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Order F18-49

MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES

Elizabeth Barker
Senior Adjudicator

November 26, 2018

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Summary: An applicant requested access to records about a meeting between the former Minister of Natural Gas Development and executives of a company proposing to build a liquefied natural gas processing and export facility. The Ministry disclosed records to the applicant, but withheld some information in them pursuant to exceptions under the *Freedom of Information and Protection of Privacy Act*. The adjudicator disagreed with the applicant's claim that the Ministry was required to disclose the information under s. 25 (disclosure in public interest). The adjudicator also found that ss. 12(1) (cabinet confidences), 14 (solicitor client privilege), 17 (harm to financial or economic interests of a public body) and 22(1) (harm to personal privacy) applied to most of the information but s. 21(1) (harm to third party business interests) did not. The Ministry was ordered to give the applicant access to some of the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 14, 17(1), 21(1), 21(1)(a), 21(1)(b), 21(1)(c), 22(1), 22(3)(d), 25(1)(a), 25(1)(b) and 44(1).

INTRODUCTION

[1] An applicant requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to all records regarding an October 19, 2016 meeting attended by the former Minister of Natural Gas Development and executives of Woodfibre LNG Limited (WLNG) and Royal Golden Eagle Inc. (RGE).[1] A few months after this request, the ministerial powers and functions

[1] LNG stands for liquefied natural gas.

relating to natural gas development were transferred to the Ministry of Energy, Mines and Petroleum Resources (Ministry).

[2] The Ministry disclosed responsive records to the applicant, but withheld information from some of the records under ss. 14 (solicitor client privilege), 16 (disclosure harmful to intergovernmental relations or negotiations), 17 (harm to financial or economic interests of a public body), 21(1) (harm to third party business interests) and 22 (disclosure harmful to personal privacy). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. The applicant also claimed that disclosure of the records was in the public interest under s. 25.

[3] During mediation the Ministry disclosed additional information. However, mediation did not resolve the other matters in dispute and the applicant requested that they proceed to inquiry. After the notice of inquiry was issued, the Ministry requested and was given permission by the OIPC to add s. 12(1) (cabinet confidences) to the issues to be decided in the inquiry. In its initial inquiry submission, the Ministry made another change and said it was no longer relying on s. 16 to refuse access to the disputed information.

[4] WLNG and RGE asked to participate in the inquiry and the OIPC added them as third parties. They provided joint submissions regarding s. 21(1). BC Hydro was also given notice and participated in the inquiry as an appropriate person pursuant to s. 54, and it provided submissions regarding ss. 17 and 21(1). With the OIPC's consent, the Ministry, BC Hydro and the third parties provided some of their submissions *in camera*.

ISSUES

[5] The issues to be decided in this inquiry are as follows:

1. Is the Ministry required to disclose the disputed information under s. 25?

2. Is the Ministry authorized to refuse to disclose the information at issue under ss. 14 and/or 17 of FIPPA?

3. Is the Ministry required to refuse to disclose the information at issue under ss. 12(1), 21(1) and 22?

[6] Section 57 of FIPPA says that the burden of proving that an applicant has no right of access under ss. 12(1), 14, 17 and 21(1) rests with the public body. However, the burden is on an applicant to prove that disclosure of third party personal information would not be an unreasonable invasion of personal privacy under s. 22. FIPPA does not say who has the burden of proving that s. 25 applies. However, previous orders 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.[2]

DISCUSSION

Background

[7] WLNG is a privately held BC company. It is a subsidiary of Pacific Oil & Gas Limited, which is part of the Singapore-based Royal Golden Eagle Group of companies. RGE manages the Royal Golden Eagle Group of companies. WLNG is proposing to build a liquefied natural gas processing and export facility on the former Woodfibre pulp mill site near Squamish BC (the Project).

[8] BC Hydro is a provincial Crown corporation under the *Hydro and Power Authority Act*. BC Hydro's owner and sole shareholder is the Province of British Columbia (Province) and its board of directors is appointed by, and is accountable to, the Province. BC Hydro is involved in ongoing negotiations with WLNG to supply electricity to the Project.[3] BC Hydro is listed as a "public body" under Schedule 2 of FIPPA.

Records at issue

[9] The information in dispute is in a letter of understanding and its four appendices, a briefing note and several emails. The Ministry is refusing to disclose any part of the letter of understanding and its appendices and some of the emails. However, it is only withholding a handful of sentences in the briefing note and other emails.

[10] The Ministry and the third parties disclosed some information about the letter of understanding and its four appendices, so I can provide those details here:

- The letter of understanding (LOU) is from the Minister to RGE and is dated October 19, 2016.
- Appendix 1: *Confidential Scope of Work* document supplied by WLNG to the Ministry (Scope Document).
- Appendix 2 and 3: Two draft agreements between BC Hydro and WLNG called *Electricity Supply Agreement* and *Load Interconnection Agreement* (Draft Agreements).
- Appendix 4: A letter from the Minister to WLNG dated November 20, 2014 (2014 Letter).

[2] See for example, Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39.
[3] BC Hydro's submission at para. 7.

Public Interest - s. 25

[11] The applicant says that s. 25 applies in this case. Section 25 says, in part:

> 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.

[12] There is a high threshold before s. 25 applies because it overrides all of the exceptions to disclosure and the privacy protections in FIPPA. It will only apply in serious situations justifying mandatory disclosure. [4]

Parties' submissions

[13] The applicant says, "WLNG's operations pose self-evident risks to the health and safety of air, land, water, plant, animal and human life through pollution of various degrees and the potential for a catastrophic malfunction or disaster in the plant itself or on the dock."[5] He also says that the public has the right to see the information in dispute to know if the former Minister and the BC Liberal Party personally received favours in exchange for approving the Project.[6]

[14] The Ministry submits that the information at issue clearly does not relate to the circumstances contemplated in s. 25(1)(a) and that the only issue is s. 25(1)(b). It also submits that the circumstances of this inquiry do not meet the threshold of "clearly in the public interest" as contemplated by s. 25(1)(b). It says that disclosure under s. 25 is not in the public interest in this case as it would severely compromise the interests protected by Cabinet privilege and solicitor client privilege related to major, ongoing issue.[7]

Analysis and findings, s. 25

[15] Section 25(1)(a) is not called into play here because the specific information in dispute is not about a risk of significant harm to the environment or the health or safety of the public or a group of people. While a small amount of information is about measures for employee safety on the construction site, it is

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[4] Order F15-27, 2015 BCIPC 29 at para. 29; Investigation Report F16-02, 2016 BCIPC 36 at p. 36.
[5] Applicant's submission at para. 59.
[6] Applicant's submission at paras. 6-10.
[7] Ministry's initial submission at para. 110.

not of a magnitude or significance that would require disclosure under s. 25(1)(a). The information is also not about a risk of significant harm to the environment.

[16] As for s. 25(1)(b), I accept that the records relate to a subject of interest to the public. The applicant's submission refers to news articles that demonstrate that the public is interested in LNG-related matters. What the applicant says, however, does not persuade me that disclosure of the specific information at issue is clearly in the public interest. He says that the public needs to know if the BC Liberal Party and the Minister received something in return for agreeing to the Project. The records do not contain anything even remotely related to such matters. Aside from his suspicions about what these records would reveal, the applicant has provided no evidence that give his allegations any air of reality.

[17] 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. I have considered the nature and context of the information and the parties' submissions and conclude the threshold required for s. 25(1)(b) is not met in this case.

Solicitor Client Privilege - s. 14

[18] 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 the information it is withholding under s. 14 is protected by legal advice privilege. The applicant disputes that s. 14 applies and he says that it should be "excluded from this inquiry." [8]

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

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

[20] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are

[8] Applicant's submission at para. 34.

satisfied, then legal advice privilege applies to the communications and the records relating to it.[9]

Analysis and findings, s. 14

[21] The records the Ministry is refusing to disclose under s. 14 are all emails. With one exception on page 136, the Ministry did not provide the emails for my review. The evidence it provided, however, was sufficient for me to decide if s. 14 applied, so I did not find it necessary under s. 44(1) to order the production of those emails for my review.

[22] The Ministry provides an affidavit from a lawyer at the Ministry of Attorney General's Legal Services Branch. The lawyer says his duties include providing legal advice to the Ministry. His affidavit includes a table with the date of each email, who was involved in each and what it was about. The lawyer's evidence is that he was involved in each email communication and the emails were directly related to Ministry employees seeking and receiving legal advice from him (he says, in a general way, what the legal advice was about). The lawyer also says these email communications with Ministry employees were confidential. There is nothing before me that contradicts the lawyer's evidence. The Ministry's evidence satisfies me that these emails are protected by legal advice privilege so the Ministry may refuse to disclose them under s. 14.

[23] However, I find that s. 14 does not apply to page 136 of the records. In its initial submission, the Ministry says that it is "in the process of reconsidering" its decision to refuse access to page 136, but it provides no information about the outcome of that reconsideration. The lawyer's affidavit says nothing about this record. As noted, the Ministry provided a copy of page 136 for my review, which allows me to see that it is an email between two Ministry employees that is copied to the lawyer and a WLNG executive. For that reason, I find that it is not a *confidential* communication between the Ministry and its lawyer because it was shared with a third party with opposing interests. Further, the email is not about the seeking, formulating or giving of legal advice. Therefore, I find that the Ministry is not authorized to refuse to disclose page 136 under s. 14.[10]

[24] In summary, I find the Ministry has established that the information it is refusing to disclose under s. 14, with the exception of the email on page 136, is protected by solicitor client privilege.

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[9] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

[10] The Ministry applied no other FIPPA exceptions to p. 136 of the records.

Cabinet Confidentiality – s. 12(1)

[25] The Ministry is relying on s. 12(1) to refuse the applicant access to the LOU and its four appendices. The applicant says that the Ministry is withholding information too broadly under s.12(1).

[26] Section 12(1) says:

> 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.

[27] The Supreme Court of Canada has said that "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…".[11]

[28] Section 12(1) protects information which would reveal the "substance of deliberations" of the Executive Council, also called Cabinet, or its committees. The Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*) [*Aquasource*] says that the test under s. 12(1) is: "Does the information sought to be disclosed form the basis for Cabinet deliberations?"[12] The Court also says that the phrase "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."[13]

Parties' submissions

[29] The Ministry says that s. 12(1) applies to the LOU and its appendices although they were not provided to Cabinet or any of its committees.

[30] The Ministry says it is required to refuse access to the LOU because it was the subject of Cabinet consideration in its draft form.[14] The Ministry's Director of Cabinet and Legislative Initiatives (Director) says that a *draft* of the LOU was presented to the Cabinet Working Group on LNG without the four appendices listed or attached. She says it appears that only minor changes were

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[11] *Babcock* v. *Canada (Attorney General)*, 2002 SCC 57 at para. 18.
[12] *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*), 1998 CanLII 6444 (BC CA) at para. 48.
[13] *Ibid* at para. 39.
[14] Ministry's initial submission at para. 38.

made before the LOU was finalized. She provides *in camera* the draft LOU and an excerpt from Cabinet minutes.

[31] On the other hand, the Ministry's Executive Project Lead for the Woodfibre Implementation Group (Project Lead) says "The Letter of Understanding has already been subject to Cabinet deliberation."[15] The Ministry does not explain the apparent inconsistency between her evidence and the rest of the Ministry's submissions and evidence, which is that the LOU was not provided to Cabinet. It seems to me that the Project Lead must be referring to the draft or information in the LOU because this is more consistent with the balance of the Ministry's evidence and submissions.

[32] Regarding the appendices, the Ministry says that although the Draft Agreements were not provided to Cabinet, s. 12(1) applies because once they are finalized and executed, they will be submitted to Cabinet for deliberation and approval.[16] The Project Lead explains that the Province has a policy that any agreements related to electricity supply and transmission services to LNG facilities must be submitted to Cabinet for deliberation, approval and a "direction" under the *Utilities Commission Act*. The "direction" takes the form of a regulation requiring the BC Utilities Commission to set rates in accordance with the terms contained in the approved agreements. The Project Lead says that once the Draft Agreements in this case are finalized and executed they will go through that process.[17]

[33] As for the 2014 Letter, the Ministry submits that s. 12(1) applies to it because it "anticipates details" that Cabinet will deliberate on when making regulations under the *Utilities Commission Act*.[18] The Project Lead says that the 2014 Letter "confirms and contains and reflects significant information contained in" the Draft Agreements.[19]

[34] The Ministry's submissions and evidence say nothing specific about the Scope Document and why s. 12(1) applies to it.

Analysis and findings, s. 12(1)

[35] Section 12(1) protects information that would reveal the substance of deliberations of the Executive Council (i.e., Cabinet) or any of its committees. Under s. 12(5) of FIPPA, the Lieutenant Governor in Council may designate a committee for the purposes of s. 12(1). The designated committees are listed in the *Committees of the Executive Council Regulation* (Regulation). At the time the

[15] Project Lead's affidavit at para. 16.
[16] Ministry's initial submission at paras. 40 - 45.
[17] Project Lead's affidavit at para. 14.
[18] Ministry's initial submissions at para. 49.
[19] Project Lead's affidavit at para. 8.

draft LOU was considered by the Cabinet Working Group on LNG, the list of designated committees in the Regulation included the Cabinet Working Group on LNG, so it was a committee of the Executive Council for the purposes of this s. 12(1) analysis.[20]

[36] The Ministry's evidence is that the LOU was not provided to Cabinet or its Working Group on LNG - but a draft version was. The Ministry's *in camera* evidence satisfies me that the LOU and the draft are essentially the same, with the LOU being a slightly more fleshed-out version. The *in camera* evidence also establishes that the draft was reviewed and discussed by Cabinet and its Working Group on LNG. Based on that evidence, I am satisfied that even though the LOU was not given to Cabinet or any of its committees, *the information in the LOU* was part of the body of information which Cabinet and its Working Group on LNG considered. Therefore, I find that disclosing the LOU would reveal the substance of Cabinet deliberations in the way that *Aquasource* describes.

[37] However, I find the opposite regarding the four appendices. The Ministry's evidence is that they were not provided to Cabinet or its Working Group on LNG. I have carefully considered what the draft version of the LOU reveals about the information that was actually provided to the Cabinet and its Working Group on LNG. Although I cannot describe the contents of the *in camera* evidence in any detail, I can say that the draft LOU and the appendices touch on similar subject matters. However, in my view, a shared topic is insufficient to establish that the actual appendices and the specific information in the appendices, was part of the body of information considered by Cabinet or its Working Committee on LNG.

[38] The Ministry also says that s. 12(1) applies to the Draft Agreements because they "reveal future materials that the Ministry intends to put before Cabinet as part of its ongoing work on LNG."[21] The Ministry's evidence is that once the Draft Agreements are "finalized and executed" they will go to Cabinet for deliberation.[22] The Ministry's evidence is also that the records relate to "ongoing and, as yet, incomplete" Project-related negotiations.[23] In addition, BC Hydro's evidence is that its negotiations regarding the Draft Agreements are ongoing and have not been finalized and the parties have exchanged numerous draft agreements.[24] Considering this evidence as a whole, I conclude that if negotiations are ongoing, then the Draft Agreements are subject to change before they are finalized and executed. Without more evidence to support what the Ministry asserts on this point, I am not persuaded that the Draft Agreements are the agreements that will be provided to Cabinet in the future for deliberation.

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[20] The Cabinet Working Group on LNG is no longer listed in the *Regulation* (*B.C. Reg 156/2017* replaced *B.C. Reg 229//2005* on August 1, 2017).
[21] Ministry's initial submissions at para. 47.
[22] Project Lead's affidavit at para. 9.
[23] Ministry's initial submissions at para. 21.
[24] BC Hydro Senior Policy Lead's affidavit at para. 6.

I find that disclosing the Draft Agreements would not reveal the substance of Cabinet's deliberations.

[39] I have also considered that the Director says the information relates to documents "created for" Cabinet or Treasury Board. [25] She does not say more to support her assertion, and I find that the content and format of the appendices are more persuasive evidence. They demonstrate clearly that the records were prepared for the parties involved in the negotiations to document their discussions. They contain nothing that indicates they were created *for* Cabinet or Treasury Board.

[40] I conclusion, I find that disclosing the LOU would reveal the substance of deliberations under s. 12(1) but disclosing the four appendices would not.

Section 12(2) circumstances

[41] Before deciding if the Ministry is authorized to refuse to disclose the LOU under s. 12(1), I must consider s. 12(2), which says:

> (2) Subsection (1) does not apply to
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> (a) information in a record that has been in existence for 15 or more years,
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> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
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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.

[42] The Ministry says that the information is not background explanations or analysis.[26] The applicant says that the Ministry has not adequately considered exceptions under Section 12(2)(c) and it is withholding information that it would otherwise be required to disclose under FIPPA.[27]

[43] I find that none of the circumstances in s. 12(2) apply to the information that the Ministry is withholding under s. 12(1). Sections 12(2)(a) and (b) do not apply 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. Section 12(2)(c) also does not apply. The LOU is a record of understanding between the Ministry and

[25] Director's affidavit at para. 7.
[26] Director's affidavit at para. 7.
[27] Applicant's submission at para. 28.

RGE and it is obvious that the purpose of the information in it is not to present background explanations or analysis to Cabinet.

[44] In conclusion, I find that the Ministry is authorized to refuse to disclose the LOU under s. 12(1) but not the four appendices. The Ministry also applied s. 17 to refuse access to the LOU and the appendices, so I will consider them again below.

Harm to Financial or Economic Interests - s. 17

[45] The Ministry is refusing to disclose the LOU and its four appendices and some information in emails and a briefing note under s. 17.[28] The parts of s. 17 that are relevant in this case state:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> …
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> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
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> (e) information about negotiations carried on by or for a public body or the government of British Columbia.
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> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[46] To rely on s. 17 a public body must establish that disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy. Subsections 17(1)(a) to (f) are examples of information that may result in harm under s. 17. Past orders have said that subsections 17(1)(a) to (f) are not stand alone provisions and even if information fits within those subsections, a public body must also prove the harm described in the opening words of s. 17.[29] Therefore, regardless of the type of information, the overriding question will always be whether disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of the government to manage the economy.

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[28] The emails are at pp. 145, 151, 152 and the briefing note is at p. 155 of the records.

[29] See for example: Order F05-06, 2005 CanLII 11957 (BC IPC) at para 36; Order F10-39, 2010 CanLII 77325 (BC IPC) at para. 32–34; Order F11-14, 2011 BC IPC 19 at paras. 47–48. Order F12-02 2012, BCIPC 2, at para. 42.

[47] The standard of proof for s. 17, which uses the language "could reasonably be expected to harm" is a middle ground between that which is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard. The determination of whether the standard of proof has been met is contextual, and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[30]

Ministry's s. 17 submissions

[48] The Ministry says the following about how s. 17 applies:

> In this case, the harms established by the third party under s. 21(1) are interconnected to the Ministry's decision to withhold information in the Record under s. 17 of FIPPA.
> …
> The interests of the third party and the financial and economic interests of the Province are interconnected, based on the projected tax revenue to be generated by the success of the project.[31]

[49] The Ministry also quotes subsections 17(1)(d), (e) and (f), which I take to mean that it believes those provisions apply. The Ministry also provides *in camera* evidence about the estimated provincial tax revenue from the Project.[32]

Third parties' submissions

[50] The third parties did not provide a submission regarding s. 17. However, I will discuss here what they say about harm under s. 21(1) because this is what the Ministry identifies to support its application of s. 17.

[51] The third parties submit that disclosing the information in dispute will significantly harm WLNG's competitive position, interfere significantly with WLNG's negotiating position and result in undue financial loss to WLNG. WLNG's Vice President of Corporate Affairs (Vice President) explains that the Project is in the first phase of its development, which includes negotiating and finalising high-value, long-term "offtake contracts" to sell the LNG that will be produced at the facility. He explains that "LNG producers need to ensure there will be purchasers for the LNG at a price that is expected to make the Project economically viable after commencing operation."[33] He says that no offtake

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[30] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[31] Ministry's initial submission at paras. 56 and 61.
[32] Project Lead's affidavit at para. 4.
[33] Vice President's affidavit at para. 25.

contracts have been secured yet and he expects negotiations to continue throughout 2018.

[52] The Vice President also says the information is about WLNG's development plans and resource needs for the Project and that this information either directly or indirectly reveals WLNG's cost information. He says WLNG closely guards and protects this type of confidential and commercially sensitive information from disclosure because of the harm it will cause during offtake negotiations.

[53] The Vice President provides evidence about the nature of the LNG market and the context for the information in dispute:

> Protection of WLNG's confidential information while these critical offtake contract negotiations are ongoing is absolutely crucial to WLNG's negotiating position and to the Project overall. The LNG market is a highly competitive global market, and the small pool of entities that are in the market to enter into long-term offtake contracts to purchase LNG are amongst the toughest and most sophisticated negotiating counter-parties that bring significant and sophisticated resources to bear to try and gain competitive advantages over LNG producers like WLNG in negotiations, including on price. It is well known in the industry that one of the ways they do this is by using a supplier's confidential information to try and undermine the supplier's negotiating position and extract a lower purchase price for LNG during offtake contract negotiations. The high value of these long-term contracts means that even seemingly "small" concessions or disadvantages to WLNG's negotiating position will result in tens or hundreds of millions of dollars of losses to WLNG.
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> The Requested Records at issue in the Inquiry contain or reveal confidential, commercially sensitive information about the costs and economics of the Project and its economic situation. It is exactly the type of information that is routinely used by potential LNG purchasers to undermine a supplier's position in offtake contract negotiations. This information is therefore closely guarded by WLNG as an LNG supplier in the highly competitive LNG industry.[34]

[54] The Vice President says that, if completed, the Project will create jobs and hundreds of millions in local, provincial and federal tax revenue for many years. He also says that, if it proceeds, the Project will generate significant revenue for BC Hydro, who will supply the electricity to operate the Project. WLNG also provides *in camera* evidence regarding how precisely disclosure could result in the harm under s. 17.

[34] Vice President's affidavit at paras. 4-5.

BC Hydro's s. 17 submissions

[55] BC Hydro submits that the records at issue should be withheld under the opening clause of s. 17(1).[35] BC Hydro provides affidavit evidence from its Senior Policy Lead who is involved in the negotiations with WLNG and RGE regarding the electricity supply agreements. He says the negotiations related to the Draft Agreements are ongoing and have not been finalized and the parties have exchanged numerous draft agreements, none of which have been publicly released. He also says the negotiations have been conducted on a confidential basis and pursuant to a non-disclosure agreement.

[56] BC Hydro says, if Draft Agreements are finalized and the Project proceeds, WLNG would be a large customer and would provide a new source of revenue to BC Hydro. BC Hydro explains that it is in an energy surplus position as it produces more electricity than domestic demand requires. Therefore, if the Project does not proceed, the electricity the Project would have used will have to be sold to the export market at a lower price. BC Hydro provides *in camera* evidence about the projected revenue it anticipates receiving from the Project and the projected loss if it does not proceed. In addition, BC Hydro's *in camera* evidence echoes much of WLNG's *in camera* evidence about how disclosure could result in harm under s. 17.

Applicant's s. 17 submissions

[57] The applicant cites three BC Orders where the adjudicator said that s. 17 did not apply to information in a finalized agreement or contract.[36] The applicant quotes and paraphrases what these orders say about the burden of proof. He does not explain how they otherwise pertain to the analysis in the present case, which is not about information in finalized agreements or contracts.

Findings and analysis, s. 17

[58] For the reasons that follow, I find that s. 17 applies to all of the LOU and the 2014 Letter and parts of the Scope Document and the Draft Agreements. It also applies to the information withheld from the briefing note and the email on page 152.

[59] The LOU contains substantive details of the discussions and negotiations about the Project that took place between the Province, the third parties and BC Hydro. The LOU includes what has tentatively been agreed to, the parties'

[35] BC Hydro submission at paras. 15 -16. It also says that subsections 17(1)(a) – (e) do not apply. I assume that there was a typo and it inadvertently omitted (f).
[36] Order F08-22, 2008 CanLII 70316 (BC IPC) (terms in an addendum and change order to a multi-year contract); F14-05, 2014 BCIPC 6 (CanLII) (agreement for the use of BC Place Stadium); F15-46, 2015 BCIPC 49 (CanLII) (amount paid under the terms of an agreement).

negotiating positions, their objectives going forward and the elements that still require further discussion and agreement. The LOU lists the appendices as attachments and specifically refers to their contents.

[60] The briefing note was prepared to provide the Minister with information about the Project. The Ministry is refusing to disclose four sentences that reveal the substance of discussions and negotiations between the Ministry, BC Hydro and WLNG about the Project. Based on WLNG and BC Hydro's evidence, it is clear to me that the negotiations and the matters addressed in the records are ongoing and are not finalized.

[61] WLNG's extensive evidence demonstrates that disclosing the substance of the discussions and negotiations regarding the Project would reveal information about WLNG's cost inputs for various aspects of the Project and that this could reasonably be expected to impair WLNG's ability to secure appropriate offtake contracts. It would do so by weakening its negotiating position and forcing concessions on the purchase price of LNG. WLNG's evidence, some of which is *in camera* so I cannot describe it here, establishes the importance of offtake contract negotiations to the viability of the Project and that there is more than a mere possibility that disclosing the disputed information could result in the harm WLNG describes.

[62] BC Hydro's evidence bolsters what the third parties say about the importance of successful offtake contract negotiations to the viability of the Project. I cannot elaborate because those evidentiary details are *in camera*. BC Hydro's evidence also demonstrates the direct link between the success or failure of the Project and BC Hydro's financial interests. It also demonstrates how BC Hydro's financial interests affect those of the Province, who is BC Hydro's owner and sole shareholder.

[63] While the Ministry says little to support its application of s. 17, I can also see how the interests of the third parties and the financial and economic interests of the Province are interconnected, based on the projected tax revenue to be generated if the Project succeeds. Further, the disputed records clearly reveal that the Province considers the Project to be very important to the economic wellbeing of the Province.

[64] Therefore, I find that s. 17 applies to the LOU, the 2014 Letter and the information withheld from the briefing note and the email on page 152. It also applies to significant portions of the Scope Document and the Draft Agreements.

[65] However, s. 17 does not apply to other information. Specifically, the Draft Agreements standard, template headings and general contractual language and the Scope Document has generic topic headings. The information I mean is broad and without specifics about the parties' costs, the volume or price of

electricity or the Project's economics, for instance. It also includes the definitions and administrative details (i.e., process for invoicing, dispute resolution, contract changes). The parties' submissions about harm do not specifically address this type of general information, so other than the records themselves there is nothing to help me understand how disclosing this kind of information could impact the parties. I am not persuaded disclosing this kind of information could reasonably be expected to cause harm under s. 17.

[66] I also find that s. 17 does not apply to the information in the emails at pages 145 and 151. That information is about the document-handling and administrative processing of the Scope Document and I cannot see how disclosing that type of detail could reasonably be expected to cause harm under s. 17.

[67] In summary, with a few exceptions, the Ministry has established that it is authorized to refuse to disclose most of the information it withheld under s. 17. The exceptions are in the Scope Document, the Draft Agreements and the information in the emails on pages 145 and 151. That information is also being withheld under s. 21(1), so I will consider it again below.

[68] For clarity, I have highlighted the information in the Scope Document and the Draft Agreements that may be withheld under s. 17 in a copy of the records that will be sent to the Ministry along with this decision. The only information remaining to consider under s. 21(1) is the non-highlighted parts of those records and the information withheld from the emails on pages 145 and 151.

Harm to Third Party Business Interests - s. 21(1)

[69] Section 21(1) says:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, …

[70] The Ministry submission for s. 21(1) refers me to the third parties' submission on s. 21(1). The third parties say that the harm under s. 21(1)(c) flows from disclosure of confidential cost information in the records. I considered the third parties' s. 21(1) submission above when deciding the s. 17 issue, and I have already found that the information that reveals costs may be withheld under s. 17. The information remaining to be considered under s. 21(1) reveals nothing about costs.

[71] For the sake of brevity, I have not decided if s. 21(1)(a) and (b) apply to the remaining information because, even if they do, s. 21(1)(c) does not. My reasons are the same as those given above for why I conclude that disclosing this information could not reasonably be expected to cause harm under s. 17. The information is generic contract language and headings, administrative details and broad-based information about matters that do not reveal the parties' costs. The Ministry and the third parties' evidence and submissions provide insufficient detail specific to this information to help me understand how its disclosure could be harmful. In conclusion, I am not persuaded that disclosing this remaining information could reasonably be expected to cause harm under s. 21(1)(c). The Ministry has not proven that it is required to refuse access to the information under s. 21(1).

Disclosure Harmful to Personal Privacy - s. 22

[72] The Ministry is also refusing to disclose part of an email on page 3 of the records under s. 22. The applicant makes no submission regarding s. 22.

[73] Section 22 says a public body must refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy.[37] Numerous orders have considered the application of s. 22, and I will apply those same principles here.[38]

[74] Only "personal information" may be withheld under s. 22. FIPPA defines "personal information" as recorded information about an identifiable individual other than contact information and "contact information" as information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.[39]

[75] The information withheld under s. 22 is in an email between the Minister and Deputy Ministry about the Minister's work schedule and it reveals what the

[37] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.
[38] For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[39] See Schedule 1 of FIPPA for these definitions.

Minister was doing on specific dates. This is recorded information about an identifiable person, and it is not contact information, so it is the Minister's personal information.

[76] Section 22(4) lists circumstances where disclosure is not an unreasonable invasion of third party privacy. I find that none of the circumstances in s. 22(4) apply to the personal information at issue here.

[77] Section 22(3) lists circumstance where disclosure of personal information is presumed to be an unreasonable invasion of third party privacy. Disclosing personal information that relates to a third party's employment history is a presumed invasion of that person's privacy under s. 22(3)(d). The Ministry submits that s. 22(3)(d) applies, and I agree. The personal information is about the reason the Minister was absent from work and I find that it relates to his employment history.[40]

[78] The final step in the s. 22 analysis is to consider the impact of disclosure in light of all relevant circumstances, including those listed in s. 22(2). The Ministry submits that there are no s. 22(2) circumstances which would override the s. 22(3)(d) presumption.

[79] I find that none of the circumstances listed in s. 22(2) are relevant or play a role here. I have considered the fact that the personal information is almost two years old, it reveals only generally what the Minister was doing on the specific dates and there is nothing to suggest that it is sensitive. Those factors suggest that disclosure would not be an unreasonable invasion of personal privacy. I have also considered the fact that the applicant said nothing about s. 22 and why he thinks disclosure of this information would not be an unreasonable invasion of the Minister's personal privacy. Despite the fact that there are factors that weigh in favour of disclosure, they are not sufficient in this case to rebut the s. 22(3)(d) presumption that says that disclosing personal information related to a third party's employment history would be an unreasonable invasion of personal privacy. Therefore I find that Ministry must continue to refuse to disclose this information under s. 22(1).

CONCLUSION

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

1. I confirm the Ministry's decision that it is not required to disclose the information in dispute under s. 25 of FIPPA.

[40] For a similar finding, see Order F12-01, 2012 BCIPC 1 (CanLII) at para. 36.

2. I confirm, in part, the Ministry's decision that it is required to refuse to disclose information under s. 12(1). The Ministry is required to refuse access to information in the LOU under s. 12(1) but not the information in the Scope Document, the Draft Agreements or the 2014 Letter.

3. I confirm, in part, the Ministry's decision that it is authorized to refuse to disclose information under s. 14. The Ministry is authorized to refuse to disclose the information it withheld under s. 14 with the exception of the information on page 136.

4. I confirm, in part, the Ministry's decision that it is authorized to refuse to disclose information under s. 17. The Ministry is only authorized under s. 17 to refuse access to the information in the briefing note, the email on page 152, the LOU, the 2014 Letter and the information that I have highlighted in the Scope Document and Draft Agreements.

5. The Ministry is not required to refuse to disclose information under s. 21(1).

6. The Ministry is required to refuse to disclose the information it withheld under s. 22(1).

7. I require the Ministry to give the applicant access to the information in dispute on pages 136, 145 and 151, and the non-highlighted information in the Scope Document and the Draft Agreements by January 10, 2019. The Ministry must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

November 26, 2018

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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