it withheld under s. 13(1) or s. 14 of the Act?

2. Should fees that the Ministry charged be excused, reduced or refunded under s. 58(3)(c) because of Ministry delay in responding to the access request?

[11] Under s. 57(1), the Ministry has the burden of proof regarding s. 13(1) and s. 14.

4.0 DISCUSSION

[12] **4.1 Procedural Objections**—SE2 objected that the Ministry's reply submission included an affidavit that should have been provided with its initial submission. SE2 also said that the affidavit repeated much of the Ministry's initial submission on why it was so long in responding to the access request. I have decided that, in view of my analysis of all the issues and evidence, the Ministry's affidavit was unacceptable, but had no real impact on the fairness of the inquiry for SE2.

[13] The Ministry objected that SE2 unfairly split its argument on litigation privilege between its initial and reply submissions. SE2 responded that it would have been in a better position to more fully address litigation privilege in its initial submission had the Ministry complied with s. 8(1)(c) of the Act by providing reasons for its decisions to refuse access, which indicated that it was relying on both branches of solicitor-client privilege.

[14] Section 8(1)(c) requires that, if access to all or part of a record is refused, the public body must include in its response "the provision" of the Act on which the refusal is based and also "the reasons for the refusal". The Ministry's response letters accompanying the disclosed records gave no reasons for the decision to refuse access. They simply cited the provisions of the Act on which the Ministry relied. As I have noted in previous orders, s. 8(1)(c) clearly requires more—it requires both reference to specific provisions of the Act relied upon and "reasons for the refusal", not just the former.

[15] The Ministry's approach to compliance with s. 8(1)(c) put SE2 in the predicament of not knowing more about the Ministry's application of s. 14 until SE2 had received the Ministry's initial submission in the inquiry. I addressed this issue by permitting SE2's reply submission despite the Ministry's objection to it, while also permitting the Ministry to make a further reply limited to SE2's reply on privilege.

[16] SE2 then objected to the Ministry's further reply on the basis that it went beyond the parameters I had set and because, SE2 said, it mis-stated legal and factual matters about document discovery for the EFSEC proceedings. I have addressed this objection by assuming, unless SE2 indicated otherwise in its submissions or correspondence for this inquiry, that all factual and legal aspects of the Ministry's further reply were contested by SE2.

[17] Finally, SE2 asked me to examine the relatively small amount of *in camera* material found in the Ministry's submissions to ensure that it was appropriately received on that basis. I have done this and am satisfied that the Ministry's *in camera* material was properly received on that basis.

[18] **4.2 Solicitor-Client Privilege**—Most of the information in dispute was withheld under s. 14, which reads as follows:

> **Legal advice**
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[19] As many previous orders and court decisions affirm, s. 14 incorporates solicitor-client privilege at common law.[3] In their submissions, both parties acknowledged that solicitor-client privilege consists of two kinds of privilege—legal advice privilege[4] (which protects confidential communications between a lawyer and client related to the giving, seeking or formulating of legal advice) and litigation privilege (which protects materials created or obtained for the dominant purpose of existing or contemplated litigation). They also acknowledged that legal advice privilege lasts indefinitely, while litigation privilege lasts until the end of the litigation in question.

[20] It is worthwhile in this case to summarize the parties' submissions on s. 14. The Ministry says most of the information was confidential communications between British Columbia (usually through the Ministry), as the

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[3] See, for example, Order 02-01, [2002] B.C.I.P.C.D. No. 1, and *College of Physicians & Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, (2002), 9 B.C.L.R. (4th) 1 (C.A.), [2002] B.C.J. No. 2779 (C.A.). The Supreme Court of Canada recently affirmed the nature and importance of solicitor-client privilege in a case involving a claim of privilege under Ontario's *Freedom of Information and Protection of Privacy Act*: *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] S.C.J. No. 31.

[4] Previous orders under the Act have referred to the first branch of solicitor-client privilege as "legal professional privilege". See, for example, Order 01-10, [2001] B.C.I.P.C.D. No. 11 and Order 02-01. The trend seems to be to use the term "legal advice privilege", as illustrated by *College of Physicians &* Surgeons, *Blank v. Canada (Minister of Justice)* (2004), 244 D.L.R. (4th) 80 (F.C.A.), and *Three Rivers District Council and others v. Governor and Company of the Bank of England (2004)*, [2004] UKHL 48. I have therefore decided to use, from now on, the term "legal advice privilege" to refer to confidential communications between solicitor and client related to the obtaining or giving of legal advice.

client, and British Columbia's lawyers, for the purpose of preparing British Columbia's cases before the EFSEC and the NEB. These communications were directly related to the giving, seeking or formulating of legal advice (including the hiring of lawyers) and were protected by legal advice privilege and by litigation privilege.

[21] The Ministry also says that some of the information consists of correspondence to or from experts that British Columbia retained, directly or through its lawyers, to provide evidence for the EFSEC or NEB hearings. British Columbia had directed its experts to include in their communications a statement that they were confidential and protected by solicitor-client privilege. Its lawyers collected information in the form of emails, memoranda and other correspondence from the Ministry and experts for the sole purpose of giving legal advice to British Columbia and conducting its cases before the EFSEC and the NEB. This information was protected by litigation privilege.

[22] According to the Ministry, in the NEB hearings, British Columbia, the City of Abbotsford and the Fraser Valley Regional District together pursued their common opposition to the S2GF and privileged information that British Columbia shared with the City of Abbotsford or the Fraser Valley Regional District was protected by the doctrine of common interest privilege.

[23] The EFSEC and NEB proceedings were, the Ministry argues, "litigation" for the purpose of litigation privilege. The EFSEC and the NEB were quasi-judicial; their processes included parties who were adverse in interest; parties had to submit evidence; and witnesses were examined, cross-examined and re-examined under oath. Litigation privilege applies, the Ministry says, not only to court proceedings, but also to administrative proceedings where a regulatory agency conducted an investigation that could result in the imposition of penalties or sanctions. The EFSEC used an adjudicative model to develop its record and inform its decision, with SE2 on one side and interveners on the other, and the discovery of documents was allowed under the *Washington Administrative Code*.

[24] Litigation privilege is not limited to processes with discovery obligations comparable to those in traditional litigation, the Ministry argues. Even if there were no discovery obligations in the energy hearings, the Ministry could still receive an access request under the Act requiring it to disclose, subject to any of the exceptions in the Act, records related to those proceedings. The underlying rationale for litigation privilege applied by reason of the right of access in the Act, even if the administrative process involved did not have a discovery mechanism. British Columbia and SE2 were adverse in interest and therefore were engaged in a dispute in the EFSEC proceedings.

[25] The EFSEC hearings were concluded when SE2 made its access request to the Ministry, but the NEB hearings were still underway. The Ministry says, therefore, that the EFSEC and NEB hearings were related proceedings dealing

with the environmental effects of the S2GF and litigation privilege continued to protect records prepared in connection with the EFSEC hearings.

[26] Last, the Ministry complains that SE2 was trying, through its access request, to use the Act to get access to communications between the Ministry and its legal advisors, to records prepared for the dominant purpose of litigation (in the form of the EFSEC and MEB proceedings) and to the contents of its lawyer's brief, all of which was not permitted by the law of solicitor-client privilege.

[27] For its part, SE2 says that much of the information in issue—for example, emails between British Columbia's legal counsel and its experts that were copied to Ministry staff—was not protected by solicitor-client privilege because it was not necessary to the existence or operation of the solicitor-client relationship between British Columbia and its lawyers.

[28] The usual rule, SE2 points out, is that communications between a lawyer and third parties are not privileged and, in this case, British Columbia retained the outside experts to provide advice about a range of issues relating to SE2's application to the EFSEC.

[29] SE2 also contended that the EFSEC and NEB hearings were not litigation, so that litigation privilege did not protect records associated with those processes. If the EFSEC proceedings were litigation, SE2 argued, any litigation privilege did not survive the conclusion of the EFSEC hearings in May of 2002. In any event, any privilege over draft expert reports, communications with experts or similar records was waived when British Columbia filed expert evidence at the EFSEC hearings.

[30] SE2 argues that litigation privilege is premised on there being adversarial litigation, since its purpose is to prevent the contents of a lawyer's litigation file from being poached by the client's adversary. Litigation privilege should, SE2 argues, be interpreted narrowly. It does not apply to administrative proceedings that were not adversarial or in which, unlike traditional litigation, the parties were free to withhold relevant documents and disclose only those favourable to them. SE2 submits that the EFSEC and NEB proceedings were not adversarial in nature, and British Columbia's participation as an intervener did not necessarily mean it was an adverse party or that participants in the hearings were adverse in interest to SE2. The EFSEC and NEB allowed interested persons to participate in their hearings to provide a forum for all views and expertise and their processes are a far cry from traditional litigation.

[31] Last, SE2 says that, while litigation privilege could extend to related litigation proceedings, the NEB hearings did not fit that description. There was no reasonable prospect at the time of the EFSEC hearings that the NEB would consider environmental effects of the S2GF. At least three experts who testified

at the EFSEC hearings were not involved in the NEB hearings and the EFSEC considered some issues (such as flooding) that the NEB did not.

[32] Before considering the merits of the s. 14 issue, I will first address the Ministry's suggestion that SE2's use of the right to make an access request under the Act would somehow give SE2 unfair access to government information. It is not wrong or inappropriate at all for someone to use the right of access in the Act to gain access to records from a public body for the purpose of a process—adversarial or non-adversarial, public or private—in which the person and the public body are both involved. That is what happened here and, in its own good time, the Ministry released three disclosure packages to SE2.

[33] I have reviewed the information which the Ministry withheld under s. 14. It fills approximately one file box. A great deal of it clearly consisted of confidential communications between British Columbia—through officials at the Ministry—and its lawyers relating to the obtaining or giving of legal advice. These communications are protected by legal advice privilege, whether they related to retaining British Columbia's lawyers for the EFSEC hearings or to legal advice, instructions and strategy concerning expert evidence or other EFSEC hearing issues, and regardless of whether the EFSEC or NEB hearings had finished.

[34] I agree with the Ministry that the doctrine of common interest privilege applied to British Columbia's joint participation in the NEB hearings with the City of Abbotsford and the Fraser Valley Regional District.

[35] The balance of the records withheld under s. 14 consists of communications between British Columbia's lawyers and experts retained to assist with and tender evidence at the EFSEC hearings, which British Columbia's lawyers had passed on to instructing officials at the Ministry. These communications with experts are not protected by legal advice privilege because that privilege extends only to communications with third parties who act as agents or conduits of the client, which was not the case here. Litigation privilege, on the other hand, applies to communications with third parties, such as experts, where the dominant purpose of the communication is preparing for or conducting litigation under way or in reasonable prospect at the time. As noted earlier, litigation privilege ends when the litigation ends.[5]

[36] The Ministry supported its position that the EFSEC and NEB hearings were litigation for the purposes of litigation privilege with information about the EFSEC certification process and excerpts from the *Revised Code of Washington*, the *Washington Administrative Code* and the *National Energy Board Act*. SE2 supported its position that those proceedings were not litigation with EFSEC orders and related correspondence, EFSEC environmental impact statements,

[5] *College of Physicians & Surgeons*, at paras. 32-33.

excerpts from EFSEC hearing transcripts and pre-filed testimony, and information about NEB process and orders, rulings and related correspondence. Both parties also referred extensively to decisions from British Columbia, Ontario and the United States.

[37] As I mentioned above, the scope and application of litigation privilege are the same as at common law in British Columbia. Litigation privilege is an exception to rules requiring parties to litigation to disclose relevant documents to each other for the purposes of the litigation. Litigation privilege allows a party to litigation a degree of confidentiality to prepare its case without its adversaries in the litigation knowing everything about its case. The applicability of litigation privilege to non-judicial proceedings and the issue of what is considered related litigation have not been frequently considered in Canada. In Order 00-08[6], I reviewed the case law as follows:

> ¶74 There are several relevant, although not conclusive, cases to consider on this issue. One is *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 61 Alta L.R. (2d) 319 (Alta. C.A.), a case relied on by the College. In that case, the Director of Investigation and Research, under what was then the *Combines Investigation Act (Canada)*, conducted an inquiry which caused the investigation's target, through its legal counsel, to instruct an accountant to prepare certain documents for use in the target's defence. The Director ended his inquiry and did not charge the target. The documents prepared in the target's defence were sought to be produced in subsequent civil litigation which involved the same or similar issues as those investigated by the Director. The Alberta Court of Appeal held that the documents prepared by the target's accountant were protected by litigation privilege. It rejected an argument that the Director's process was not "litigation", at p. 326:
>
> > For Miller it is urged that an inquiry by the Director of Investigation and Research under the *Combines Investigation Act* is not litigation. Alternatively, it is said that, if the documents were ever privileged, that privilege ended once the director terminated his inquiry. In my view, both arguments take too narrow a view of the term "litigation". Once the director focused on the Caterpillar companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation. The parties could look ahead to many possible procedures. Some under the Act have possible penal consequences; some were civil as this very action establishes. All involved the same issues. The inquiry seems to have resolved itself to the question of the costs of the Caterpillar "no-charge" services and the very same issue appears at the forefront on this action.
> >
> > The conclusion of the director's inquiry did not mean that the litigation was ended. Section 39 of the *Combines Investigation Act* expressly provides that civil rights of action remain despite the provisions of the

[6] [2000] B.C.I.P.C.D. No. 8.

> Act. The issues raised by the director were still open to other litigants such as the respondent.

¶75 I make three observations about the *Ed Miller* case. First, the above aspect of that case has not been considered in any British Columbia judicial decision of which I am aware. Second, unlike this case, where privilege is being invoked by the College, in *Ed Miller* privilege was invoked by the target of the Director's inquiry. Third, in order to commence an inquiry under the applicable legislation, the Director was statutorily required to have reason to believe that a ground existed for an order against the target or that an offence had been or was about to be committed. No such threshold for the College's investigation of complaints under the MPA has been brought to my attention and I have not found any. For these reasons, I do not consider the decision in *Ed Miller* to be binding upon me or, in any event, to stand for the proposition that litigation privilege applies to a statutory agency when it investigates a complaint of regulatory or professional wrongdoing.

¶76 It should be noted that *Ed Miller* was considered in *Alberta (Treasury Branch) v. Ghermezian*, [1999] A.J. No. 624 (Alta. Q.B.). Applying a somewhat different approach, the court held, at paras. 18-21, that an appeal of a tax assessment to a review board was not litigation for the purposes of establishing litigation privilege:

> The purpose of granting privilege over documents made in anticipation of litigation is to allow a party to freely prepare its case. This privilege is also necessary to override the requirement in civil litigation that parties exchange all relevant documents. If a party is not afforded the protection provided by litigation privilege, it would be required to forward to its opponent unfavourable information which it has developed while preparing its case. As stated in *The Law of Evidence in Canada* (J. Sopinka, J. Lederman and A. Bryant, Toronto: Butterworths, 1992):
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> > The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine its truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. ... Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigation and thought processes compiled in the trial brief of opposing counsel. (p. 654)
>
> However, if there is no requirement that a party provide all documents to the other side, the need for litigation privilege disappears. The mandatory disclosure requirement is an important aspect of "traditional litigation" insofar as the entitlement to litigation privilege is concerned. Therefore, for the litigation privilege to attach to documents prepared in contemplation of a proceeding which is not

> traditionally classified as litigation, a party must demonstrate that his opponent has a right to access any material prepared in contemplation of that proceeding. If a certain proceeding does not have a sufficiently similar disclosure requirement to that of "traditional litigation", it follows that it should not be characterized as "litigation" for the purpose of finding litigation privilege.
>
> There is no evidence before me that parties involved in a dispute before the Municipal Tax Assessment Board are required [to] exchange relevant documents or make any type of disclosure akin to that in a civil action. As such, the policy justifications underlying litigation privilege are not brought into play in this case. WEM was free to gather any information it required to prior to the hearing, and was able to choose which information it disclosed to the City and to the Board. There is no need for privilege because a party is not required to exchange documents with the opposing parties.
>
> Under this test, it is possible that the material may become privileged if at some point in the regular course of the proceedings the parties become obliged to disclose all relevant documents to the other side. At that point the rationale for instigating litigation privilege would come into play. However, the proceedings in this action did not reach a point where there was any requirement of disclosure, and it is unlikely that such a requirement would ever have come into existence. As such, I find that the Appraisal is not covered by litigation privilege.

> ¶77 I am not, with respect, convinced that the test articulated in *Ghermezian* is necessarily an apt one. Because it focuses only on whether disclosure requirements apply to a proceeding, it ignores the need for an adversarial element to support the existence of litigation privilege. Further, the existence of discovery requirements does not create a static zone of litigation privilege; on the contrary, in a traditional civil litigation context the "modern trend is in the direction of complete discovery", with litigation privilege being "the area of privacy left to a solicitor after the current demands of discoverability have been met": *General Accident*, above, per Carthy J.A., at p. 256.
>
> ¶78 The approach taken in *Ghermezian* would also assume that, if no traditional discovery requirements are attached to a proceeding, then the parties would not be required to make any type of disclosure. This assumption may be valid for private parties who are engaged in a traditionally adversarial judicial or quasi-judicial process. It lacks validity, however, where one of the parties is a disciplinary, regulatory or criminal prosecutor. This is because, as is discussed below, disclosure of relevant evidence - whether damaging or supportive - is a component of both administrative and criminal justice.

[38] In *College of Physicians & Surgeons*, the Court of Appeal set aside Order 00-08 as it related to s. 13(1) of the Act. For litigation privilege under s. 14, the court applied the test that information gathered or obtained by a lawyer for the dominant purpose of use in litigation that is reasonably in prospect is privileged from production. In doing so, the court accepted the reasoning in

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.,[7] that the interest of the target of the regulatory investigation was adversarial to that of the investigating agency. The Court of Appeal found, however, that the College of Physicians and Surgeons did not have an adversarial interest in the outcome of its investigation, litigation was not in reasonable prospect at the relevant time and the College was not gathering or creating information for the dominant purpose of litigation.

[39] As for other cases, SE2 cited the case of *Whitehead v. Braidnor Construction Ltd.,*[8] which held that accident investigation reports were not protected by litigation privilege on the basis that they had been gathered for submission to a workers' compensation board. I have also considered *Re L. (a minor),*[9] in which the majority of the House of Lords held that child protection proceedings did not attract litigation privilege because they were essentially non-adversarial in nature. Most recently, in *Blank v. Minister of Justice,*[10] the majority of the Federal Court of Appeal confirmed that the solicitor-client privilege exception in s. 23 of the federal *Access to Information Act*, which is essentially the same as s. 14 of the Act, applied only to records which were privileged at the time the access request was made and, in contrast to legal advice privilege—which was not limited in time—litigation privilege ends when the litigation ends (subject to the possibility that the litigation may include related proceedings).

[40] I have concluded that the information the Ministry refused to disclose on the basis of litigation privilege was protected by that privilege. The scope and application of litigation privilege in relation to administrative proceedings, and principles for deciding when proceedings are related to each other, are still developing. In deciding that litigation privilege applies here, I have kept in view the underlying policy of litigation privilege, which is, again, to give parties who are adverse in interest in contested legal proceedings confidentiality protection for information that they obtain or create to prepare their cases.

[41] I note that, in *College of Physicians*, the Court of Appeal approved of *Ed Miller Sales*, which held that a regulatory investigation can support a claim of litigation privilege in relation to the adversarial interest of the target of the investigation. SE2 and British Columbia were clearly opposed in interest in the EFSEC and the NEB hearings—their interests were adversarial, as was the case in *Ed Miller*.

[42] Further, it was clear throughout, in my view, that SE2's applications to the EFSEC for approval of the S2GF in Washington were linked to its applications to the NEB for approval of the international power line to British Columbia.

[7] (1988), 61 Alta L.R. (2d) 319 (Alta. C.A.), paras. 74-78.
[8] (2001), 304 A.R. 71 (Alta. Q.B.).
[9] [1997] A.C. 16 (H.L.).
[10] (2004), 244 D.L.R. (4th) 80 (F.C.A.), leave to appeal granted [2004] S.C.C.A. No. 513.

While identity of issues or evidence between the EFSEC and the NEB hearings was unlikely, it was easily foreseeable, I think, that there would be some overlap between the issues and evidence in the two proceedings.

[43] As for waiver, when British Columbia's lawyers were consulting experts for the EFSEC hearings, it was well known that SE2's application was pending with the NEB for approval of the international power line. If SE2 maintained that principles of fairness or consistency in connection with the EFSEC or the NEB hearings necessitated waiver of litigation privilege over working communications between British Columbia's lawyers and experts consulted for the EFSEC proceedings, then it was incumbent on SE2 to pursue this position in those hearings, not through an access request under the Act.

[44] The NEB proceedings (the hearings or the application for judicial review that followed) were not concluded at the time SE2 made its access request to the Ministry, so it cannot be said that litigation privilege had ended by that time.

[45] I find that s. 14 authorized the Ministry to refuse disclosure of the information to which it applied that exception.

[46] **4.3 Advice or Recommendations**—Section 13(1) of the Act reads as follows:

> **Policy advice, recommendations or draft regulations**
>
> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[47] Section 13(2) provides that certain types of information may not be withheld under s. 13(1), while s. 13(3) says that s. 13(1) does not apply to information in a record that has existed for more than 10 years.

[48] The parties referred to previous orders that characterized the purpose of s. 13(1) as being to allow full and frank discussion of advice or recommendations on a proposed course of action within a public body, preventing the harm that would occur if the deliberative process of government decision and policy-making was subject to excessive scrutiny, particularly while a public body is considering a given issue. The Ministry also said a public body is authorized to refuse information that would allow an individual to draw accurate inferences about advice or recommendations. It said all of the information withheld under s. 13(1) constituted advice or recommendations to the Ministry concerning a course of action or the exercise of a power or function, to which s. 13(2) and (3) did not apply.

[49] The Ministry withheld relatively little information under s. 13(1), in the following types of records: draft position, advisory and communications notes on the S2GF from which proposed wording and revisions to wording were withheld; several emails involving the Ministry and British Columbia's lawyers and a draft report to which s. 14 was also applied; information in a number of other emails (one of which concerned a draft editorial); and a draft letter and information in emails associated with proposed changes and revisions to that letter.

[50] I do not need to deal with the information that was also withheld under s. 14 because I have already upheld the Ministry's authority to refuse access under that section. The information that the Ministry withheld in the draft notes, editorial and letter was recommended wording or suggested revisions to the wording of these records that the Ministry was, I have concluded, authorized to withhold under s. 13(1). The information withheld in the emails to which the Ministry did not apply s. 14 was advice or recommendations to Ministry staff on possible courses of action that in my view fell under s. 13(1). Sections 13(2) and (3) do not apply to any information withheld here.

[51] **4.4 Fees Charged by the Ministry**—SE2 never objected to the amount of the fees the Ministry charged. Its complaint was always that what SE2 considered to be the excessive time the Ministry took to respond to the access request, warranted an order for the refund of fees under s. 58(3)(c).

[52] Section 58(3)(c) reads as follows:

> **Commissioner's orders**
>
> 58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following: …
>
> (c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;…

[53] In Order 02-54,[11] I was critical of a six-month delay in responding to an access request when there was no apparent reason why the public body could not have released records as and when they were processed. In Order 03-32,[12] I reminded public bodies that they must not ignore the requirements of the Act when there is litigation underway.

[54] In Order F05-21,[13] Adjudicator Celia Francis made an order under s. 58(3)(c) requiring the refund of fees for an access request to which Land and Water British Columbia Inc. had taken nine months to respond. Related orders

[11] [2002] B.C.I.P.C.D. No. 55.
[12] [2003] B.C.I.P.C.D. No. 32.
[13] [2005] B.C.I.P.C.D. No. 29.

were also made against two ministries.[14] The basis for her decisions was that s. 58(3)(c) is worded the way it is to make it clear that, while public bodies may charge fees, they may be required to forgo those fees in certain cases, including where they fail to meet time limits.

[55] SE2 submitted that fees should be refunded because what it sees as the Ministry's extraordinary delay and recalcitrance in responding had substantially defeated SE2's right of access under the Act. The Ministry accepted that there is authority in s. 58(3)(c) to order a refund or reduction of a fee where a public body has failed to meet a time limit, but said this remedy was only warranted as a punitive measure and should not be applied every time a public body is late responding to an access request. The Ministry did not elaborate on what circumstances might justify such a "punitive" measure.

[56] SE2 said, and I tend to agree, that the reason for limiting and scrutinizing extensions of time under the Act is that delay can become a systemic barrier to the right of access—access delayed is often access denied. While I agree with the Ministry that there is no right to a fee refund whenever a time limit for responding to an access request is missed, s. 58(3)(c) is not focussed only on punishing a public body. That would fail to account for the effects on the applicant of the fee and the delay in getting a response to the access request, which are circumstances that are also be relevant to the appropriateness of a fee.

[57] Some of the Ministry's submissions focus on the fact that SE2 did not request a fee waiver or reduction under s. 75 of the Act. It also appears there was some confusion about the relevance of s. 75 in early correspondence, found in the inquiry record, among this Office, SE2 and the Ministry. SE2 readily acknowledged throughout that it was not seeking a fee waiver or reduction under s. 75. It was, instead, seeking a refund of fees under s. 58(3)(c) based on the Ministry's delay in responding to the access request. Focus on s. 75 is not helpful on the issue at hand, which is whether an order should be made under s. 58(3)(c).

[58] The time that it took for the Ministry to respond to SE2's access request breaks down as follows:

- SE2 made its access request on May 30, 2002.
- On June 25, 2002, the Ministry issued a fee estimate of $8,618.75 for 22,475 pages of records and 100 hours to prepare records for disclosure.
- On July 10, 2002, SE2 paid the fee deposit of $4,500.00.
- On July 11, 2002, the Ministry took an extension under s. 10(1)(b) of a further 30 days, of the time for its response to SE2's access request.

[14] Order F05-22, [2005] B.C.I.P.C.D. No. 30 and Order F05-23, [2005] B.C.I.P.C.D. No. 31.

- On September 4, 2002, the Ministry asked this Office to allow a further extension, under s. 10(1)(c), of the time for responding to the access request.
- On September 6, 2002, this Office granted the Ministry an extension to November 15, 2002. The reasons indicated for seeking and granting the extension were to enable the Ministry to consult with other public bodies. The extension under s. 10(1)(c) was subject to the following terms:
    - The Ministry was to immediately notify the applicant of the extension, provide reasons for it, and tell the applicant when a response could be expected.
    - The Ministry was to respond to the applicant as soon as possible with the requested records. If possible, the Ministry was to release records to the applicant in stages as the review progressed. The Ministry was not to delay releasing records to permit bulk release unless it was absolutely necessary for the global consideration of the disclosure package.
    - The Ministry would not be granted an additional time extension unless exceptional circumstances arose.
- The Ministry released no records by the extended time of November 15, 2002 and it sought no further extensions of time under the Act to respond to the access request.
- On January 20, 2003, the Ministry released its first disclosure package, which, according to SE2, consisted largely of already public documents.
- On February 27, 2003, the Ministry official specifically assigned to the access request informed SE2 that he hoped to have a second disclosure package ready by the next week.
- On March 20, 2003, the Ministry manager responsible for access requests informed SE2 that the official who had been working on the matter had retired and was in the process of being replaced by the Ministry, which would disclose further records to SE2 when it had available staff.
- On March 31, 2003, the Ministry consulted with the Ministry of Finance concerning disclosure of a record originating with the Crown Corporations Secretariat.
- The Ministry took what it described as the extraordinary step (due to the volume of the records involved) of hiring a contractor (at a cost of $3,125) to review requested records to determine what could be released under the Act. The Ministry apparently also hired a secretarial service (at a cost of $1,050) to copy responsive records.

- On May 26, 2003, the Ministry released its second disclosure package. The fees were adjusted to $8,970.10 for 13,450 pages of records and 189 hours to locate, retrieve and prepare records.
- On June 4, 2003, SE2 paid $4,470.10, the balance of the fees owing.
- On June 9, 2003, the Ministry released its third disclosure package.
- The main NEB hearings—in which SE2 and British Columbia were opposed in interest—were held from May to September 2003.
- From November 2002 to June 2003, SE2 sent persistent communications to the Ministry (and to this office) concerning the Ministry's failure to respond in a timely fashion to the access request and about the appropriateness of the fees charged by the Ministry in the circumstances.

[59] The Ministry said in its submissions that SE2 unnecessarily requested and pursued records that it already had through the EFSEC proceedings, which was an irresponsible exercise of access rights under the Act and a significant added burden for the Ministry in processing this access request. SE2 strongly contested these allegations and their relevance to whether a fee refund should be ordered in the circumstances.

[60] There were discrepancies in the inquiry record as to the volume of records involved for the access request, but it was obviously significant—in the order of eight file boxes (some 15,000 to 17,000 pages), seven of which (some 13,000 to 15,000 pages) were disclosed to SE2.

[61] The Ministry pointed to SE2's November 2000 access request, which covered some 33,000 pages of records in 15 file boxes and to which the Ministry responded in April 2001. Both requests were large, but I do not see how SE2's earlier access request is relevant to the Ministry's processing of the 2002 access request involved here. SE2 made its first access request, and the Ministry responded before British Columbia's decision to oppose the S2GF project. SE2's second access request was made after British Columbia's decision to oppose S2GF. If anything, the Ministry's response time for the first access request might suggest that the Ministry demonstrated its capability of responding to the larger access request much more quickly than it responded—during a time when British Columbia was vigorously opposing SE2's plans—to the large, but considerably smaller, access request involved in this inquiry.

[62] As regards its request for a refund of fees, SE2 contends that the Ministry failed to comply with the terms of the time extension granted by this Office in September 2002; that the Ministry failed to respond to the access request at all for eight months; the records the Ministry did disclose—in the first disclosure package, at least—were public records that SE2 already had; dates on some records indicate they were assembled by the Ministry in July and August 2002 but were not disclosed until May 2003 (with no indication as to why it took so

long); the Ministry disclosed the majority of the records—in May and June 2003––after the NEB hearings, in which British Columbia was participating, were underway; and the Ministry failed to provide reasons for withholding information.

[63] The Ministry acknowledges that it took a long time to process the access request, but says its response was still reasonable given the volume of records involved. It argues that it went to extraordinary lengths to process the access request in as timely a fashion as possible. According to the Ministry, the process of locating, retrieving, reviewing and copying the records was incredibly time-consuming and the fees it charged did not reflect the true cost of processing.

[64] The Ministry acknowledges that it should have sought a further time extension from this Office. It goes so far as to suggest, however, that a longer time extension had been warranted in September 2002, but it did not request one because the Ministry believed this Office would not grant it.

[65] I have concluded that in the circumstances of this case it is appropriate to order the Ministry to refund 50% of the fees charged to SE2. The Ministry's response time for this access request was long and was well beyond time limits in the Act. A further serious consideration is the extent to which (for over six months) the Ministry processed this access request outside of the accountability framework in the Act. I am not referring to set time limits in the Act which, the reality is, have sometimes been exceeded. I am referring to the accountability mechanism for time extensions to respond to access requests in s. 10 of the Act and the terms of the extension that this Office allowed under s. 10(1)(c) in September 2002.

[66] In seeking and getting the September 2002 extension, the Ministry apparently represented that it required more time in order to consult with other public bodies. The extension was granted on that basis and SE2 was told of it. I agree with SE2 that the Ministry did not comply with the terms of that extension. It is troubling, as well, that there is a lack of evidence that the Ministry spent any time at all in consulting with other public bodies (other than about one record with the Ministry of Finance, on March 31, 2003). If the Ministry was labouring under difficult circumstances that were affecting its ability to respond in a timely way, it is not at all clear why those matters were not brought forward in the form of a request for a further extension of time, particularly in the context of an access request that clearly was time sensitive in relation to the upcoming NEB hearings and was being very actively pressed by SE2.

[67] Most important, it is not fair to access applicants for public bodies to take unilateral, very long, *de facto* time extensions that sidestep the explicit mechanism in the Act for the scrutiny of extensions of time to respond to access requests. While I acknowledge that those administering the Act—including this Office—can at times find it challenging to meet the Act's timelines, it is not open

to a public body to sail ahead in disregard of an express and specifically applicable accountability provision in the legislation, in this case s. 10.

5.0 CONCLUSION

[68] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. At the time that the access request was made, the Ministry was authorized to refuse to disclose the information it withheld under s. 13(1) or s. 14 of the Act and I confirm its decision; and

2. The circumstances are appropriate for a refund of fees charged in connection with the access request and I therefore order the Ministry to refund $4,486.00 to SE2.

July 18, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

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