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Order F15-06

BRITISH COLUMBIA UTILITIES COMMISSION

Michael McEvoy
Deputy Commissioner

February 19, 2015

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Summary: In the course of investigating consumers' complaints about Active Energy, BCUC commissioned an investigative report from Consumer Protection BC. During the process, BCUC decided the report should be held in confidence and later, having heard submissions, decided to expunge it from the record. BCUC's enforcement action later resulted in a settlement agreement with Active Energy. The applicant requested access to the report and BCUC decided to disclose it. Active Energy's appeal is allowed, as s. 61(2)(c) of the *Administrative Tribunals Act* excludes the record from FIPPA's application.

Statutes Considered: *Administrative Tribunals Act*, s. 61(2)(c).

Authorities Considered: Order F07-07, 2007 CanLII 10862 (BC IPC).

INTRODUCTION

[1] The British Columbia Utilities Commission ("BCUC") regulates aspects of the production and supply of various forms of energy to consumers in British Columbia. Active Energy Corp. was engaged in the marketing of natural gas through Active Renewable Marketing Ltd. ("Active Energy"). BCUC renewed Active Energy's licence to market natural gas on October 20, 2011.

[2] BCUC's Code of Conduct for Gas Marketers, and its Customer Choice Program, allows customers to dispute their contract with a gas marketer. If they cannot resolve the dispute, BCUC will review the dispute and determine whether the contract is valid.

[3] Between November 17, 2011 and February 28, 2012, BCUC received a number of disputes between Active Energy and its customers. The disputes alleged either that signatures on contracts had been forged or were not authorized. On March 8, 2012, BCUC by order established a compliance inquiry relating to Active Energy. That same date, BCUC directed Consumer Protection BC to investigate the allegations and report to BCUC. Consumer Protection BC delivered a report to BCUC on June 18, 2012 ("report").

[4] A copy of the report made its way to Active Energy. On August 27, 2012, Active Energy asked BCUC to "expunge" the report. It contended that the report's author breached the rules of natural justice and fairness by inappropriately stating opinions and legal conclusions that were properly BCUC's to state or draw. Active Energy also alleged that the author had investigated and reported on the allegations in a way that failed to meet the standards of fairness, neutrality and thoroughness that are required of an investigator.

[5] BCUC decided to treat both the report and Active Energy's application as confidential, but also sought submissions on whether they should remain confidential pending disposition of Active Energy's application to expunge. BCUC's own Compliance Team indicated it had no objection to the interim confidentiality. BCUC later decided, on September 12, 2012, to seek written and oral submissions on Active Energy's application to expunge the report. On October 5, 2012, it was decided that the report and Active Energy's application would "be held confidential pending" an oral hearing on the expungement application, with oral argument on the application not being open to the public.

[6] On January 30, 2013, BCUC ordered the report "expunged from the record of this proceeding" and ordered that it "not be made public.[1] It is evident from the BCUC's January 30, 2013 order that throughout the autumn of 2012, Active Energy and the Compliance Team were working to resolve the disputes originating in the various consumer complaints. Initially, BCUC did not approve a settlement of those disputes on the basis that it was not in the public interest, but on January 30, 2013 it did approve a revised settlement.[2] BCUC also ordered that background information about consumer complaints would not be made publicly available, on the ground that it contained "personal and commercially-sensitive information about customer accounts."[3]

[7] BCUC's reasons for deciding to expunge the report and not make it publicly available merit full quotation here:

[1] BCUC Order A-1-13, p. 2.
[2] BCUC Order A-1-13, p. 2, a copy of which is found at tab E of Active Energy's initial submission.
[3] BCUC Order A-1-13, p. 2.

> The panel has reviewed the Consumer Protection BC Report and the submissions from the Compliance Team and Active Energy. The Panel agrees with Active Energy and the Compliance Team that the investigation report goes well beyond its proper scope. The report not only sets forth certain evidence gathered in the investigation, but also contains expressions of opinion about Active Energy's conduct and reaches legal conclusions both of which are properly the domain of the Panel or other authorities. The Panel considered whether it could release certain parts of the Consumer Protection BC report through redaction of the offensive portions but concludes that it is not possible to do so because the offensive portions are too intermingled with the evidentiary portions. Instead, the Panel reviewed the proposed settlement agreement and the consolidated summaries for the complaints and concludes that all the necessary evidentiary components from the Consumer Protection BC Report have been adequately captured in the Proposed Settlement Agreement. Therefore, the individual complainants will have access to the necessary evidence for adjudication and resolution of the individual complaint affecting them without unfairly and unnecessarily imposing a substantial expectation of harm to the financial and economic interests of Active Energy, which would occur if the Consumer Protection BC Report was made available to the public. The Commission Panel's view is that the Proposed Settlement Agreement provides an adequate evidentiary record for the purposes of the Compliance Inquiry, and for the purposes of this Inquiry, replaces the proper evidentiary record that was contained in the Consumer Protection BC Report. The Commission Panel therefore expunges the Consumer Protection BC Report from the evidentiary record of this Proceeding. Given that the report is expunged, and that the Panel finds that there is a reasonable and substantial expectation of harm to Active Energy if the report is released, the Commission Panel has determined that the Consumer Protection BC Report will not be made available to the public.[4]

[8] On February 5, 2013, the BC Public Interest Advocacy Centre ("PIAC") made a request to BCUC, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), for access to a copy of the report. BCUC gave notice of the request to Active Energy, under s. 23 of FIPPA, on March 1, 2013. Active Energy objected to disclosure.[5] On April 22, 2013, BCUC notified Active Energy that it had decided that it was not authorized or required under FIPPA to refuse access to the report, and that it would be released. Active Energy sought a review of this decision on April 26, 2013. Mediation by this Office did not

[4] BCUC Order A-1-13, p. 2.

[5] The Investigator's Fact Report states that PIAC made the access request. In its initial submission in the inquiry, PIAC stated that it was, in the context of BCUC processes, representing a range of client groups. It is clear, however, that PIAC is the access applicant here, not other groups.

resolve the request for review, so an inquiry was held under Part 5 of FIPPA. BCUC did not participate in the inquiry.[6]

ISSUES

[9] The Notice of Written Inquiry issued by this Office on May 15, 2014 stated that, at the inquiry, the issues to be addressed were whether the report is within the custody or under the control of BCUC, "for the purposes of ss. 3(1) and 4(1) of FIPPA." It added that, [i]f so, the adjudicator will consider whether the public body is required to refuse access under ss. 21 and 22 of FIPPA."

[10] By way of a revised Investigator's Fact Report dated August 27, 2014, this Office's Registrar of Inquiries indicated that Active Energy had notified this Office that it would not make submissions under ss. 21 or 22 of FIPPA, but would argue that s. 61(2)(c) of the *Administrative Tribunals Act* ("ATA") applies to the report.[7] The revised Investigator's Fact Report stated the issues as follows:

1. Is the information in the record at issue outside of the scope of FIPPA due to s. 61(2)(c) of the ATA?
2. Is the record at issue within the custody or under the control of BCUC for the purposes of ss. 3(1) and 4(1) of FIPPA?
3. If there is information contained in the record at issue within the scope of FIPPA, is BCUC required to refuse access under s. 22 of FIPPA?

[11] In its initial submission, PIAC said it did not contest restrictions on access to personal information where both BCUC and Active Energy agree that s. 22 of FIPPA applies to that information.[8] Neither Active Energy nor PIAC addressed whether s. 21 of FIPPA requires BCUC to refuse to disclose information in the report. However, because I have, for reasons given below, determined that s. 61(2)(c) of the ATA applies, neither s. 21 nor s. 22 need be addressed.

[12] Nor is it necessary to consider whether the report is in BCUC's custody or control, despite its having been 'expunged'. This is because, even if one assumes for discussion purposes only that the report is in BCUC's custody or control, I have found that s. 61(2)(c) of the ATA excludes it from FIPPA's operation.

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[6] It is unfortunate that BCUC chose not to participate in this inquiry, as it could have assisted this Office with evidence relevant to its processes and what happened here. This said, the record before me is sufficient for the purposes of this inquiry.

[7] Although the Notice of Written Inquiry did not mention this provision, on June 19, 2014, counsel for Active Energy notified PIAC that Active Energy intended to argue that this provision applies.

[8] Initial submission, paras. 4 and 5.

DISCUSSION

[13] BCUC's decision that it was not authorized or required under FIPPA to refuse access to the report does not explicitly address the ATA issue. Active Energy raised that issue for the first time in this inquiry, and all parties made submissions on its merits. Like the custody or control issue under FIPPA, which I do not need to address, the ATA question is a threshold issue, *i.e.*, whether the disputed record is within the scope of FIPPA. Such an issue is, put another way, a jurisdictional issue as regards FIPPA's application. For BCUC to have considered and decided the applicant's request for access under FIPPA, it must be taken to have decided that FIPPA applies to that record viewed through the lens of the ATA. It is therefore clear that this issue falls within Active Energy's right under FIPPA to request a review of BCUC's decision to disclose the report.[9]

Does the ATA oust FIPPA's application?

[14] The ATA governs certain administrative tribunals in British Columbia. It covers a variety of matters, including governance, decision-making processes and judicial review of decisions. Section 2(4) of BCUC's governing statute, the *Utilities Commission Act* ("UCA"), provides that a number of the ATA's provisions apply to BCUC, including s. 61:

> **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 dispute resolution 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;
>
> (b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application;
>
> (c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;
>
> (d) a transcription or tape recording of a tribunal proceeding;
>
> (e) a document submitted in a hearing for which public access is provided by the tribunal;

[9] This would, of course, also be the case for the applicant if BCUC had refused to disclose the report.

> (f) a decision of the tribunal for which public access is provided by the tribunal.
>
> (3) Subsection (2) does not apply to personal information, as defined in the Freedom of Information and Protection of Privacy Act, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

[15] Active Energy argues that s. 61(2)(c) applies to the report when interpreted in accordance with the accepted approach to statutory interpretation. Active Energy argues that the report was received in a "hearing", or "part of a hearing", from which the public and others were excluded.

[16] The Supreme Court of Canada has affirmed many times that the basic modern rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[10] In determining whether s. 61(2)(c) applies, it is important to assess whether the nature of what BCUC was doing, and other circumstances—including the manner in which the report was sought and received—were such that there was a "hearing" within the meaning of s. 61(2)(c).

[17] In order to do this, I must have regard to the purpose of s. 61(2)(c). Having regard to the context of the UCA as a whole, and the purpose of that statute, I conclude that the purpose of s. 61(2)(c) is to protect information submitted to a tribunal hearing in private (*in camera*, as the lawyers call it). This protects commercially sensitive or valuable business information through the confidentiality provided by an *in camera* hearing. At the same time, it can ensure that the tribunal and the other parties to the proceeding have all relevant information. Even if another party is present at the *in camera* hearing, a tribunal may place trust or other conditions on that party, to ensure the information remains confidential and is not used improperly.[11] By providing, in s. 61(2)(c), that an access request cannot be made under FIPPA for information received *in camera*, the Legislature has left it to BCUC to regulate its own procedures respecting hearings, and access to information provided in such hearings, in a manner it considers necessary.

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[10] Quoting from R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at p. 67, with the Court most recently approving of this in *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 36.

[11] An implied undertaking to keep the information confidential and not use it for other purposes may also apply to other parties present. The fact that s. 21 of FIPPA might also protect the same information does not, of course, mean that FIPPA must apply despite s. 61(2)(c).

[18] Considered in the context of the rest of s. 61 and the ATA as a whole, one is not driven to conclude that the term "hearing" refers only to an oral hearing, as opposed to either an oral or written hearing. The Legislature would be aware that, whether on the basis of an express statutory mandate or through tribunal policy, tribunals may conduct either kind of hearing.[12] It is reasonable to conclude, therefore, that the Legislature did not intend the scope of s. 61(2)(c) to be narrow and limited to receipt of information in an oral hearing alone.

[19] The next question is whether, in the circumstances, BCUC received the report in a hearing or part of a hearing. In commissioning the report, BCUC was, it is reasonable to conclude, delegating to Consumer Protection BC investigative functions that BCUC's own staff might undertake in such a case. Can it be said that by commissioning the report from Consumer Protection BC, rather than doing the work itself, BCUC "received" the report as s. 61(2)(c) requires? Moreover, can the report be said to have been "received" in a hearing within the meaning of s. 61(2)(c)?

[20] In my view, the answer to both of these questions is yes. It might be argued that a "hearing" for the purposes of s. 61(2)(c) is one convened in order to adjudicate a matter, where evidence is submitted, through oral testimony or in documentary form, by a party to the proceeding. That argument would, however, overlook both the language of s. 61(2)(c), and the statutory context in which it appears, which provide no real support for that very particular, perhaps even overly-exacting, interpretation.

[21] It cannot persuasively be argued that the Legislature intended s. 61(2)(c) to apply only to a "hearing" on the merits of a matter, as opposed to a hearing convened to determine the admissibility of evidence. One purpose of the ATA is to enable administrative tribunals to conduct their proceedings, and make decisions, with a certain degree of flexibility as regards openness of proceedings, and thus information they consider. It is clear on the face of s. 61(2)(c), in fact, that some insulation from FIPPA's right of access to records is intended.[13] Like the courts, many tribunals will convene an *in camera* hearing—which is often referred to as a *voir dire*—for the sole purpose of receiving evidence to determine its admissibility. This convention recognizes, as does the Legislature through

[12] Although it is not of assistance in interpreting the legislative intention that informs s. 61(2)(c), I will note here that the UCA does not require BCUC to hold all of its hearings orally. Section 86.2, which over-rides the rest of that Act, provides that BCUC "may conduct a written hearing" even if the UCA otherwise appears to require an oral hearing.

[13] This does not mean that tribunals are free from any other obligations providing for access to evidence or information that they receive or create. The ATA itself otherwise makes provision for public access to evidence or information, a factor of some interest in deciding what qualifies as a "hearing". Other tribunals' governing statutes might contain over-riding provisions of this kind. The rules of natural justice and fairness may, as regards actual parties to a matter, require disclosure of evidence. There is also the open court principle, which is increasingly seen to apply to administrative tribunals.

s. 61(2)(c), the need to protect other important interests, including the interest in appropriate protection for individual privacy and commercially valuable information.

[22] I conclude that a hearing convened to determine a preliminary matter such as the admissibility of evidence (or "information") is a "hearing" within the meaning of s. 61(2)(c). For all intents and purposes, I conclude, this is what occurred here. The evidence before me indicates that BCUC had not yet reached the stage of convening a hearing on the merits of any complaints, which were later settled without a hearing. It is evident from the record before me that BCUC had the report and its contents in front of it, and decided, in light of Active Energy's objections, to determine whether it could properly take that material into account in its ongoing enforcement proceeding or action. BCUC convened a hearing in order to determine that question. I conclude, therefore, that the hearing convened for this purpose was a "hearing" within the meaning of s. 61(2)(c).

[23] I also find that the report was "received" by BCUC as contemplated by s. 61(2)(c). The fact that it was produced by a BCUC 'service provider' does not mean that it was not "received" in a hearing by BCUC itself.[14] Tribunals covered by the ATA undoubtedly vary in terms of the nature of their activities and the varying tools and processes they are empowered to use to do their work. Consistent with what I have already said about legislative intention, to read into s. 61(2)(c) the limitation that it can only apply where a party to a proceeding submits evidence to a passive tribunal before it can be said to be "received" by the tribunal reads too much into the statutory language, certainly as it relates to BCUC. In taking this view, I have kept in mind the nature of BCUC's functions, both investigative and adjudicative, and the statutory powers it exercises in discharging those functions. BCUC, I conclude, "received" the report in a hearing as required by s. 61(2)(c).[15]

[24] The last issue to be considered is whether the report was received in "confidence". The evidence before me on that issue comes from the BCUC decisions, with Active Energy contending in its submissions that the report was always confidential, throughout the process. For s. 61(2)(c) purposes, the issue

[14] The appellant argued that BCUC could not, if it produced the report itself, have then itself "received" the report in a hearing. I do not agree. Some tribunals still exercise investigative and adjudicative functions, as does BCUC in some respects. I do not see why such a tribunal should be precluded, in terms of what s. 61(2)(c) might allow, from putting before itself information that it compiled during its earlier investigative-stage activities.

[15] I also keep in mind the statutory intention of the provision, in the context of the ATA overall, which addresses British Columbia's varied administrative tribunal landscape. Still, to be clear, I do not foreclose the possibility that this issue might arise again where a tribunal has strictly adjudicative functions, and thus has no role in generating information or evidence for its own purposes.

is whether it was "received" at a hearing in confidence. I am satisfied, based on the BCUC decisions alone, that this was the case.[16]

[25] It follows from all of the above that s. 61(2)(c) applies to the report, thus excluding it from the right of access to records created under FIPPA. BCUC's decision to give access to the report is therefore overturned, on the basis that FIPPA does not apply.

[26] Again, given the above finding, it is not necessary to make a finding on the custody or control issue. I leave for another day the issue of whether the fact that information is "expunged" from a proceeding, such that it might be said to cease to exist, or have no import in that proceeding, also means that a public body does not have custody or control of the same record for FIPPA purposes.[17]

CONCLUSION

[27] For the reasons given above, I find that, by virtue of s. 61(2)(c) of the ATA, FIPPA does not apply to the report in dispute. Consistent with numerous previous orders, because FIPPA does not apply to the report, no order under s. 58 is necessary.[18]

February 19, 2015

ORIGINAL SIGNED BY

Michael McEvoy, Deputy Commissioner

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[16] See the explicit terms of BCUC Order A-5-12, Order A-1-13 and Order A-20-2012, copies of which are found at tabs D, E and F, respectively, of Active Energy's initial submission, or at bcuc.com.
[17] Or, for that matter, other purposes, including auditing, litigation or archival purposes.
[18] See, for example, Order F07-07, 2007 CanLII 10862 (BC IPC).