Office of the Information & Privacy Commissioner for British Columbia

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Order F18-24

MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES

Elizabeth Barker
Senior Adjudicator

June 26, 2018

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Summary: The applicant requested records related to the eDrive electricity rate for producers of liquefied natural gas. The Ministry disclosed records but withheld some information under ss. 12(1) (cabinet confidences), 13(1) (policy advice or recommendations) and 14 (legal advice) of the *Freedom of Information and Protection of Privacy Act*. The applicant said that s. 25(1) applied (public interest). The adjudicator confirmed the Ministry's s. 12(1) decision in part and all of its s. 14 decision but found that ss. 13(1) and 25(1) did not apply. The Ministry was ordered to disclose a small amount of information that could not be withheld under ss. 12(1) or 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c), 13(1), 14, 25(1)(a) and 25(1)(b).

INTRODUCTION

[1] The applicant is a journalist who requested access to records related to the business case and cost/benefit analysis for the Province's eDrive electricity rate program. The Ministry of Energy, Mines and Petroleum Resources (Ministry) disclosed records to the applicant but withheld some information under s. 12(1) (cabinet confidences), s. 13(1) (policy advice or recommendations), s. 14 (legal advice) and s. 17 (harm to financial or economic interests of a public body) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested a review of the Ministry's decision by the Office of the Information and Privacy Commissioner (OIPC). The applicant also submitted that s. 25 (disclosure in the public interest) applies. Mediation did not resolve the

matters in dispute and the applicant requested that they proceed to written inquiry.

[3] After the notice of inquiry was issued, the Ministry reconsidered its decision and released additional information. It also said it had decided that it would no longer rely on s. 17. Further, in its initial submission, the Ministry also said it had decided that it would no longer rely on ss. 15 or 21, although those exceptions were not mentioned in the OIPC fact report, the notice of inquiry or the Ministry's January 20, 2017 decision letter to the applicant. I conclude that ss. 15, 17 and 21 are not at issue in this inquiry.

ISSUES

[4] The issues to be decided are as follows:

1. Is the Ministry required to disclose the disputed information pursuant to s. 25(1)?

2. Is the Ministry required to refuse to disclose the disputed information under s. 12(1)?

3. Is the Ministry authorized under ss. 13(1) and 14 to refuse access to the disputed information?

[5] Section 57 of FIPPA places the burden on the Ministry to establish that it is authorized under ss. 12(1), 13(1) and 14 to refuse to disclose the information in dispute. FIPPA does not say what the burden of proof is for s. 25(1). I agree with previous OIPC orders that have said that as a practical matter it is in the interests of both parties to provide whatever evidence and argument they have to assist the adjudicator in making the s. 25 determination.[1]

DISCUSSION

Background

[6] In November 2016, the Province announced a new eDrive electricity rate for producers of liquefied natural gas (LNG) who agree to use electricity from BC Hydro's grid for LNG production. The eDrive rate is the same as BC Hydro's standard industrial electricity rate and is lower than the LNG rate that was announced two years earlier.[2]

[1] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39.
[2] The rate was implemented through a Cabinet regulation: *Domestic Long-Term Sales Contracts Regulation*, OIC 612, November 3, 2014. Also: Assistant Deputy Minister, Electricity and Alternative Energy Division's (ADM) affidavit at exhibit A.

[7] The Ministry explains that the Province offered the eDrive rate as an incentive to encourage LNG proponents to use electricity rather than natural gas to produce LNG (i.e., using compressors to chill and liquefy natural gas). The intent behind the rate incentive was to try and limit greenhouse gas emissions. The eDrive rate is only available to LNG proponents once they announce their final decision to proceed with their LNG projects and commit to using electricity in their production processes.

[8] The Ministry says that as a result of the May 2017 election and change in government, the Province's position on LNG is evolving. The Ministry says it continues to work on LNG-related issues and anticipates that this work will require future appearances before Cabinet and the Treasury Board, if the Province chooses to proceed with LNG.[3]

Records

[9] The information in dispute is contained in the following records:

1. Speaking Notes – Joint speaking notes for the appearance of the former Minister of Natural Gas Development and the former Minister of Energy and Mines before the Cabinet Working Group on Liquefied Natural Gas (CWGLNG).[4]

2. Slide Deck – A copy of the slide show used for a Ministry presentation to CWGLNG.[5]

3. Agenda - An agenda for a CWGLNG meeting.[6]

4. Meeting Minutes - The minutes of a CWGLNG meeting.[7]

5. Cabinet Submission draft with a covering email string.[8]

6. Treasury Board Submission draft with a covering email.[9]

7. Discussion Paper – This record is evidently only three pages of a discussion paper. The Ministry says this document was created by BC Hydro and that these three pages are all that it has in its possession.[10]

8. Legal Opinions.[11]

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[3] ADM's affidavit at para. 6.
[4] Speaking Notes: pp. 14-13 (duplicates at pp. 45-57, 58-70 and 158-170).
[5] Records: pp. 6-9 (duplicates at pp. 141-144).
[6] Records: p. 36 (duplicate at p.149).
[7] Records: p. 4 (duplicate at p. 5).
[8] Records: pp. 82-92 (duplicates at pp. 119-128).
[9] Records pp. 93-104 (duplicates at pp. 129-140).
[10] Records: pp. 1-3 (duplicates at pp. 114-116).
[11] Records: pp.27-35 and 71-78

Public Interest - s. 25(1)

[10] Section 25 of FIPPA requires a public body to disclose information, even if other provisions in FIPPA would otherwise require or authorize it to be withheld. If s. 25 applies, the information must be disclosed without delay. The parts of s. 25 that are relevant in this case are as follows:

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

[11] Section 25 overrides all of FIPPA's exceptions to disclosure, including the mandatory exceptions to disclosure found in Part 2 and the privacy protections contained in Part 3, and consequently there is a high threshold before it applies.[12] It applies only in serious situations justifying mandatory disclosure.[13]

[12] The applicant submits that disclosure of the information in dispute is in the public interest, so s. 25 applies, but he does not specify whether he means s. 25(1)(a) or (b). All of his s. 25 submissions, however, relate to s. 25(1)(b) matters. The Ministry submits that given the applicant's access request was for records about the "business case and cost/benefit analysis for the eDrive program," s. 25(1)(a) clearly does not apply. I find that s. 25(1)(a) is not at issue here because the information in dispute is not about the environment or the health or safety of the public or a group of people.

[13] As for the matters under s. 25(1)(b), the applicant submits that political donations were made to the governing BC Liberal party by Woodfibre LNG at the time that it was in negotiations to receive the eDrive rate. He says:

> The public has a right to know that the decision-making by a public body is carried out with the public interest paramount, and that it is not corrupted by the influence of donations to political parties or kickbacks. A private interest that receives public subsidies must be fully understandable to the public.[14]

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[12] Investigation Report F16-02, 2016 BCIPC 36 at p. 36.
[13] Order F15-27, 2015 BCIPC 29 at para. 29.
[14] Applicant's submission at para. 40.

[14] The applicant also submits that if BC Hydro provides electricity to LNG producers at the eDrive rate, instead of the higher LNG rate that the Province had earlier determined was needed for BC Hydro to recover its costs, it will result in a subsidy to LNG producers. He says that other BC Hydro customers will have to pay increased rates to cover the shortfall.

[15] In support of his arguments, the applicant provides links to online news stories and a press release. I have followed the links and read the material, but I do not know for certain if the links still connect to the articles he intends as he did not provide copies. The articles are as follows: *Why Should British Columbians Pay Power Bills for LNG Industry?*; *Did Christy Clark Pull a Too-Fast PR Stunt on LNG?*; *The 'wild west' of fundraising; Leaked Records Reveal Offshore's Role In Forest Destruction* and the Province's press release about the appointment of a special prosecutor for the Elections BC investigation into lobbyists' indirect political donations.[15]

[16] The Ministry submits that s. 25(1)(b) does not apply because disclosure of this specific information is not "clearly" in the public interest.[16] The Ministry says that a considerable amount of information regarding LNG and the eDrive rate is already publicly available and it provides copies of six press releases that were issued on November 4, 2016 about the eDrive rate, LNG, and Woodfibre LNG's project.[17] The Ministry also says that "its November 4, 2016 announcement regarding the eDrive electricity rate was well before BCUC's [British Columbia Utilities Commission] review of Site C commenced, so eDrive would have been within the scope of work contemplated by the BCUC in its review."[18] The Ministry provides a December 11, 2017 press release that demonstrates the chronology of those events. Although it does not elaborate, I understand the Ministry to mean that there is no need to disclose the information in dispute pursuant to s. 25 because sufficient information has already been publicly disclosed or reviewed by an oversight body, specifically BCUC.

[17] The Ministry also submits that s. 25 should not be interpreted as overriding ss. 12, 13 and 14 given the important principles underlying those exceptions to disclosure.[19] It says, "to apply s. 25 to release such information is, in fact, not in the public interest at all in that it would severely compromise the fundamentals of cabinet privilege on a major, ongoing topic that the Ministry continues to work on."[20]

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[15] In order: *The Tyee*, November 16, 2016 and January 4, 2017; *The Globe and Mail*, March 3, 2017;*The International Consortium of Investigative Journalists*, November 8, 2017; Criminal Justice Branch Press release, March 30, 2017.
[16] Ministry's initial submissions at para. 99.
[17] Director's affidavit at exhibits A-F.
[18] Ministry's reply submission at para. 3.
[19] Ministry's initial submission at para. 101 and reply submission at para. 5.
[20] Ministry's initial submission at para. 104.

[18] I am unable to see some of the information in dispute in this case. The Ministry refused to produce it for my review because it asserts that information is protected by solicitor client privilege. This is discussed more fully below in the s. 14 analysis. However, the Ministry did provide affidavit evidence from two lawyers about this information, and their affidavit evidence was sufficient for me to determine whether s. 25(1)(b) applies.

Analysis and findings, s. 25(1)(b)

[19] Section 25(1)(b) only applies where disclosure is "clearly" in the public interest. Analyzing the application of s. 25(1)(b) in a specific situation begins by considering whether the information at issue concerns a subject, circumstance, matter or event justifying mandatory disclosure. Once it is determined that the information is about a matter that may engage s. 25(1)(b), the nature of the information itself should be considered to determine whether it meets the threshold for disclosure. In any given set of circumstances there may be competing public interests, weighing for and against disclosure, and the threshold, while remaining high, will vary according to those interests. Disclosure will be required under s. 25(1)(b) where a disinterested and reasonable observer, knowing the information and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.[21]

[20] I accept that the public would generally be interested in the matters the disputed records address, namely BC Hydro rates, LNG production and whether government decision-making is being influenced by political donations from private companies. This public interest is reflected in the news articles and information that the applicant provides and the Province's press releases. However, for the reasons that follow, I find that disclosing the specific information in this inquiry does not meet the required threshold in s. 25(1)(b) of being *clearly* in the public interest.

[21] Based on the Ministry's evidence and my review of the records, it is apparent that the Treasury Board and Cabinet Submission are drafts and not finalized documents. Both documents are unsigned and the Cabinet Submission is labeled "draft." The emails that accompany these submissions are discussions about what the submissions should say. The Ministry's evidence is that these are drafts that were not provided to Cabinet or Treasury Board. In my view, these incomplete submissions may not accurately reflect the facts and analysis the drafters intended to convey to Executive Council or they may reveal only initial thoughts.

[22] Similarly, the BC Hydro Discussion Paper is evidently missing pages, so it relays incomplete information. Draft or incomplete information in the two submissions and the Discussion Paper would not advance public discourse or

[21] Investigation Report F16-02, supra note 12 at pp. 26- 27.

understanding of the issues in any meaningful way or enable the public to make informed political decisions. The public certainly has an interest in good decision-making by public bodies, but these drafts and incomplete records would not provide accurate insight into the decision-making in this case.

[23] I also find that disclosing the balance of the information would not contribute in any substantive way to public understanding of the eDrive rate program. The Ministry's evidence satisfies me that a significant amount of information about the intersection of the LNG industry, BC Hydro and the eDrive rate is already public. The fact that the eDrive rate is lower than the previously announced LNG rate has not been kept from the public or the utilities regulator. It was publicly announced well before the BCUC concluded its review and report of the Site C hydroelectric dam and its impact on BC Hydro.

[24] As for the applicant's allegations about the timing of the eDrive rate decision for Woodfibre LNG and its donations to the BC Liberal party, there is nothing in any of the disputed records that adds to what the applicant says he already knows about that topic.

[25] The fact that the public may be interested to see what the disputed information reveals about the eDrive rate, and how decisions were made about it, is not enough to meet the threshold required for s 25(1)(b). Section 25(1)(b) does not apply to information simply because it might pique the interest of the public.[22] The reasons for invoking s. 25(1)(b) must be of sufficient gravity to override all other provisions of FIPPA and that is not the case here with the particular information in dispute.

[26] In conclusion, I find that disclosure of the information in dispute is not "clearly" in the public interest and s. 25(1)(b) does not apply.

Cabinet confidentiality – s. 12(1)

[27] The Ministry is withholding a large part of the records under s. 12(1). The applicant argues that the Ministry has applied s. 12(1) too broadly. Section 12(1) and (5) state as follows:

> 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
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> …

[22] Investigation Report F16-02, supra note 12 at pp. 26 and 27.

> (5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.

[28] The Supreme Court of Canada said the following about the importance of maintaining the confidentiality of Executive Council (*i.e.*, Cabinet):

> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny… If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect…
>
> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly….[23]

[29] The Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*) [*Aquasource*] explained what is meant in s. 12(1) by the term "substance of deliberations":

> Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted....". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.…
>
> It is my view that the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications….[24]

[30] The Court of Appeal went on to say that the test for s. 12(1) is: "Does the information sought to be disclosed form the basis for Cabinet deliberations?"[25]

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[23] *Babcock* v. *Canada (Attorney General)*, 2002 SCC 57 at para. 18.
[24] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA) at paras. 39 and 41.
[25] *Ibid* at para. 48.

Committees of the Executive Council

[31] Section 12 protects information that would reveal the substance of deliberations of the Executive Council (i.e., Cabinet) or any of its committees. Some of the information here concerns the Treasury Board and the CWGLNG. In order for s. 12 to apply to this information, I must first determine whether these bodies are committees for the purposes of s. 12. Under s. 12(5) of FIPPA, the Lieutenant Governor in Council may designate a committee for the purposes of s. 12. The committees so designated are listed in the *Committees of the Executive Council Regulation* (Regulation). The list of designated committees in the Regulation included the Treasury Board and CWGLNG for the time period covered by the access request.[26] In this case, they are both committees of the Executive Council for the purposes of s. 12(1).

Would disclosure reveal the substance of deliberations?

[32] The Ministry says disclosing the disputed information would reveal the substance of CWGLNG's deliberations as well as material that the Ministry intends to put before Cabinet as part of its ongoing work on the LNG issue.[27]

[33] The Ministry provided affidavit evidence regarding the s. 12 severing from three Ministry officials: the Assistant Deputy Minister, Electricity and Alternative Energy Division (ADM), the Director, Cabinet and Legislative Initiatives (Director) and the Executive Director, Strategic Initiatives Branch (Executive Director). Both the ADM and the Director say:

> The Province's work on LNG slowed in advance of the provincial election in May 2017. After the provincial election and the eventual change in government, the Province's position on LNG continues to evolve. Nonetheless, the Ministry continues to work on LNG-related issues with the anticipation that this work will require future appearance before Cabinet and the Treasury Board should the Province choose to proceed.[28]

[34] The ADM and Director say that the Ministry appeared before the CWGLNG on July 28, September 13 and October 13, 2016 to provide information on the eDrive rate for LNG facilities, and it is the Ministry's work in relation to those appearances that resulted in the creation of most of the records in dispute. The Executive Director says that implementation of the eDrive rate will require further consideration by Cabinet as well as amendments to, or creation of, regulations to support the implementation.[29]

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[26] The time period is May 1 - November 4, 2016. CWGLNG is no longer listed in the *Regulation* (i.e., *B.C. Reg 156/2017,* which replaced *B.C. Reg 229/2005* on August 1, 2017).
[27] Ministry's initial submission at para. 39.
[28] ADM's affidavit at para. 6 and Director's affidavit at para. 6.
[29] Executive Director's December affidavit at para. 12.

[35] The Director and the ADM identify and describe the records in dispute, and I will address each in turn below.

[36] Speaking Notes - The Ministry's evidence is that this record is the joint speaking notes of the former Minister of Natural Gas Development and the former Minister of Energy and Mines, which were used for their October 13, 2016 presentation to CWGLNG. There is a final version and three previous versions of these notes, which I see differ in only minor ways. I find that these speaking notes contain information that was provided to CWGLNG and they reveal the body of information considered at the meeting. In my view, this information forms the basis of CWGLNG's deliberations and would allow accurate inferences about those deliberations. I conclude disclosing this information would reveal the substance of CWGLNG's deliberations, so s. 12(1) applies.

[37] Slide Deck – There are four versions of this record which the Ministry says is a slide deck prepared for the October 13, 2016 presentation to CWGLNG. The Ministry says two versions were provided to CWGLNG and two are previous versions. I have reviewed all versions and they contain substantially the same information and do not differ in any significant way. The Ministry's evidence satisfies me that all versions contain information that was presented to CWGLNG. In my view, disclosing this information would reveal the body of information considered by CWGLNG. This information forms the basis of CWGLNG's deliberations and would allow accurate inferences about those deliberations. I find that disclosing this information would reveal the substance of CWGLNG's deliberations, so s. 12(1) applies.

[38] Agenda – This record is the agenda for CWGLNG's October 13, 2016 meeting. The Ministry only disclosed the title, which is *Cabinet Working Group on LNG - Revised Agenda*, and the following phrase at the bottom: "Confidential, 12/10/2016 08:12". The Ministry is withholding each agenda item, who was speaking to that item and for how long, and whether there were tabbed documents.[30] The Ministry's only evidence is that the Agenda "sets out the topics put before" the CWGLNG.[31]

[39] Other BC Orders have found that s. 12(1) does not apply to headings or titles that reveal only bare-bones information about the subject as opposed to information about the substance of deliberations. This approach was found to be reasonable in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*. Joyce, J. agreed with the determination in Order F08-18 regarding agenda items, specifically that

[30] The tabs were not included in the records in dispute.
[31] Director's affidavit at para. 9.

"headings that merely identify the subject of discussion without revealing the "substance of deliberations" do not fall within the s. 12(1) exception."[32]

[40] In my view, the Agenda here is an administrative tool whose purpose is to schedule and organize how the meeting will proceed. The items for discussion are simply bare-bones statements about the topics to be addressed and they reveal nothing about the substance of the deliberations on those topics. While there may be circumstances where the items on an agenda would reveal the substance of deliberations, in this case, I find they do not. This reasoning also applies to the rest of the information in the Agenda such as the name of the person presenting each item and how much time was allotted to their presentation. Accordingly, I find that s. 12(1) does not apply to the information withheld from the Agenda.[33]

[41] Meeting Minutes - This record is titled *Previous Minute – Woodfibre* and the Ministry says it is "record of decision" document. The Ministry is withholding all the information in this record except the document's main title. The withheld information is Cabinet and CWGLNG's views, recommendations and decisions regarding information that CWGLNG presented to Cabinet. I conclude that this information reveals the substance of their deliberations, so s. 12(1) applies.

[42] However, I find that s. 12(1) does not apply to the headings in this document because they only reveal the date of the meetings and do not reveal the substance of deliberations.[34]

[43] Cabinet Submission and Treasury Board Submission - The disputed records include two copies each of a draft Cabinet Submission and a draft Treasury Board Submission. The Cabinet Submission is attached to a completely redacted email chain. The Ministry only disclosed that the document is a draft cabinet submission, the name of the Minister and Ministry and the date of the draft. The Treasury Board Submission is attached to a partially redacted email from BC Hydro. The Ministry has disclosed that the record is a draft treasury board submission, but it is refusing to disclose any of its contents.

[44] The Ministry's evidence is that the Cabinet Submission and the Treasury Board Submission are drafts and they have not yet been provided to Cabinet or its committees. The Ministry says these documents were prepared for submission to Cabinet and it anticipates that they will go to Cabinet committees

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[32] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 112 at paras. 94-97 upholding the decision about Cabinet meeting agenda items in Order F08-17, 2008 CanLII 57360 (BC IPC) at paras. 18-24. See also: Order F12-01, 2012 BCIPC 1 (CanLII) at para. 22; Order F14-51, 2014 BCIPC 55 at para. 25; Order F14-55, 2014 BCIPC 59 (CanLII) at para. 35.

[33] The Ministry did not apply any other FIPPA exceptions to the information in the Agenda.

[34] The Ministry did not apply any other exceptions to the headings in the Meeting Minutes.

in the future."[35] It relies on *Aquasource* to support its argument that "substance of deliberations" refers not only to the body of information which Cabinet considered in making a decision, but also to the body of information which it would consider in the case of submissions not yet presented.

[45] The Ministry also says that "the substance of" these two submissions "remains a key piece of Ministry work," and that the Ministry has used the information in them "to inform new senior officials within the Ministry, including the Minister."[36] For instance, the Treasury Board Submission was provided to the Minister of Natural Gas Development to help him prepare for his October 13, 2016 appearance before CWGLNG. Regarding the Cabinet Submission, the Ministry says that "much of the substance of this document has already been provided to the Cabinet Working Group in other forms."[37] It does not, however, provide specifics.

[46] Although the Ministry's evidence is that the two submissions were not actually submitted to Cabinet or its committees, I am satisfied that they were prepared for submission to Cabinet or its committees. This is evident by their content and format and what is said in the emails to which they are attached. It is also supported by the ADM and Director's affidavit evidence. Both submissions clearly contain policy and legislative considerations, options, implications and recommendations. Therefore, I find that the submissions are the type of information meant by the phrase "advice, recommendations, policy considerations…prepared for submission to the Executive Council or any of its committees" in s. 12(1).

[47] I also accept the Ministry's evidence that the information in the two submissions is eventually going to be presented to Cabinet or its committees for their consideration because it is still key to the Ministry's ongoing work on the issues the submissions address. Therefore, if these submissions and the descriptive content in their covering emails are disclosed now to the applicant, he will be able to accurately infer the substance of the deliberations of Cabinet or its committees when these issues next come up for consideration.

[48] In my view, the Cabinet Submission, the Treasury Board Submission and the descriptive parts of their covering emails contain the type of information that the BC Court of Appeal in *Aquasource* meant by the phrase "the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision."[38] Therefore, with the exception of the information that I discuss in the next paragraph, I am satisfied

[35] Ministry's initial submission at para. 38 and 40.
[36] ADM's affidavit and Director's affidavit at paras. 9.
[37] ADM's affidavit at para. 9.
[38] *Aquasource*, supra note 24 at para. 39.

that the information in these records forms the basis of CWGLNG's deliberations, so s. 12(1) applies.

[49] However, I find that s. 12(1) does not extend to the names of the preparers and signatories of these submissions, the dates and the non-descriptive, generic headings (i.e., "Treasury Board Submission," and "Issue"). It also does not apply to the names of the people communicating in the cover emails, the dates of the emails, a few sentences about administrative process and the category of record attached to the emails. There is simply insufficient evidence in this case to suggest that disclosing that type of bare-bones information would reveal the substance of deliberations.

[50] Discussion Paper - The Ministry says this three-page document was created by BC Hydro. The only information that the Ministry has disclosed are two headings at the top: "Discussion Paper – E-Drive Rate for LNG Facilities" and "Confidential – Advice to Cabinet." The paper contains policy considerations and analysis regarding the eDrive rate and an option to consider. The Ministry's evidence is that this document was never provided to the CWGLNG. However, the Ministry says that this record is "likely the key document that informs the Ministry's materials that it has placed before the Cabinet Working Group."[39] The Ministry does not specify which materials it means.

[51] Although this specific record was not given to CWGLNG or Cabinet, it is clear that it contains information that was under consideration by CWGLNG. I make that finding based on my review of the information that was provided to CWGLNG in the Speaking Notes and Slide Deck. I conclude that the Discussion Paper contains information that is part of the body of information considered by CWGLNG. For that reason, I am satisfied that it forms the basis for Cabinet deliberations in the way *Aquasource* said would reveal the substance of deliberations. Therefore, I find that s. 12(1) applies to the information severed from the Discussion Paper.[40]

[52] Legal Opinions - The Ministry says that disclosing these legal opinions, which were provided to the Ministry about eDrive and LNG, would reveal the substance of information the Ministry put before the CWGLNG. The Ministry does not provide any particulars or further explanation, and it has not provided the content of these 17 pages for my review (it also claims that they are protected by legal advice privilege). In my view, the Ministry has not provided sufficient information to establish that disclosing these pages would reveal the substance of CWGLNG's deliberation, so s. 12(1) does not apply. However, given the claim that these pages are protected by solicitor client privilege, I will consider them again when I discuss s. 14.

[39] Director's affidavit at para. 9 (first bullet).
[40] The Ministry also applied s. 13 to withhold this record but I did not consider its application, given my finding that s. 12 applies.

Section 12(2)(c)

[53] I have found that disclosing most of the information being withheld under s. 12(1) would reveal the substance of Cabinet or committee deliberations. However, that is not the end of the analysis because I must also consider s. 12(2), which says that s. 12(1) does not apply in certain circumstances. In other words, Cabinet confidences do not have absolute protection from disclosure as s. 12(2) provides a window of access under limited circumstances. The relevant circumstance in this case is s. 12(2)(c):

> (2) Subsection (1) does not apply to
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> …
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> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
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> (i) the decision has been made public,
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> (ii) the decision has been implemented, or
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> (iii) 5 or more years have passed since the decision was made or considered.[41]

[54] It can be difficult to distinguish between information that forms the "substance of deliberations" and that which forms "background explanations or analysis." In *Aquasource*, the Court of Appeal confirmed that ss. 12(1) and 12(2)(c) cannot be read as watertight compartments and that former Commissioner Flaherty was correct in harmonizing them in Order No. 48-1995. In that Order, the former commissioner said that s. 12(2)(c) "relates to the purpose for which the information is given: if it is to provide background or analysis and is not interwoven with any of the items listed in s.12(1), the information can be disclosed."[42] He also said the following about the meaning of "background explanations or analysis" in s. 12(2)(c):

> …"Background explanations" include, at least, everything factual that Cabinet used to make a decision. "Analysis" includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it. Records prepared for submission to Cabinet should not be presumed to automatically reveal the substance of deliberations and must be considered for release to an applicant under section 12(2)(c).[43]

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[41] Sections 12(2)(a) and (b) clearly do not apply in this case as the information has not been in existence for more than 15 years and it does not relate to a decision on an appeal under an Act.
[42] *Aquasource*, supra note 24 at para. 50.
[43] Order No. 48-1995, July 7, 1995, at p. 12; *Aquasource* supra note 24 at paras. 50-51.

[55] This interpretation has been followed in subsequent orders and I will do the same here.[44]

[56] In this case, the Ministry says that s. 12(2)(c) does not apply because the information "is not purely background information or analysis."[45] It also says that "the implementation of the eDrive rate will require further consideration by Cabinet. As such, the Ministry submits that it is too early in the process to say that any of the elements of s. 12(2) of FOIPPA apply."[46] The applicant says s. 12(2)(c) applies to all or parts of the records at issue.

[57] I disagree with the Ministry that none of the elements of s. 12(2) apply. The press releases that the Ministry provided show that a decision about the eDrive rate has been made public.[47] Specifically, on November 4, 2016, the Province publicly announced the following:

- A new eDrive electricity rate is available to LNG producers for their liquefaction and ancillary needs.
- The eDrive electricity rate is the same as the standard industrial electricity rate.
- That Woodfibre LNG had decided to use electricity for its LNG production.

[58] In addition, I find that a small amount of information in the records is "background explanation and analysis" that relates to the publicly announced decision to offer the eDrive rate for LNG producers. It is factual information and discussion of that factual information. It is evident that the purpose of including that information is to present background explanation or analysis to CWGLNG and Cabinet for their consideration when making a decision.

[59] However, the small amount of information I find to be "background explanations and analysis" is not in neat, discrete blocks of text. Instead, it is interwoven with advice, recommendations and policy considerations. This is the case, even under the headings "Background/Context" in the Treasury Board Submission and the Cabinet Submission. In my view, it would not be possible to reasonably sever the records in order to disclose only the background explanation and analysis without also revealing the substance of deliberations.[48]

[60] In conclusion, I find that s. 12(2)(c) does not apply to the information to which I find s. 12(1) applies.

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[44] *Aquasource* supra note 24 at paras. 50-51. See examples: Order 01-02, 2001 CanLII 21556 (BC IPC) at para. 15 and Order F17-15 2017 BCIPC 16 at para. 26.
[45] Ministry's reply submission at para. 7.
[46] Ministry reply submission at para. 7.
[47] Specifically, the press releases that accompany the Director's affidavit.
[48] For a similar conclusion, see Order F17-15 2017 BCIPC 16 at para. 29.

Advice or recommendations - s. 13

[61] All of the information the Ministry is refusing to disclose under s. 13 was also withheld under s. 12(1). As I have found that most of it is appropriately withheld under s. 12(1) I will only consider the few instances where it is not. They are as follows:

- Agenda – agenda items and related tab materials, who would present each item and for how long;
- Meeting Minutes - headings that reveal meeting dates;
- Cabinet and Treasury Board Submissions and emails - the submissions' dates, generic headings and names of the preparers and signatories, the parties to the emails, the category of record attached to the emails and sentences in the emails about administrative process.

[62] Section 13(1) says that the head of a public body may refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. BC Orders have said that s. 13(1) applies not only when disclosure of the information would directly reveal advice and recommendations, but also when it would allow accurate inferences about the advice or recommendations.[49] Further, the Court of Appeal said that the term "advice" includes "opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body."[50]

[63] The Ministry submits that the information it is withholding under s. 13(1) directly reveals advice or recommendations developed by and for the Ministry. The applicant disputes that s. 13(1) applies.

[64] I have considered the small amount information that is in dispute under s. 13(1), which I have found may not be withheld under s. 12(1). I find that it does not directly reveal, or allow accurate inferences about, advice or recommendations. Therefore, that information may not be withheld under s. 13(1). [51]

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[49] Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC).

[50] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665 at para. 111.

[51] For the sake of clarity, I have highlighted that information in a copy of the records that is being sent to the Ministry along with this order.

Solicitor client privilege - s. 14

[65] The Ministry is withholding some full records and portions of records under s. 14.[52] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege. The Ministry submits that that the information it withheld under s. 14 is protected by legal advice privilege.

[66] When deciding if legal advice privilege applies, BC Orders have consistently applied the following criteria:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[67] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[53]

Section 14 records not produced

[68] The Ministry did not produce a copy of the s. 14 information for my review. Instead, it provided affidavits from two lawyers with the Ministry of Attorney General's Legal Services Branch. Both lawyers say they acted as legal counsel and provided legal advice to employees of the Ministry on matters relating to the records responsive to the applicant's FIPPA access request. They each say that they have reviewed the records that are the subject of their affidavit. Their affidavits contain a table with the date and page numbers of the s. 14 information, a brief description of the type of record or information and who was involved in the communications.

[69] The OIPC has the power pursuant to s. 44(1) of FIPPA to order production of records for which solicitor client privilege is claimed. However, given the importance of solicitor client privilege to the operation of the legal system, it will only do so when necessary to adjudicate the issues in an inquiry. In this case, I determined that the two lawyers' affidavit evidence was sufficient for me to

[52] This includes the Legal Opinions which I found above cannot be withheld under s. 12(1).
[53] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

decide if s. 14 applied and that it was unnecessary to also order production of the records for my review.

[70] The two lawyers say that the information severed under s. 14 discloses their confidential communications with the person who at that time was the Assistant Deputy Ministry for the Ministry of Natural Gas Development. They say that the information reveals communications that relate directly to the seeking, formulating or giving of legal advice. In addition, they say that some of the s. 14 information reveals the Ministry speaking of legal advice they received or legal advice they need to seek and the lawyers did in fact provide that advice. The lawyers say that they have reviewed their own records and confirm that in each instance they were acting in their role as legal counsel at Legal Services Branch when they provided advice to the Ministry.

[71] The lawyers' affidavit evidence satisfactorily establishes that disclosing the information the Ministry is withholding under s. 14 would reveal confidential communications between the Ministry and its lawyers that directly relate to the seeking, formulating and providing of legal advice. I find that the Ministry has proven that this information is protected by legal advice privilege and the Ministry is authorized to refuse to disclose it under s. 14.

CONCLUSION

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

1. I confirm that the Ministry is not required to disclose the information in dispute under s. 25(1).

2. I confirm that, subject to paragraph 5 below, the Ministry is authorized to refuse to disclose the information it withheld under s. 12(1).

3. The Ministry is not authorized to refuse to disclose the information it withheld under s. 13(1).

4. I confirm that the Ministry is authorized to refuse to disclose the information it withheld under s. 14.

5. I require the Ministry to give the applicant access to the highlighted information on pages 4, 36, 82-92 and 93-104 that are being sent to the Ministry along with this order. For clarity, the Ministry is not required to disclose the duplicates of those pages.

6. I require the Ministry give the applicant access to the highlighted information by August 9, 2018. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

June 26, 2018

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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