



Order F22-41

BRITISH COLUMBIA UTILITIES COMMISSION

D. Hans Hwang
Adjudicator

September 9, 2022

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Summary: A journalist requested records about the Site C construction review. The BC Utilities Commission (BCUC) withheld some information in the records under multiple exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act* (FIPPA). Subsequently, BCUC also claimed that s. 61 of the *Administrative Tribunals Act* applies to the information in dispute and overrides FIPPA's application. The adjudicator found s. 61(1)(c) of the *Administrative Tribunals Act* excludes the information in dispute from FIPPA's application. For that reason, it was not necessary to decide if the FIPPA exceptions also applied.

Statutes Considered: *Administrative Tribunals Act*, SBC 2004, c 45, ss. 61(2)(c) and (e), *Constitutional Question Act*, RSBC 1996, c 68, s. 8, *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 16(1)(a)(iii), 17, 19, 22 and 58.

INTRODUCTION

[1] A journalist (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the BC Utilities Commission (BCUC) for access to two reports related to the Site C Dam project. In response, the BCUC provided him with the reports but withheld some information in them under ss. 17 (disclosure harmful to the financial or economic interests of a public body), 21 (disclosure harmful to business interests of a third party), and 22 (unreasonable invasion of a third party's personal privacy) of FIPPA.¹

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the BCUC's decision.

¹ Access request document, October 31, 2017.

[3] During the OIPC review process, the BCUC reconsidered its decision and it disclosed more information in the reports to the applicant and it dropped reliance on s. 21. However, it decided to also apply ss. 16(1)(a)(iii) (disclosure harmful to intergovernmental relations or negotiations) and 19 (disclosure harmful to individual or public safety) to refuse access in addition to ss. 17 and 22.²

[4] Mediation did not resolve the matter and the applicant requested that it proceed to an inquiry.³

[5] The OIPC invited the British Columbia Hydro and Power Authority (BC Hydro) to participate in this inquiry as an appropriate person under s. 54(b) of FIPPA.⁴ BC Hydro provided submissions.

[6] Prior to filing its initial submission in this inquiry, the BCUC requested permission from the OIPC to add ss. 61(2)(c) and (e) of the *Administrative Tribunals Act* (ATA) to this inquiry as new issues.⁵ Section 61 of the ATA lists several types of records and information to which FIPPA does not apply. The OIPC agreed to add ss. 61(2)(c) and (e) into the inquiry and a revised notice of inquiry was issued.⁶

Preliminary matter – Late raising of Constitutional Challenge

[7] In his response submission, the applicant suggests that denying him access to the records violates s. 2(b) the *Canadian Charter of Rights and Freedoms* (Charter). Section 2(b) of the Charter states that everyone has the fundamental “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. What the applicant says about this is vaguely worded and somewhat unclear. However, I believe he is saying that BCUC is an administrative tribunal so it must adhere to the “open court principle” embedded in s. 2(b) of the Charter, so it must give him full and timely access to the records. He seems to be saying that BCUC’s reliance on s. 61 of the ATA and s. 22 of FIPPA to refuse him access to the records is an unjustifiable violation of s. 2(b) of the Charter. I note that there is no indication that the applicant provided notice of constitutional question to the provincial and federal Attorney Generals as required by the *Constitutional Question Act* R.S.B.C. 1996 c. 68 (CQA).

² Investigator’s fact report at para. 5.

³ Investigator’s fact report at paras. 5-6.

⁴ OIPC’s s. 54(b) notification to BC Hydro, May 19, 2022.

⁵ BCUC’s letter, May 31, 2022.

⁶ Revised notice of written inquiry, dated June 1, 2022.

[8] What the applicant says about the Charter was not listed as an issue in the notice of inquiry, and both BCUC and BC Hydro object to adding a Charter issue. The OIPC's notice of inquiry and its *Instructions for Written Inquiries*, both of which were provided to the applicant at the outset of the inquiry, clearly explain that parties may not add new issues into the inquiry without the OIPC's prior consent. Past orders and decisions of the OIPC have consistently said the same thing.⁷ Here, the applicant did not apply to the OIPC for permission to add s. 2(b) of the Charter as an issue in the inquiry, and he does not explain why he is only raising it at this late juncture in the process.

[9] I can see no exceptional circumstances that warrant adding this new issue into the inquiry at this late point in the inquiry, especially when it is so vaguely worded and proper notice under the CQA has not been given. Therefore, I will not add this issue or consider the applicant's Charter arguments any further.

ISSUES

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

1. Is the information at issue outside of the scope of FIPPA due to ss. 61(2)(c) and (e) of the ATA?
2. If the information at issue is within the scope of FIPPA, is the BCUC authorized to refuse access under ss. 16(1)(a)(iii), 17 and 19 of FIPPA?
3. If the information at issue is within the scope of FIPPA, is the BCUC required to refuse access under s. 22 of FIPPA?

[11] Section 57(1) of FIPPA places the onus on the BCUC to prove that the applicant has no right of access to the information it is withholding under ss. 16(1)(a)(iii), 17 and 19. However, the applicant has the burden of proving that disclosure of personal information in the records would not be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.⁸ Section 57 is silent regarding the burden of proof in cases involving scope issues, and in such cases,

⁷ For example, see Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-27, 2010 BCIPC 55 at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).

⁸ FIPPA, s. 57(2). However, the Ministry has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

as a practical matter, it is in the interests of both parties to present argument and evidence to support their positions.⁹

DISCUSSION

Background

[12] The BCUC is responsible for regulating BC's energy utilities, the Insurance Corporation of BC's basic automobile insurance rates, common carrier pipelines and the reliability of the bulk electrical transmission grid, under the *Utilities Commission Act* (UCA).¹⁰

[13] In early August 2017, the Lieutenant Governor in Council (LGIC) issued Order in Council number 244 (OIC) that directed the BCUC to establish an inquiry into the BC Hydro Site C Dam project (Site C Inquiry).

[14] In August 2017, as directed in the OIC, the BCUC initiated the Site C Inquiry. It appointed a panel consisting of four commissioners (panel) to conduct the Site C Inquiry. The BCUC also directed BC Hydro to make an evidentiary filing.

[15] As part of the Site C Inquiry, the BCUC retained a consulting firm Deloitte LLP (Deloitte) as an independent expert to perform an analysis and to provide reports on the questions in the Site C Inquiry.

[16] Within weeks, Deloitte submitted two reports to the Site C Inquiry: the *Site C Construction Review* report (Construction Report) and the *Site C Alternative Resource Options and Load Forecast* report (Forecast Report). The BCUC subsequently disclosed a redacted version of the Construction Report and a unredacted version of the Forecast Report on the BCUC public website.¹¹ The BCUC also provided a process for parties in the Site C Inquiry to request access to the redacted information in the Construction Report.¹²

[17] In September 2017, the applicant made his FIPPA access request for unredacted copies of the Construction Report and Forecast Report.

⁹ Order F10-41, 2010 CanLII 77327 (BC IPC); Order F18-02, 2018 BCIPC 2

¹⁰ R.S.B.C. 1996, c. 473.

¹¹ Affidavit #1 of the BCUC's Commission Secretary at para. 6; Exhibit D.

¹² Affidavit #1 of the BCUC's Commission Secretary at para. 7; Exhibit E.

[18] The BCUC issued its final report on the Site C Inquiry to the Government of BC in November 2017. That final report is not at issue in this inquiry.

Information in Dispute

[19] I noted several inconsistencies in the parties' submission and evidence regarding information in dispute in this inquiry. In response to my letter for clarifying this issue, the BCUC confirmed that the Forecast Report was fully released on its website and is not at issue.¹³ Therefore, the only information in dispute in this inquiry is in the Construction Report.

[20] The BCUC provided me with a copy of the Construction Report which is 115 pages long. BCUC refuses to disclose approximately 16 of those pages in their entirety or in part.

Section 61(2) of the ATA

[21] The ATA governs certain administrative tribunals in British Columbia. Section 2.1 of the UCA¹⁴ says that section 61 of the ATA applies to BCUC.

[22] Section 61 of the ATA says as follows:

61 (1) In this section, "decision maker" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.

(2) The Freedom of Information and Protection of Privacy Act, other than section 44(1)(b), (2), (2.1) and (3), does not apply to any of the following:

- (a) a personal note, communication or draft decision of a decision maker;
- (b) notes or records kept by a person appointed by the tribunal to conduct a facilitated settlement process in relation to an application;
- (c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;

¹³ BCUC's email response, August 22, 2022.

¹⁴ Section 2.1 of the *Utilities Commission Act*.

- (d) a transcription or tape recording of a tribunal proceeding;
- (e) a document submitted in a hearing for which public access is provided by the tribunal;
- (f) a decision of the tribunal for which public access is provided by the tribunal.

[23] The BCUC submits that ss. 61(2)(c) and (e) of the ATA apply to the Construction Report.¹⁵ BC Hydro also submits that ss. 61(2)(c) and (e) apply to the Construction Report and it submits that report is outside the scope of FIPPA¹⁶ so the commissioner has no jurisdiction to proceed with this inquiry.¹⁷

[24] While the applicant does not specifically address ss. 61(2)(c) and (e) issues, I have reviewed his submission and identified the relevant arguments to consider in my analysis. The applicant says:

The records are aged and any harms that may have been claimed when they were created — harms that the applicant denies exist anyway — would not be harms anymore. In fact, the harms of withholding the reports from the public have probably resulted in the cost overruns on the shoulders of ratepayers.¹⁸

BCUC is an administrative tribunal and administrative tribunals must adhere to the open court principle. Notwithstanding section 61 of the BCUC enabling legislation.¹⁹

Section 61(2)(c) of the ATA

[25] I will first address whether s. 61(2)(c) of the ATA applies to the information in dispute in the Construction Report. I will only need to decide if s. 61(2)(e) applies if I find s. 61(2)(c) does not apply.

Was the information received by a “tribunal”?

[26] In my view, the first consideration is to determine whether the information was received by a tribunal.

¹⁵ BCUC’s initial submission at para. 24.

¹⁶ BC Hydro’s initial submission at para. 22.

¹⁷ Affidavit #1 of the BCUC’s Commission Secretary at para. 20; OIPC’s s. 54(b) notification to BC Hydro, May 19, 2022; OIPC Investigator’s Fact Report.

¹⁸ Applicant’s submission at para. 3.

¹⁹ Applicant’s submission at para. 6.

[27] The BCUC says that it is an independent tribunal of the Government of BC, the BCUC initiated the Site C Inquiry proceeding on August 9, 2017, and Deloitte submitted the Construction Report to the BCUC in the Site C Inquiry.²⁰ BC Hydro submits the Construction Report was received by the BCUC *in camera* for the Site C Inquiry hearing.²¹

[28] What the applicant says about the ATA is brief. He says, “BCUC is an administrative tribunal and administrative tribunals must adhere to the open court principle. Notwithstanding section 61 of the BCUC enabling legislation.”²²

[29] For the following reasons, I find that the BCUC’s submission and evidence establish that the information in dispute in the Construction Report was received by a tribunal.

[30] First, I am satisfied that the BCUC is a “tribunal” because of what the UCA and the ATA say. The ATA is legislation that governs administrative tribunals. The ATA defines the term “tribunal” as “a tribunal to which some or all of the provisions of this Act are made applicable”. Section 2.1 of the UCA expressly says that parts of the ATA apply to the BCUC, including many of the provisions regarding hearings:

2.1 The following provisions of the *Administrative Tribunals Act* apply to the commission [BCUC], and, for that purpose, a reference in those provisions to a vice chair under that Act must be read as a reference to a deputy chair under this Act:

- (a) Part 1 [Interpretation and Application];
- (b) Part 2 [Appointments];
- (c) Part 3 [Clustering];
- (d) Part 4 [Practice and Procedure], except the following:
 - (i) section 14 [general power to make orders];
 - (ii) section 16 [consent orders];
 - (iii) section 17 [withdrawal or settlement of application];
 - (iv) section 22 [notice of appeal (inclusive of prescribed fee)];
 - (v) section 23 [notice of appeal (exclusive of prescribed fee)];
 - (vi) section 24 [time limit for appeals];
 - (vii) section 25 [appeal does not operate as stay];
 - (viii) section 26 [organization of tribunal];
 - (ix) section 27 [staff of tribunal];
 - (x) section 31 [summary dismissal];

²⁰ BCUC’s initial submission at paras. 1, 5 and 10.

²¹ BC Hydro’s initial submission at para. 6.

²² Applicant’s submission at para. 6.

- (xi) section 34 (1) and (2) [party power to compel witnesses and order disclosure];
- (e) section 44 [tribunal without jurisdiction over constitutional questions];
- (f) section 46.3 [tribunal without jurisdiction to apply the Human Rights Code];
- (g) section 48 [maintenance of order at hearings];
- (h) section 49 [contempt proceeding for uncooperative witness or other person];
- (i) section 54 [enforcement of tribunal's final decision];
- (j) section 56 [immunity protection for tribunal and members];
- (k) section 59.1 [surveys];
- (l) section 59.2 [reporting];
- (m) section 60 (1) (a), (b) and (g) to (i) and (2) [power to make regulations];
- (n) section 61 [application of Freedom of Information and Protection of Privacy Act].

[31] I also accept the affidavit evidence of the Commission Secretary that the information in dispute was “received” by the BCUC. The Commission Secretary says “On or about August 9, 2017, the BCUC established the Site C Inquiry, pursuant to section 5 of the UCA, appointed a panel to conduct the Site C Inquiry, and directed BC Hydro to make certain evidentiary filings in respect of the OIC and the Site C Inquiry” and “The [Construction Report] submitted to the BCUC on or about August 30, 2017, in the Site C Inquiry.”²³

[32] In conclusion, I find that the information in dispute in the Construction Report was received by a tribunal.

Was the information received in a “hearing”?

[33] The next consideration is whether the Construction Report was received by the tribunal in a hearing or part of a hearing.²⁴

[34] The BCUC submits the Construction Report was filed as an exhibit in the Site C Inquiry and the Site C Inquiry was a hearing within the meaning of s. 61(2)(c) of the ATA.²⁵ It says:

²³ Affidavit #1 of the BCUC’s Commission Secretary at paras 4 and 6.

²⁴ Order F15-06 at paras. 19-20.

²⁵ BC Hydro’s initial submission at paras. 28-29.

Although the Site C Inquiry was both an oral and written hearing, there can be no question that an inquiry, and specifically the Site C Inquiry, is a hearing for the purposes of section 61(2)(c).²⁶

[35] For the following reasons, I find that the Construction Report was received by the tribunal in a hearing or a part of hearing.

[36] In determining whether the Construction Report was received in a hearing, I considered the BCUC's evidence about the circumstance of how that report was created and submitted. Having reviewed the affidavit evidence the BCUC submitted,²⁷ I can see that after initiation of the Site C Inquiry, the BCUC engaged Deloitte to provide an independent review of the Site C Dam project to assist the BCUC to answer questions in the Site C Inquiry.²⁸ I find that within weeks Deloitte produced the Construction Report and that report was submitted to the BCUC while the Site C Inquiry was still proceeding.²⁹ Therefore, I conclude that the Construction Report was received in a "hearing" within the meaning of s. 61(2)(c) of the ATA.

If it was a hearing, was it a hearing from which the public, party or intervenor was "excluded"?

[37] Section 61(2)(c) of the ATA applies to information received by a tribunal in a hearing or a part of a hearing from which the public, party or intervenor was excluded.

[38] In considering the purpose of s. 61(2)(c), the adjudicator in Order F15-06 found:

Having regard to the context of the UCA as a whole, and the purpose of that statute, I conclude that the purpose of s. 61(2)(c) is to protect information submitted to a tribunal hearing in private (*in camera*, as the lawyers call it). This protects commercially sensitive or valuable business information through the confidentiality provided by an *in camera* hearing. At the same time, it can ensure that the tribunal and the other parties to the proceeding have all relevant information.³⁰...

²⁶ BC Hydro's initial submission at para. 35.

²⁷ Affidavit #1 of the BCUC's Commission Secretary, in particular Exhibit D.

²⁸ Affidavit #1 of the BCUC's Commission Secretary at para. 6.

²⁹ Affidavit #1 of the BCUC's Commission Secretary at paras. 5-7.

³⁰ Order F15-06, 2015 BCIPC 6 at para. 17, also cited in Order F15-07, 2015 BCIPC 7 at para. 10.

It cannot persuasively be argued that the Legislature intended s. 61(2)(c) to apply only to a “hearing” on the merits of a matter, as opposed to a hearing convened to determine the admissibility of evidence. One purpose of the ATA is to enable administrative tribunals to conduct their proceedings, and make decisions, with a certain degree of flexibility as regards openness of proceedings, and thus information they consider. It is clear on the face of s. 61(2)(c), in fact, that some insulation from FIPPA’s right of access to records is intended. Like the courts, many tribunals will convene an *in camera* hearing—which is often referred to as a *voir dire*—for the sole purpose of receiving evidence to determine its admissibility.³¹

[39] BC Hydro submits “The BCUC was empowered with a wide discretion to collect evidence in a variety of forms (which it did), in order to answer the Inquiry Questions. Some of the evidence was collected in public consultations, some was submitted via email, and some was submitted in confidence through processes managed directly by the BCUC.”³² BC Hydro also says that the Construction Report was received by the BCUC *in camera* for the Site C Inquiry hearing.³³ The BCUC submits the Construction Report was filed confidentially with the BCUC³⁴.

[40] In my view, it is important to consider when the BCUC received an unredacted version of the Construction Report and whether it was still part of the Site C Inquiry at the time of receiving of that report. I can see the following sequence of events took place: the BCUC established the Site C Inquiry on August 2, 2017,³⁵ an unredacted version of the Construction Report was submitted to the BCUC on August 30, 2017, and a redacted version of that report was released on September 8, 2017.³⁶ The Commission Secretary attests that only a redacted version of the Construction Report was made publicly available on September 8, 2017, and he provides a copy of it.³⁷ The first page says:

The Commission will consider the information contained in the [Construction Report], as well as the information provided by BC Hydro in its August 30, 2017 submission, and the submissions of data and analysis from members of the public, when preparing its preliminary report due September 20, 2017.³⁸

³¹ Order F15-06 at para. 21.

³² BC Hydro’s initial submission at para. 18.

³³ BC Hydro’s initial submission at para. 6.

³⁴ BCUC’s initial submission at para. 18.

³⁵ Affidavit #1 of the BCUC’s Commission Secretary, Exhibit B.

³⁶ BCUC’s initial submission at para. 10.

³⁷ Affidavit #1 of the BCUC’s Commission Secretary at paras. 6 and 7.

³⁸ Affidavit #1 of the BCUC’s Commission Secretary, at p. 1 of Exhibit D.

[41] The BCUC's evidence also includes a letter that it issued on September 29, 2017 to explain to the public about the redactions made in the Construction Report.³⁹

[42] Based on my review of the parties' submissions and evidence, I am satisfied that the unredacted Construction Report was received by BCUC at an early stage of the Site C Inquiry that excluded the public, intervenors and all parties except BC Hydro. The public and all other parties in the Site C Inquiry were never allowed to see the parts of the Construction Report that are at issue in this inquiry. Therefore, I am satisfied that BCUC received the information in dispute at a part of the Site C Inquiry from which the public, a party or an intervenor was excluded under s. 61(2)(c).

Conclusion on Section 61(2) of the ATA

[43] For the reasons above, I find that s. 61(2)(c) of the ATA applies to the information in dispute in the Construction Report. I find the information in dispute was received by a tribunal, specifically the BCUC, in a part of the Site C Inquiry from which the public, a party or an intervenor was excluded.

[44] Given I find that s. 61(2)(c) of the ATA applies here, I do not need to decide if s. 61(2)(e) also applies.⁴⁰

CONCLUSION

[45] For the reasons given above, I find that, by virtue of s. 61(2)(c) of the ATA, FIPPA does not apply to the information in dispute. Consistent with previous orders, no order under s. 58 is necessary because FIPPA does not apply to the report.⁴¹

September 9, 2022

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F17-72061

³⁹ Affidavit #1 of the BCUC's Commission Secretary at para. 10 and Exhibit G.

⁴⁰ *White v. The Roxy Cabaret Ltd.*, 2011 BCSC 374 at paras. 40-41.

⁴¹ See, for example, Order F07-07, 2007 CanLII 10862 (BC IPC); Order F15-06, 2015 BCIPC 6; Order F15-07, 2015 BCIPC 7.