



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

Order F06-01

MINISTRY OF ENERGY, MINES & PETROLEUM RESOURCES

Celia Francis, Adjudicator
February 1, 2006

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Summary: The applicant requested access to records relating to a public report on offshore oil and gas exploration prepared for the Minister of Energy and Mines by a panel of three scientific experts. For records in the possession of the Ministry, s. 12(1) applied to a small amount of information, ss. 13(1) and 16(1) applied to some other information and s. 25(1) did not apply. Some information in these records was also incorrectly withheld as not responsive to request but may be withheld under ss. 13(1) and 16(1). Records in the possession of panel members or the panel secretariat are under the control of the Ministry and subject to an access request under the Act.

Key Words: scope of the Act—in the custody or under the control—Cabinet confidences—substance of deliberations—not responsive—advice or recommendations—developed by or for a public body or a minister—disclosure harmful to intergovernmental relations or negotiations—public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1), 6(1), 12(1), 12(2), 13(1), 16(1)(a)(i), 16(1)(b) and s. 25(1).

Authorities Considered: **B.C.:** Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order 01-13, [2001] B.C.I.P.C.D. No. 14; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 02-25, [2002] B.C.I.P.C.D. No. 25; Order 02-29, [2002] B.C.I.P.C.D. No. 29; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-19, [2003] B.C.I.P.C.D. No. 19; Order 04-15, [2004] B.C.I.P.C.D. No. 15; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order 04-37, [2004] B.C.I.P.C.D. No. 38; Order F05-29, [2005] B.C.I.P.C.D. No. 39.

Cases Considered: *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219 (C.A.); *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, (1997), 4 Admin L.R. (3d) 96 (T.D.); *Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.); *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.); *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781; *Doern v. British Columbia (Police Complaint Commissioner)* (2001), 203 D.L.R. (4th) 295 (appeal quashed as moot (2003), 227 D.L.R. (4th) 295 (S.C.C.)); *Sekela v. British Columbia (Police Complaint Commissioner)* (2001), 206 D.L.R. (4th) 747; *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

1.0 INTRODUCTION

[1] This order is about a request to the Ministry of Energy and Mines (now the Ministry of Energy, Mines and Petroleum Resources) (“Ministry”) for access to records under the *Freedom of Information and Protection of Privacy Act* (“Act”) relating to a 2002 public report on offshore oil and gas exploration that a panel of three scientific experts prepared for the Minister of Energy and Mines.

[2] The applicant, the West Coast Environmental Law Association (“WCEL”), describes itself as a public interest law organization with a mandate to advance public interest environmental protection through the use of legal tools. WCEL says it monitors government policies relating to the oil and gas industry and assesses how they may impact British Columbia’s natural environment and the socio-economic health of its communities.¹

[3] What was, at the time of the access request, the Ministry of Competition, Science and Enterprise assisted the Ministry in processing access requests under the Act. As a result, it handled, on behalf of the Ministry, the correspondence and responses to WCEL’s access request.²

[4] With the exception of a brief time in the 1960s, the British Columbia government has restricted offshore oil and gas exploration since 1959. A federal government moratorium has also been in place since 1972.³ In the Speech from the Throne on July 24, 2001, British Columbia announced that an “independent scientific review panel” would be appointed to examine offshore oil and gas development⁴:

For over two years, northern British Columbians have waited for government leadership to explore the enormous opportunities of offshore oil and gas off our North Coast. The potential gains and risks could be enormous. Therefore, over the next six

¹ Para. 1, WCEL’s initial submission; para. 2, Campbell affidavit.

² Nothing in this inquiry turns on this relationship between the two ministries and references to the “Ministry” in this order are to what was then the Ministry of Energy and Mines, whether or not it was acting or communicating through what was then the Ministry of Competition, Science and Enterprise.

³ Para. 7, WCEL’s initial submission; para. 3, Campbell affidavit; p. 1, Panel’s Terms of Reference; para. 59, O’Rourke affidavit. Except where noted, all references to the “O’Rourke affidavit” are to his first affidavit.

⁴ Para. 4.01, Ministry’s initial submission; para. 6, O’Rourke affidavit.

months, my government will examine the possibility of converting those rich reserves into jobs and opportunities for northern working families.

An independent scientific review panel will be appointed to address the hard questions that must be answered before we can consider realizing this potential. It will ascertain whether those resources can, in fact, be extracted in a way that is scientifically sound and environmentally responsible, with its initial findings being tabled by January 31, 2002.⁵

[5] On October 19, 2001, the Minister announced the appointment of, and terms of reference for, the Offshore Oil and Gas Scientific Panel (“Panel”), composed of three academics. The terms of reference contemplated the Panel submitting its report by January 15, 2002. In November and December 2001, the Ministry entered into service contracts with the Panel members and a contract with the Maritime Awards Society of Canada (“MASC”) for MASC to provide secretariat services to the Panel.⁶

[6] The Panel’s January 15, 2002 report, called *British Columbia Offshore Hydrocarbon Development – Report of the Scientific Review Panel* (“Panel report”), was not released publicly on that date⁷ and, on February 20, 2002, WCEL made a request⁸ to the Ministry under the Act for access to:

- (a) A copy of the panel’s report.
- (b) A copy of all drafts of the report.
- (c) Any correspondence, briefing materials, memoranda, proposals, e-mails, notes, record of discussions, presentations or submissions, or other documents commenting on or related to report drafts, including preliminary, partial and final drafts, as well as drafts reviewed by Minister’s [*sic*] and/or their staff.

[7] Part (a) of WCEL’s access request became academic when the Panel report was released publicly on May 1, 2002.⁹ The Panel report concluded that, while there were gaps in knowledge, there was no inherent or fundamental inadequacy of science or technology, properly applied in an appropriate regulatory framework, to justify an ongoing moratorium on British Columbia offshore oil and gas exploration.¹⁰

[8] In July 2002, the Ministry responded to parts (b) and (c) of WCEL’s access request by stating, “we have reviewed the contractual relationship with the third party who prepared all of the draft materials and have determined that the records are not under the custody and control of the Ministry and are therefore outside the coverage of the Act”.¹¹

⁵ See <<http://www.legis.gov.bc.ca/37th2nd/4-8-37-2.htm>>.

⁶ Paras. 8-9, WCEL’s initial submission; paras. 4 & 16, Campbell affidavit; paras. 4.02-4.08, Ministry’s initial submission; paras. 6-14 & 16-18, O’Rourke affidavit; p. 3, Panel’s Terms of Reference.

⁷ Paras. 4.08-4.09, Ministry’s initial submission; paras. 14-15, O’Rourke affidavit; para. 5, Campbell affidavit.

⁸ See Exhibit “A”, Campbell affidavit.

⁹ Para. 4.09, Ministry’s initial submission; para. 15, O’Rourke affidavit; para. 8, Campbell affidavit.

¹⁰ See <http://www.offshoreoilandgas.gov.bc.ca/reports/scientific-review-panel/>, p. 51.

¹¹ Ministry’s letter of July 5, 2002, Exhibit “B”, Campbell affidavit.

[9] WCEL sought a review of this decision by this Office.¹² Mediation was initially unsuccessful and WCEL asked that the issue of custody or control proceed to an inquiry under Part 5 of the Act. Further discussions resulted in adjournment of the inquiry.

[10] On January 9, 2003, WCEL also made an access request, not in issue here, for records concerning how its initial access request was processed.¹³

[11] In a February 2003 meeting between the parties, the Ministry acknowledged that WCEL was seeking drafts of the Panel report “as well as various types of records related to such drafts”.¹⁴ The Ministry said it had not received or reviewed any drafts of the Panel’s report, only the final version.¹⁵ WCEL replied that, in its view, the final version was the “final draft” and part (c) of its access request was directed at associated materials around the “final draft”, including records that arose from the Ministry’s handling of the Panel report after receiving it.¹⁶ In a letter to the Ministry dated March 5, 2003, WCEL said this:

As we discussed, the government sat on the Report of the Offshore Scientific Panel for several months before it was finally released, and our initial FOI request was filed during that time. As you know, our interest is in obtaining drafts of the report, and information about the report during that time period. In our view, this includes correspondence and exchanges about the report, any discussions that were held amongst officials about why the release of the report was delayed, briefing notes, communication plans, and any other material that would have been generated during that time.

[12] The Ministry saw this letter as an expansion of part (c) of WCEL’s access request.¹⁷ In my view, the letter provided examples of records “commenting on or related to” the Panel report. It did not expand an already broadly-worded access request. It clarified that breadth in the face of the narrow interpretation the Ministry gave to it.

[13] At some point after July 2002—when the Ministry cited the contractual relationship with the third party who prepared draft report materials as the reason why records sought in parts (b) and (c) of WCEL’s access request were not in Ministry custody or control under the Act—WCEL also made an access request for contracts with Panel members and with MASC.¹⁸ WCEL received copies of these contracts, but the reverse side of the contract with each Panel member—containing terms that included provisions for Ministry ownership and access to Panel records—was missing.¹⁹

¹² See WCEL’s letter of July 11, 2002.

¹³ Para. 1.10, Ministry’s initial submission; para. 12, WCEL’s initial submission; para. 11, Campbell affidavit; Exhibit “C”, Campbell affidavit.

¹⁴ Para. 13, Reid affidavit.

¹⁵ Para. 13, Reid affidavit.

¹⁶ Letter of March 5, 2003, Exhibit “D”, Campbell affidavit.

¹⁷ Para. 1.17, Ministry’s initial submission; para. 16, Reid affidavit.

¹⁸ I could find no mention of the date of this request but it is apparently a separate request from the January 2003 request mentioned above; see para. 16, Campbell affidavit.

¹⁹ Para. 12, WCEL’s reply submission.

[14] In July 2003 and February 2004, the Ministry further responded to part (c) of WCEL’s access request, in relation to records the Ministry acknowledged were in its custody.²⁰ Of the 85 pages of records involved²¹, the Ministry fully disclosed 28 pages (consisting of public media releases, some emails and a fax cover sheet). The remaining 57 pages were withheld in whole or part as follows:

1. Media lines (2 pages)—Information withheld under s. 13 or 16 or because it was not responsive to the access request.
2. Emails (20 pages)—Information withheld under s. 12, 13, 16 or 22 or because it was not responsive to the access request.
3. Correspondence and briefing material, much of it draft (35 pages)—Information withheld under s. 16 or because it was not responsive to the access request.

[15] WCEL asked the Commissioner to review the Ministry’s decision to apply ss. 12, 13 and 16 (but not s. 22) and to withhold parts of some records on the ground that they were not responsive to the access request.²² These matters did not settle in mediation. The inquiry under Part 5 of the Act resumed, joining all WCEL’s grounds of review of the Ministry’s responses to its access request.

[16] There are two categories of records now in issue:

1. Drafts of the Panel report and associated records relating to the work of the Panel that are in the possession of Panel members or MASC and that the Ministry maintains are not in its custody or under its control within the meaning of the Act.
2. Records in the possession of the Ministry from which it has withheld information under s. 12, 13 or 16 of the Act or because it is not responsive to WCEL’s access request.

[17] For clarity of reference only, in this order, I call records in the possession of Panel members or MASC “Panel records” and records in the possession of the Ministry “Ministry records”.

2.0 ISSUES

[18] These are the issues in this inquiry:

1. Are Panel records under the control of the Ministry within the meaning of ss. 3(1) and 4(1) of the Act?

²⁰ Para. 17, Campbell affidavit.

²¹ See Exhibit “G”, O’Rourke affidavit.

²² See WCEL’s letter of March 3, 2004.

2. Did the Ministry comply with s. 6(1) of the Act with respect to Ministry records by withholding information on the grounds that it was not responsive to WCEL's access request?
3. Did s. 12(1) of the Act require the Ministry to refuse access to some information in Ministry records?
4. Did ss. 13(1) and 16(1)(a) and (b) of the Act authorize the Ministry to refuse access to some information in Ministry records?
5. Does s. 25(1) of the Act require the Ministry to disclose any Ministry records?

[19] Under s. 57(1) of the Act, the Ministry has the burden of proof regarding the applicability of ss. 12, 13 and 16.

3.0 DISCUSSION

[20] **3.1 Procedural Objections**—WCEL objected²³ to the Ministry's submission of an unsworn affidavit²⁴ in the inquiry—the sworn affidavit arrived eight days later—and to the fact that another Ministry affidavit²⁵ had an unnumbered and uncertified exhibit consisting of the contribution agreement with MASC, with the Panel's terms of reference attached.²⁶ I attach no significance to these irregularities. It is true that the sworn affidavit's arrival was slightly delayed, but WCEL received an unsworn copy on time. The uncertified exhibit is not contentious and copies of the MASC agreement and Panel's Terms of Reference were also part of WCEL's own submissions to the inquiry, as well as appearing elsewhere in the Ministry's submission.

[21] The Ministry objected that WCEL's submission introduced a new issue about delay in the response to the request by linking the amount of time that had passed since the Panel report was made public with the Ministry's obligation under s. 6 of the Act to make every reasonable effort to assist access applicants.²⁷ I do not agree with the Ministry's perception of WCEL's concerns about the pace of the administration of the Act. In any event, I agree that any delay in the Ministry's response is not an issue in this inquiry.

[22] **3.2 Evidence of Extent and Content of Panel Records**—Although I did not review the Panel records for purposes of this inquiry, there is some evidence of their extent and contents.

[23] Patricia Gallagher, a Panel member, deposes that she remembered email messages, with draft chapters attached, being exchanged among the Panel members and MASC, but she did not know if she still had any of those records and did not recall seeing a draft of the full report, only draft chapters that were put together as the final report for submission to the

²³ See WCEL's letter of April 30, 2004.

²⁴ Referring to the Gallagher affidavit, part of the Ministry's initial submission.

²⁵ Referring to the Dobell affidavit, part of the Ministry's initial submission.

²⁶ See WCEL's letter of April 30, 2004.

²⁷ Paras. 55-56, Ministry's reply submission.

government.²⁸ Tracy-Jo Reid, of the Ministry of Competition, Science and Enterprise, deposed that Derek Muggeridge, another Panel member, informed her he had disposed of any drafts of his own chapter once the report was posted on the Ministry’s website, but still had copies of final chapters drafted by the other Panel members that were the same, he believed, as the chapters published in the final report.²⁹ In his affidavit, Rod Dobell of MASC said that he had copies of some correspondence between MASC and Panel members attaching draft portions of the report.³⁰

[24] It is important to bear in mind that a finding as to whether records are in the custody or under the control of a public body within the meaning of the Act is not a judgement about the importance or sensitivity of all or part of the records or a finding about their disclosure or non-disclosure under the Act.

[25] In its submission, the Ministry stated as follows:

The issue of whether or not the Ministry would have wished such records to be disclosed was not relevant to its determination as to whether the records were within its control.³¹

[26] I agree entirely with this. Moreover, an applicant’s relationship to requested information can be relevant to the operation of exceptions in the Act, but the applicant’s identity or motives are generally not relevant to the right of access under the Act. An applicant does not have to explain or justify the reasons for making an access request and the right of access is not measured by perceptions of the worthiness or motives of the applicant or their access request.³²

[27] In summary, whether Panel records—by their nature or the limited evidence in this inquiry about their extent and content—seem to the Ministry, to a bystander or to me to warrant the effort of an access request under the Act, or are likely to be protected by an exception in Part 2, is not relevant to the determination of whether they are under the control of the Ministry within the meaning of the Act.

[28] **3.3 Control of Panel Records**—I will deal first with the issue of custody or control of the Panel records.

The Ministry’s access decision and its documentation

[29] This issue relates to the Ministry’s July 2002 decision that, in light of “the contractual relationship with the third party who prepared all of the draft materials”, Panel records in parts (b) and (c) of WCEL’s access request were not under the Ministry’s “control” within

²⁸ Paras. 14-16, Gallagher affidavit.

²⁹ Para. 22, Reid affidavit.

³⁰ Para. 29, Dobell affidavit.

³¹ Page 2, Ministry’s reply submission.

³² Order F05-29, [2005] B.C.I.P.C.D. No. 39, para. 43; Order 04-19, [2004] B.C.I.P.C.D. No. 19, paras. 51-53.

the meaning of the Act. The “contractual relationship with the third party” presumably referred to the Ministry’s contracts with Panel members and with MASC.³³

[30] As already noted, WCEL made a separate access request for the contracts and the Ministry disclosed them, except that the reverse side of the service contracts with Panel members, on which contractual terms are printed, was missing. Because of this, WCEL made its initial submission in this inquiry on the basis that the service contracts with Panel members were silent as to rights and obligations respecting contractor work product.³⁴ WCEL became aware of the terms on the reverse side of the service contracts only when a complete copy of the contract with the chair of the Panel was included in the Ministry’s initial submission.³⁵ WCEL then made a detailed response to this new information in its reply submission.³⁶

[31] It is striking, at least at first blush, that the Ministry concluded the Panel records were not under its control within the meaning of the Act, despite the fact that the Ministry’s contracts with Panel members have explicit provisions for Ministry ownership and inspection of material received or produced as a result of the contracts. All of the evidence and arguments on this issue must be fully considered, however, including affidavits the Ministry provided.

The Panel’s terms of reference

[32] The Panel’s terms of reference,³⁷ announced October 19, 2001, are six pages long, including two appendices that identify the Panel members and describe MASC. These are the relevant parts of the terms of reference:

IV. Mandate

The Scientific Panel will provide advice to the Minister of Energy and Mines on whether offshore oil and gas activity can be undertaken in a scientifically sound and environmentally responsible manner. In particular, the Panel will advise on:

- The scientific and technological considerations relevant to offshore oil and gas exploration, development and production;
- Further research or studies that should be undertaken to advance the “state of knowledge” on these considerations;
- Any specific Government actions that should be taken prior to a decision on whether to remove the current moratorium; and,
- Any specific conditions or parameters that should be established as part of a Government decision to remove the moratorium.

³³ No other contracts have been mentioned in this proceeding.

³⁴ Paras. 24-63, WCEL’s initial submission.

³⁵ As Exhibit “E”, O’Rourke affidavit.

³⁶ Paras. 11-26, WCEL’s reply submission.

³⁷ Exhibit “A”, O’Rourke affidavit, Ministry’s initial submission, and part of Exhibit “H”, WCEL’s initial submission.

V. Tasks

The Scientific Panel will be expected to undertake the following tasks:

- Review and provide analysis of the JWEL [Jacques Whitford Environment Ltd] report³⁸;
- Summarize stakeholder response to JWEL report;
- Undertake additional literature reviews of relevant publications;
- Solicit submissions and/or commentary by other relevant scientists or other experts as required; and
- Prepare a final report for the Minister in accordance with the mandate above.

VI. Accountability

The Scientific Panel will be appointed by, and will provide advice to, the Minister of Energy and Mines. The Scientific Panel will operate independently from Government, but any decisions based upon its advice, particularly in relation to the current moratorium, will be made by Cabinet.

VII. Structure and Composition

The Scientific Panel will consist of three (3) internationally known and experienced academics, each with broad, relevant experience and expertise.

The Scientific Panel will have the capacity to include additional experts as “ex-officio” or “subject specific” members, as required to ensure that all relevant disciplines and perspectives are considered. These additional members would be appointed by the Minister of Energy and Mines on the recommendation of the Scientific Panel.

The Scientific Panel will receive project support from the Maritime Award Society of Canada (MASC). This support will include development of a project overview and workplan, coordinating meetings, managing submissions, and drafting work on the Scientific Panel’s report to the Minister.

A senior official from the Ministry of Energy and Mines will be the liaison between the Ministry and the Scientific Panel.

Members of the Scientific Panel are identified in Appendix A. The MASC is described in Appendix B.

³⁸ The Ministry had contracted consulting firm Jacques Whitford Environment Ltd. to produce the JWEL report, which was to be a study of offshore oil and gas technology based on 1986 and 1998 reports that had been prepared for but not released by the provincial government. The Ministry expected to receive the JWEL report on October 19, 2001, the same day that the Panel terms of reference were announced. See para. 4.25, Ministry’s initial submission and p. 2, Panel’s Terms of Reference.

VII. Timeframe

The Scientific Panel will deliver its final report to the Minister of Energy and Mines no later than January 15, 2002. The Panel will work through the following phases:

Phase 1: Preparation (conclude October 26, 2001)

- Post JWEL report on the Ministry website (University of Northern British Columbia will link into Ministry website)
- Finalize organizational arrangements for Scientific Panel and MASC

Phase 2: Investigation and Review (conclude December 15, 2001)

- Panel to review and comment on JWEL Report
- Panel to investigate supplementary literature
- Panel to formulate recommendations
- Panel to seek additional submissions as required

Phase 3: Documentation and Submission (conclude January 15, 2002)

- Documentation of Report
- Documentation of non-technical executive summary
- Collation of Public Commentary
- Submission of Report to Government

Service contracts with Panel members

[33] The Ministry and each Panel member entered into what appears to be a standard-form contract entitled “Service Contract (General)”.³⁹ The front page of the service contract identifies the parties, *i.e.*, the representative of the Province of British Columbia (the Ministry) and the contractor (the Panel member). The parties’ contractual commitment follows:

THE PROVINCE AND THE CONTRACTOR AGREE TO THE TERMS ON THE REVERSE SIDE OF THIS DOCUMENT AND IN THE SCHEDULES OUTLINED BELOW. [upper case letters in original]

[34] Five standard schedules are listed—A Services, B Fees and Expenses, C Approved Subcontractor(s), D Insurance, E Additional Terms—with spaces to fill in information or indicate attachments. At the bottom of the front page are standard language and signature blocks for the contract’s signing, followed again by the capitalized text, “READ TERMS ON REVERSE” (which refers to the 45 terms printed on the reverse side).

[35] The service contracts between the Ministry and Panel members were signed in November 2001.⁴⁰ The term was from October 19, 2001 to January 31, 2002 and two

³⁹ The Ministry describes them at para. 4.33 of its initial submission as “standard service agreements”.

⁴⁰ Para. 16, Campbell affidavit.

schedules were attached. Schedule A, the description of services under contract, consists of the Panel's terms of reference. Schedule B is one page of terms governing fees and expenses, the maximums for which are set forth on the front page of the contract. Patrick O'Rourke, the Assistant Deputy Minister of Energy and Mines, and David F. Strong, the chair of the Panel, signed the service contract presented in evidence here.⁴¹

[36] In response to its access request for the contracts, WCEL received the front page of the service contract and the two attached schedules. The missing terms printed on the reverse side of the front page of service contract include the following:

5. We may from time to time give you reasonable instructions (in writing or otherwise) as to the performance of the Services. You must comply with those instructions but, unless otherwise specified in this agreement, you may determine the manner in which those instructions are carried out.
6. You must, upon our request, fully inform us of all work done by you or a subcontractor in connection with providing the Services.
7. You must maintain time records and books of account, invoices, receipts, and vouchers of all expenses incurred, in form and content and for a period satisfactory to us.
8. You must permit us at all reasonable times to inspect and copy all material that has been produced or received by you or any subcontractor as a result of this agreement (collectively the "Material"), including, without limitation, accounting records, findings, software, data, specifications, drawings, reports, and documents, whether complete or not.
9. You must treat as confidential all Material and not permit its disclosure without our prior written consent except as required by applicable law.
10. The Material and any property we provide to you or a subcontractor is our exclusive property. You must deliver it to us immediately upon our request.
11. The copyright in the Material belongs exclusively to us. Upon our request, you must deliver to us documents satisfactory to us waiving in our favour any moral rights which you or your employees or subcontractors may have in the Material and confirming the vesting of the copyright in us.
- ...
28. We may terminate this agreement (a) for your failure to comply with this agreement immediately on giving written notice of termination to you; and (b) for any reason, on giving 10 days' written notice of termination to you. If we terminate this agreement under (b), we must pay you the portion of the fees and expenses described in Schedule B which equals the portion of the Services completed to our satisfaction before termination. That payment discharges us from liability to you under this agreement.
29. If you fail to comply with this agreement, we may terminate it and pursue other remedies as well.
30. You are an independent contractor and not our employee, agent, or partner.
- ...

⁴¹ Exhibit "E", O'Rourke affidavit; Exhibit "H", Campbell affidavit.

32. We must make available to you all information in our possession which we consider pertinent to your performance of the Services.
33. This agreement is governed by and is to be construed in accordance with the laws of British Columbia.
- ...
37. No modification of this agreement is effective unless it is in writing and signed by the parties.
38. This agreement and any modification of it constitute the entire agreement between the parties as to performance of the Services.
- ...
40. Sections 6 to 11, 13, 15, 23, 24, 27 to 29 and 39 continue in force indefinitely, even after this agreement ends.
41. The schedules to this agreement are part of this agreement.
42. If there is any conflict between a provision in a schedule to this agreement and any other provision of this agreement, the provision in the schedule is inoperative to the extent of the conflict unless it states that it operates despite a conflicting provision of this agreement.

Agreement with MASC

[37] The contract between the Ministry and MASC consists of a three-page letter⁴² headed “Contribution Agreement” from Ross Curtis, Acting Deputy Minister of Energy and Mines, to MASC. Dated December 6, 2001, it indicates that MASC signed it on December 12, 2001. Under the contract, MASC was to provide secretariat services to the Panel and to receive and disburse funds, at the Panel’s direction, for retaining experts to support the Panel. There are 10 pages of attachments consisting of the Panel’s terms of reference (six pages) and two appendices. Appendix I (two pages) contains various terms relating to fees and expenses, including a budget and payment schedule. Appendix II (two pages) contains additional contract terms, including the following:

INDEPENDENT RELATIONSHIP

The Organization [MASC] will not be the servant, employee, or agent of the Province. The Organization will not in any manner whatsoever commit or purport to commit the Province to the payment of any money to any person, firm, or corporation.

REPORTS

The Organization will:

- (a) will fully inform the Province’s representatives of the work done and to be done by the Organization in connection with the Project; and

⁴² Exhibit “I”, Campbell affidavit; Exhibit “D”, O’Rourke affidavit.

- (b) immediately advise the province of any expected cost overruns and/or delays in completing the project.

INSPECTION

The Organization will permit the Province's representatives at all reasonable times to inspect, examine, review and copy any and all layouts, copy, prints, specifications, drawings, working papers, reports, documents and all audio, visual and print material whether complete or otherwise (collectively called the "Material") that have been produced, received or acquired by the Organization in connection with the Project.

Other Ministry documentation

[38] Among the disclosed Ministry records⁴³ is an August 2, 2001 email (p. 10) from the Premier's Office to senior officials in three ministries, including the Ministry. The email states that the Premier had recently directed those ministries to prepare terms of reference and propose members of the Panel and it was "a heads up and a request that you begin work on this as a joint project". In an email dated August 3, 2001 (p. 18), the Deputy Minister of the Ministry responded to the Premier's office that he would be pleased to lead the work on the Panel and mentioned two other Ministry officials, including Patrick O'Rourke.

[39] WCEL also provided records, apparently received in response to its other access requests to the Ministry, that it considers relevant to the issue of Ministry "control" of Panel records. These include five pages of minutes⁴⁴ of the initial meeting of the Panel on October 30, 2001, attended by the three Panel members, Ministry officials Patrick O'Rourke and Ron Burleson and MASC personnel Rod Dobell, Douglas Johnston and Justin Longo. Under the heading "Mandate and Responsibility of the Scientific Panel", the minutes attribute the following to Patrick O'Rourke:

- The position of the B.C. government with respect to the mandate and work of the Scientific Panel is as set out in the Terms of Reference (October 19, 2001)... The Panel is to act independently and at arm's length from the government – though the Ministry of Energy and Mines (with Patrick O'Rourke acting as the senior Ministry Liaison with the Panel, with the assistance of Ron Burleson) is willing to make available to the Panel whatever literature and in-house scientific expertise the Panel may wish to access.
- While not detailed in the Terms of Reference, the Ministry envisions the report of the Scientific Panel as a document of perhaps 10 to 20 pages in length (with allowance for detailed technical appendices) that undertakes a review of the relevant scientific literature and provides advice and recommendations to the Minister, with scientifically based justifications for those recommendations. The advice and recommendations should include both references to what government needs to do before making a decision on the moratorium as well as describe the conditions that need to be addressed should the government decide to lift the moratorium.

⁴³ Exhibit "G", O'Rourke affidavit

⁴⁴ Exhibit "J", Campbell affidavit.

[40] Under the heading “Relationship Between Panel and External Stakeholders”, the minutes attribute the following to Ron Burleson:

- Panel members should be aware that the recorded communications of the panel (e.g., email exchanges) may be subject to requests under the Freedom of Information Act (ACTION ITEM: Ron to check this).

[41] Under the heading “Resources Available to the Panel”, the minutes attribute the following to Patrick O’Rourke:

- an allowance has been made in the Panel’s budget to give the Panel the capacity to bring in outside expertise wherever the Panel feels such assistance is necessary. The Panel should not feel constrained in its ability to take advantage of outside expertise (These arrangements will likely be handled through direct contract arrangements with the government).
- Panel members will be remunerated for their work based on formal arrangements with the Ministry (to be completed in the near-term); fees and expenses can be billed to the Ministry under the terms of the agreement
- a separate agreement with the Maritime Awards Society, as secretariat to the Panel, will be completed.

[42] The following appears, without attribution, under the sub-heading “General Discussion”:

- the Maritime Awards Society of Canada, as Secretariat to the Panel, will be the primary supporting body for the Panel. Panel members are encouraged to contact MASC with any requests for assistance in obtaining copies of research papers and scientific literature, contacting experts or other sources of information, arranging meetings and providing general administrative support. MASC will work with the Ministry to provide these services.

[43] There is a November 6, 2001 email⁴⁵ from the Panel chair, David Strong, to those who were present at the initial meeting of the Panel. The email has three one-page attachments, all dated November 7, 2001: David Strong’s notes of a lunch meeting with MASC personnel; a draft work plan; and an outline of the Panel report. The text of the email reads as follows:

Dear All,

I attach a first and highly incomplete attempt at drafting a work plan etc. I send it along more to focus your mind on the fact that we have so little time, than to lay out very specific steps. But I hope you will add to and refine it so that we can make it a functional document which Justin (?) can keep updated.

⁴⁵ Exhibit “K”, Campbell affidavit.

The report outline is my best guess, based [on] our exchanges to date, but I'd welcome your own thoughts.

The lunch notes are from memory. Rod made notes, so his version is the one to trust.

[44] David Strong's one page of attached notes include the following statement:

From here on in it will be important to keep everyone informed, so I will always use the 'offshore' email address which has you all in it. We should leave it to MASC to liaise with Ministry folks, unless we have specific purposes.

[45] The attached draft work plan includes the following:

Dec. 10 ... Note that we have scheduled a full panel/MASC meeting for Dec. 12 to draft a progress report for the Ministry.

Dec. 17 Today we submit the above to the Ministry. That probably means that Justin should plan to work on it that weekend!

[46] A December 14, 2001 letter⁴⁶ from David Strong to the Minister reads as follows:

I am pleased to provide you with this brief interim report on the progress of the offshore scientific review panel.

Since our appointment we have been busy in reading, writing and meeting. As you know, there is a voluminous amount of written material available, and many people who have valuable experience, insights and expertise. It is impossible for us to meet with all of those we would like to consult, and indeed to read, absorb, understand and refine the written material. Accordingly, we have engaged a number of key specialists, most of whom are found right here in BC, to provide us some supplementary commentaries.

While we are awaiting the final reports from those consultants and advisors, we are well on the way to seeing the shape and substance of our report. Although there may be some changes, it currently has the following outline.

[list of six chapter titles omitted]

Given the arms-length nature of our mission, it would not be appropriate for us to expect any response to this interim note; but please be assured that we will provide you with our Report in time for the January 15th deadline that we accepted on appointment.

Before closing, I want to also express my gratitude to the Maritime Awards Society of Canada for the many ways in which they continue to support our activities.

⁴⁶ Exhibit "L", Campbell affidavit.

[47] In a December 17, 2001 email⁴⁷ to another Ministry official about David Strong's December 14, 2001 letter to the Minister, Patrick O'Rourke said:

FYI. I have discussed with Maritime Awards Society and they will NOT be publicly releasing this letter, or posting on their website.

[48] A January 7, 2002 email⁴⁸ from David Strong to Ron Burleson at the Ministry—who forwarded it to Patrick O'Rourke—said in part the following:

We're getting there, but not quite as crisply on time as I would like. We will of course have the report in Jan. 15th as a matter of principle, but I doubt that we will have time to have it reviewed by a few expert "peers" as we had planned. Is there any chance that we can have that done after submitting it to you, i.e. will you be releasing it immediately to the public, or will there be a couple of weeks grace while you folks read it, and during which we could have it peer-reviewed?

[49] A January 16, 2002 email⁴⁹ from Rod Dobell, Director of the Project Team at MASC, to David Strong described a telephone conversation he had with Patrick O'Rourke, as follows:

David –

Pat O'Rourke and I have just had a telephone conversation in response to my recent msg, Pat explaining possible logistic problems created by my suggestion that we could ask for review of the material prior to public release. On reflection, it seems clear that it would be far better to wait for public release of the report by the government, and then invite review by the panel's consultants or other experts, with the idea that a "corrigendum" could be prepared by the MASC production team and submitted by the Panel to the Ministry so that all necessary technical or substantive corrections can be incorporated in a "revised, corrected" version of the document that would be placed on the website to replace the original for any subsequent dissemination.

I've agreed that for my part this seems the appropriate approach, and I will defer any circulation of pieces of the documentation. I pass this information along to you for your use in any discussion with panel members on the question.

[50] Finally, there is an email⁵⁰ dated May 2, 2002, from David Strong to Ron Burleson (and apparently others), that reads in part as follows:

Greetings All,

Just a note to say thanks, at last, for your assistance with our offshore review, which was finally released yesterday.

⁴⁷ Exhibit "M", Campbell affidavit.

⁴⁸ Exhibit "N", Campbell affidavit

⁴⁹ Exhibit "O", Campbell affidavit.

⁵⁰ Exhibit "P", Campbell affidavit.

We also apologize for not being able to give you a chance to comment on our draft report, but I expect you'll understand that as we got right up to the deadline (Jan 15th), the draft report became the final report.

We hope it will be seen as a useful base for moving forward, and that your time won't have been wasted.

[51] I will now outline in summary fashion the parties' positions on this issue.

Ministry's position

[52] The Ministry states that "[t]here are many instances where government retains property over, and control of, any and all internal records produced by a contractor as a result of their contract with government" but that "this is clearly not one of those cases".⁵¹ The "process was structured in such a way that the Ministry did not control the Panel's development or formulation of its substantive findings"⁵² and there is simply no issue of "contracting out" of obligations under the Act:

... When a public body retains a third party to perform certain functions under a contract, it must decide what records in the possession of that party it will need to have control of. That issue must be determined on a case by case basis. In this case, because it wanted the Panel to be independent of government, the Ministry did not want control over internal documentation leading up to the formulation of the Panel's final report. [WCEL] claims that this constitutes "contracting out" of the Ministry's obligations under the Act. The Ministry disagrees.

If the Legislature had intended that a public body, in hiring a third party under contract, was required to provide to applicants the internal records of the contractor relating to the contract, then the Ministry submits the Legislature would have said so. It did not. Instead, the Legislature decided that an applicant's access rights under the Act only applied to records in a public body's custody or control. Control is an issue that can only be determined by considering the circumstances of a particular case, including an analysis of what the agreement was between the public body and the contractor. There is simply no support for [WCEL's] allegation that when a public body decides it need not have control of internal contractor records it is somehow "contracting out" of its obligations under the Act.

... [WCEL] is effectively arguing that it would be contrary to public policy to allow government to establish an arms length relationship with an entity for the purpose of receiving advice. The Ministry submits that there are strong public policy reasons for allowing government to set up just such a relationship.

... government made a conscious choice to appoint an independent panel and to not exert any control over the drafts of its report or otherwise exert influence over the formulation of its conclusions.⁵³

⁵¹ Para. 32, Ministry's reply submission.

⁵² Para. 9, Ministry's reply submission.

⁵³ Paras. 39-42, Ministry's reply submission.

[53] According to the Ministry, the only Panel work product that is in its “control” within the meaning of the Act is records that the Panel or MASC actually conveyed to the Ministry, not draft reports or other materials that were not shared with the Ministry.⁵⁴

[54] The Ministry acknowledges that “the content of those [Panel] records would presumably have some relation to the Ministry’s functions and mandate”, but says it has never had authority to regulate the use or disposal of the Panel records or seen or relied on them.⁵⁵

[55] The Ministry says its commitment to Panel members and to the public that the Panel would operate independently of government, and the level of independence with which the Panel in fact operated, are inconsistent with the written contract terms for Ministry ownership of and access to material produced or received by the Panel members and MASC. The Ministry essentially contends that those contract terms are therefore legally ineffective.⁵⁶

[56] According to the Ministry, the legal rule that excludes oral evidence about the intentions or agreement of parties to a written contract does not prevent a stated common understanding of contracting parties from prevailing over inaccuracies that were recorded in their written contract. The Ministry says that it, Panel members and MASC never understood, despite the express wording of the contracts, that the Ministry would own or be able to obtain drafts of the report. The Ministry says that the parties could have amended their contracts at any time but the Ministry did not regard it as necessary and “the Commissioner must enforce the will of the parties to those contracts, i.e. their understanding of what those agreements entailed with respect to the issue of whether the Ministry has control over the records at issue”.⁵⁷

[57] In support of its position, the Ministry relies on two affidavits sworn by Patrick O’Rourke and affidavits of David Strong, Patricia Gallagher and Tracy-Jo Reid.

[58] Patrick O’Rourke is the senior provincial government official responsible for commissioning the report from the Panel. He received a Bachelor of Law degree in 1988 and qualified to practice law in British Columbia in 1989. Since 1990, he has held various senior provincial government positions, including treaty negotiator and assistant deputy minister positions in several ministries. In September 2001, he was Assistant Deputy Minister of the Ministry’s Land Use and Aboriginal Relations Division, with responsibility for offshore oil and gas. Since early 1993, he has been Assistant Deputy Minister assigned to the British Columbia Offshore Oil and Gas Team. For a period he was also Acting Deputy Minister.⁵⁸

[59] The Speech from the Throne relevant to this inquiry was on July 24, 2001 and, by early August, the Premier’s office had directed work to begin immediately on the Panel’s

⁵⁴ Paras. 4.10-4.48, Ministry’s initial submission; para. 15, Ministry’s reply submission.

⁵⁵ Para. 4.43, Ministry’s initial submission, and para. 14, Ministry’s reply submission.

⁵⁶ Paras. 4.28-4.39, Ministry’s initial submission.

⁵⁷ Para. 45, Ministry’s reply submission.

⁵⁸ Paras. 1-5, O’Rourke affidavit.

terms of reference.⁵⁹ Patrick O'Rourke deposes that, before preparing the Panel's terms of reference, the Ministry decided it was important for the Panel to be at arm's length from government, and that this became an important objective for the Panel members as well. He also says that Article IV of the Panel's terms of reference, which were eventually incorporated as a schedule to the contracts, provided that the Panel would operate independently of government.⁶⁰

[60] Patrick O'Rourke describes the selection of Panel members as follows:

The Ministry went to considerable lengths to select qualified and credible individuals to be members of the Panel who would be publicly accepted as independent and unbiased. In retrospect, I believe our efforts in that respect were successful. For instance, I am not aware of a situation where a Panel member has been criticized as not being independent and/or credible.

As mentioned, the Ministry appointed Professor Patricia Gallagher, a Marine Biologist with Simon Fraser University, to be a member of the Panel. Ms. Gallagher advised me, and I believed it to be true, that she wanted to ensure that her academic reputation and independence were not questioned as a result of her role on the Panel. I replied that the task of the Panel Members was to look at the issues independently of government. I advised Ms. Gallagher that we wanted Panel members to make recommendations to government in an unbiased and independent manner, and without inhibition.

From my discussions with other Panel Members, I believe that they also wanted to ensure that their academic reputations and independence were not undermined by their role on the Panel.⁶¹

[61] The membership of the Panel was not finalized until October 18, 2001 and the Jacques Whitford Environment Ltd. ("JWEL") report (which the Panel was to review) was not scheduled for completion until October 19, the same day the Panel terms of reference and membership were announced. The service contracts with the Panel members were signed in November. The contract with MASC was signed in December.⁶²

[62] Here is Patrick O'Rourke's evidence about the preparation of the contracts, which merits lengthy quotation:

Because of very tight timelines, the Maritime Agreement was put together very quickly.

In September, 2001, the Ministry let a contract to review an earlier scientific report.... This contract had a due date of October 19, 2001. The Ministry and the Premier's

⁵⁹ See email of August 2, 2001, p. 10, Exhibit "G", O'Rourke affidavit.

⁶⁰ Paras. 7-12, O'Rourke affidavit.

⁶¹ Paras. 10-12, O'Rourke affidavit.

⁶² Paras. 20-21, O'Rourke affidavit; Exhibits "D" and "E", O'Rourke affidavit.

Office wanted to announce the establishment of the Scientific Panel prior to the release of that contractor's report.

The membership of the Panel was not finalized until October 18, 2001.

In putting together the agreements with Maritime and Panel Members we did not have sufficient time to draft a contract from scratch that would ensure that its terms fully reflected the entire agreement between the Ministry and the Panel members and Maritime. Nor did we have time to ensure that the resulting contract deviated from standard contract language where necessary.

For the reasons that follow, I believe that one of the provisions in Appendix II of the contract between the Ministry and Maritime, namely, the section entitled "inspection", does not accurately reflect the actual agreement between those parties.

... Notwithstanding the wording in that paragraph, it was never the Ministry's intention, nor do I believe it was the intention of Maritime, that the Ministry would be entitled to have access to or copy any draft version of the Report or any internal document relating to the drafting of the Report that was created or acquired by Maritime other than the final Report deliverable on January 15, 2002.

To the contrary, I believe that the intent of the Ministry and Maritime was that the Panel would be completely independent from government in preparing the requested report and that the only report the Ministry was entitled to receive a copy of, or see, was the Panel's final report, not interim drafts of the Report. I do not believe that there was any confusion on the part of the Ministry or Maritime on that issue.

Unfortunately, because of the tight timelines involved, we used boiler plate contract language, not recognizing at the time that such wording appeared to include an obligation on the part of Maritime to allow the Ministry to access and copy any material produced or received as result of the contract. That, I believe, was contrary to the actual understanding between the Ministry and Maritime that the Ministry did not wish to see drafts of the Report.

The Panel Members were remunerated for their work on the Panel through standard service contracts entered into with the Ministry. Each of those contracts contained identical "Terms of Service".

...

In the case of the Maritime Agreement, we chose to use standard 'boiler plate' contract language. In the case of the Panel members, we chose to use standard service contracts given the time constraints.

The agreements entered into by the Ministry with the Panel Members contained a paragraph (paragraph 8) that stated that the Panel Members must permit the Ministry to inspect and copy any material produced or received as a result of those agreements, whether complete or not. Notwithstanding the wording in that paragraph, it was not the intention of the Ministry, nor do I believe it was the intent of the Panel members, that the Ministry would be entitled to have access to or copy any draft version of the Report

or any internal document relating to the drafting of the Report that was created or acquired by Panel members other than the Report deliverable on January 15, 2002.

To the contrary, I believe that the intent of the Ministry and Panel Members was that the Panel Members would be completely independent from government in preparing the requested report and that the only version of the report the Ministry was entitled to review or receive was the Report. Again, because of the tight timelines involved, we used government's standard service contract, not recognizing at the time that the standard service contract contained an obligation on the Panel members to allow the Ministry to access and copy any material produced or received as a result of the contracts. That, I believe, was contrary to the understanding between the Ministry and Panel Members that the Ministry did not wish to see drafts of the Report.

If the Ministry would have had more time to prepare the agreements with Maritime and the Panel Members, it would have made sure that the agreements were consistent with the actual understandings of the parties. As stated above, the Ministry did not have sufficient time to customize these contracts. As a result, the above mentioned "Inspection" paragraph in the Maritime Agreement and paragraph 8 in the contracts with Panel Members do not reflect the actual understandings of the parties. Nor do I believe that such provisions were consistent with the Terms of Reference attached to the contracts with the Panel Members and the Maritime Agreement.

Section VI of the Terms of Reference states that the Panel would operate independently from government. The Terms of Reference were part of the agreements between the Ministry and Maritime and the Panel Members. To the extent that the paragraphs providing that the Ministry could inspect and copy documents could be read as enabling the Ministry to access and obtain copies of draft versions of the Report or internal documents dealing with the drafting of the Report in the hands of Panel Members or Maritime, I believe that those paragraphs are inconsistent with and superceded by the Terms of Reference that provide that the Panel was to operate independently of government.

I do not believe that the Ministry is now, or has ever been, entitled to demand access to, or request copies of, interim drafts of the Panel's report or any other record relating to the development of the Report held by Maritime or the Panel Members. In my view, such a demand would be contrary to the understanding of the parties that the Panel and Maritime would prepare the Report independently of government.

...

One of the reasons the Ministry did not want to have access to interim drafts of the Report or internal records dealing with the drafting of that report was a concern that such access could potentially have been perceived as undermining the independence of the Panel.

In contrast, prior to the establishment of the Panel, in September, 2001, the Ministry issued a request for proposal in another context wherein the contractor was required to provide the Ministry with a draft report on a certain date, with the final report being prepared by a subsequent date, and the final document had to incorporate comments from the Ministry. That was the case where the Ministry identified the need to review drafts of the commissioned report.

However, in this case, the Ministry did not want to see draft versions of the Report. Had it wanted to do so, the Ministry would have used similar language and imposed a similar requirement to submit a draft version prior to the final version.

The Ministry consciously wanted a different arrangement with Maritime and the Panel Members. The Ministry only wanted access to one document, namely the final Report, deliverable on January 15, 2002, and that was all. The Ministry did not expect to receive, did not want, and did not consider it was entitled to ask for, any draft copies of the Report or any records relating to the development of the Report in the custody of Maritime or the Panel Members.⁶³

[63] Patrick O'Rourke also describes meetings he attended with the Panel on October 30, 2001 and in December 2001. At the October 30 meeting, he told the Panel, among other things, that it was to act independently and at arm's length from government. He deposes that the December 2001 meeting was about administrative matters only.⁶⁴ Last, Patrick O'Rourke describes his interactions with David Strong and Rod Dobell in January 2002 as follows:

On the weekend prior to the deadline for issuing the Report, the Panel Chair, Dr. David Strong, asked me if the Ministry wanted to participate in a meeting to be held that weekend at which time the final report would be prepared. I declined that offer because I wanted to ensure that the Panel's preparation of the Report was independent of government.

The Ministry received the Report from the Panel on January 15, 2002.

On January 16, 2002 I received an e-mail from Professor Rod Dobell, requesting that a revised Appendix 3 be inserted into the Report. I immediately advised Professor Dobell that I would not do so because the Ministry had already received all that it has asked for, namely, the final Report and that was all the Ministry wanted to see.⁶⁵

[64] In his second affidavit, Patrick O'Rourke responds to WCEL's arguments about the significance of various documents, including the minutes of the October 30, 2001 meeting and the emails relating to the December 14, 2001 letter from David Strong to the Minister and peer review of the Panel Report.⁶⁶

[65] The affidavits of David Strong and Patricia Gallagher support Patrick O'Rourke's accounts of his meetings and other interactions with the Panel. David Strong's affidavit adds the following:

Given my professional reputation, it was important for me that the Panel operate independently of government in preparing its report.

⁶³ Paras. 19-27, 29-34, 39-42, O'Rourke affidavit.

⁶⁴ Paras. 43-45, O'Rourke affidavit.

⁶⁵ Paras. 47-49, O'Rourke affidavit.

⁶⁶ Paras. 3-29, second O'Rourke affidavit.

Though the Ministry never did so, in the event it had requested copies of interim drafts of the Panel's report or my contribution to that report, I would have taken the position that the Ministry was not entitled to see and/or obtain copies of such documents. In my view, such a request would have been inconsistent with government's commitment that the Panel would perform its function independently of government.

...

Section 8 of the Agreement stated that I had to permit the Ministry to inspect and copy any material produced or received by me as a result of that agreement.

I had no reason to ever direct my attention toward section 8 of the Agreement, as that would not have been consistent with the general understanding I had with Mr. O'Rourke.

Nor do I recall having discussions with Ministry representatives concerning whether the Ministry would be entitled to view and/or obtain any and all records prepared by me in my role as Panel member. I never thought to engage in such a discussion because I never considered the possibility that the Ministry would be entitled to see anything more than the final report.

Similarly, notwithstanding section 8 of the Agreement, it was never my intention that the Ministry be entitled to access and/or copy any and all documents prepared by me or the Panel other than the final report ultimately delivered to the Ministry.

To the contrary, I would have thought that a demand by the Ministry to access and/or copy such records would have been inconsistent with the Ministry's commitment that the Panel would operate independently of government in preparing its report.⁶⁷

[66] Patricia Gallagher offers similar evidence:

Given my professional reputation, it was important for me that the Panel operate independently of government in preparing its report.

Each of the Panel members drafted their own chapters, with drafts of those chapters being exchanged between members for editorial comments. Having one's colleagues review a draft of a publication is common in the academic world.

...

Section 8 of the Agreement stated that I had to permit the Ministry to inspect and copy any material produced or received by me as a result of that agreement.

I cannot recall ever considering the implications of section 8 of the Agreement. Nor do I recall the Ministry raising the possibility that it could request and review copies of the draft report in my possession.

⁶⁷ Paras. 8-9, 11-15, Strong affidavit.

In my view, the Ministry is not entitled to demand access to or request copies of interim drafts of the Panel's final report or any records relating to the preparation of that report that may be in my possession. In my view, such a demand would be inconsistent with government's commitment to the Panel that it would operate independently of government.

Despite section 8 of the Agreement, it was never my understanding that the Ministry was entitled to review or copy interim drafts of the Panel's report in my possession. Rather, I understood that the Panel was only required to produce one copy of the report to the Ministry, that being the final report deliverable on January 15, 2002.⁶⁸

[67] Tracy-Jo Reid, the Ministry's Information and Privacy Manager, deposes on information and belief as to a conversation she had—on an unspecified date—with the third Panel member, Derek Muggeridge. She says he advised her that he did not believe the Ministry was entitled to demand access to or request copies of interim drafts of the Panel's final report or any records related to the preparation of the report that may be in his possession, that such a demand would have been inconsistent with government's commitment to the Panel that it would operate independently of government and that the only report the Ministry wanted was the final report, not interim drafts.⁶⁹

[68] The evidence of Rod Dobell, Director of the Project Team at MASC, is similar to the evidence of the Panel members:

My understanding in December 2001, as a member and Past President of the Board of Governors of Maritime, was that the Ministry would not be supervising the efforts of Maritime in respect of its work for the Panel.

To the contrary, my understanding at that time and throughout the conduct of the work was that the Panel and Maritime (in support of the Panel) would operate independently and fully at arms length from government in preparing a final report.

More specifically, my understanding in December 2001 and subsequently was that Maritime would do its work under the Agreement independently of the Ministry. I do not believe that there was an expectation that the Ministry would be permitted to influence or control in any way the work that led up to the production of the Panel's report, or that there would any interim reporting to the Ministry prior to the submission of the Report to the Minister.

I do not recall any discussions between the Ministry and Maritime concerning whether the Ministry would be entitled to demand copies of internal records held by Maritime other than the final Panel report.

However, and despite the section in Appendix II of the Agreement entitled "Inspection", my understanding was that the Panel Chair was required to submit to the Minister only the final report of the Panel, and that Maritime was required to prepare the necessary materials for the Panel for that purpose. I do not believe that intention

⁶⁸ Paras. 7-8, 10-13, Gallagher affidavit.

⁶⁹ Para. 22, Reid affidavit.

was that the Panel members or Maritime would be required to produce interim drafts of that report to the Ministry. Under these circumstances, no mechanism was established for the Ministry to provide comments on any draft materials.⁷⁰

WCEL's position

[69] Emphasizing a liberal and purposive interpretation of “control” under the Act, WCEL’s arguments⁷¹ can be distilled as follows:

1. The contracts between the Ministry and Panel members expressly provide that Panel records are under Ministry control. This is reinforced by the Panel’s terms of reference, attached as a schedule to the contracts, which set out the mandate of the Panel to provide advice to the Minister on whether or not offshore oil and gas could be extracted in an environmentally sound manner and specifically refer to the preparation of a final report in accordance with that mandate. The Panel (and MASC), contractors to the Ministry, developed the Panel records as a necessary and integral part of developing the final report.
2. The “parol evidence rule” precludes the Ministry from relying on alleged verbal understandings to modify contrary terms in its contracts with Panel members and MASC.
3. In any event, there is little or no evidence suggesting that the Ministry or the Panel understood the provision in the Panel’s terms of reference for the Panel to operate independently of government to mean that the Ministry had no control over Panel records within the meaning of the Act. Taking the most charitable view of the Ministry’s evidence, the Ministry and Panel may have expected that the government would not request draft documents while the Panel was engaged in its work.
4. The Ministry’s conclusion that Panel records are not under its control within the meaning of the Act rests on the false premise that control is inconsistent with objective scientific advice and recommendations from the Panel. These two conditions are not mutually exclusive. There is no conflict in an arrangement under which the Panel’s substantive conclusions are reached free of government influence and its draft reports and associated records are under Ministry control within the meaning of the Act.
5. In relying on the provision in the Panel’s terms of reference for the Panel to operate independently of government to void certain contract provisions, the Ministry ignores section 42 of the terms of the service contracts, which provides that, if there is conflict between a provision in a schedule (the Panel’s terms of reference) and any other provision in the contract (including provisions for Ministry ownership, inspection and copying of materials received or produced by the contractor), then the

⁷⁰ Paras. 10-14, Dobell affidavit.

⁷¹ Paras. 28-63, WCEL’s initial submission; paras. 11-87, WCEL’S reply submission.

- provision in the schedule is inoperative unless it says it prevails despite conflict with the contract provision.
6. The Ministry's position on control also ignores section 37 of the terms of the service contracts, which provides that no modification is effective unless in writing and signed by the parties, and section 38, which provides that the contract and any modification of it constitute the entire contract.
 7. The Ministry also selectively disregards other terms of the service contracts that manifest a high level of Ministry control:
 - The Ministry may give the contractor reasonable instructions on performance of the contracted services and the contractor must comply with those instructions but, unless otherwise specified in the contract, may determine the manner in which the instructions are carried out (section 5)
 - The contractor must, on request, inform the Ministry of work done in connection with the services (section 6)
 - The contractor must maintain time records, books of account and expenses in form and content and for a period satisfactory to the Ministry (section 7)
 - The contractor must treat contract material confidentially and must not disclose it without the Ministry's permission (section 9)
 - The contractor must, on request, deliver contract material to the Ministry (section 10)
 - Copyright in contract material belongs to the Ministry (section 11)
 8. The remark about access requests under the Act that is attributed to Ron Burleson in the minutes of the October 30, 2001 initial meeting of the Panel is evidence that Ministry staff and Panel members contemplated the applicability of the Act to Panel records.
 9. This inquiry raises broader questions about the relationship between the Act and contract work undertaken at the request of government. The Ministry cannot avoid its obligations under the Act by simply contracting out certain work. Any other interpretation of "control" would run counter to the purpose and spirit of the Act.

Analysis

[70] Section 3(1) of the Act provides that the Act "applies to all records in the custody or under the control of a public body...". The Legislature defined "record" and "public body" in Schedule 1 of the Act, but it chose not to define "custody" or "control".

[71] The Ministry is a "public body" as defined in Schedule 1. The Panel, not itself a public body, was appointed by the Minister and retained by contracts with the Ministry to

provide advice to the Minister on whether offshore oil and gas activity can be undertaken in a scientifically sound and environmentally responsible manner.

[72] In considering WCEL’s access request, the Ministry decided that Panel records were not in the Ministry’s custody or control under the Act, having regard to “the contractual relationship with the third party who prepared all of the draft materials”.

[73] There is no indication that “custody” of Panel records or any of the exclusions in s. 3(1)(a) to (i) of the Act is relevant in this inquiry. The issue, rather, is whether Panel records are under the “control” of the Ministry within the meaning of the Act and therefore subject to the right of access under s. 4(1) of the Act.

[74] On the face of the terms of the contracts with Panel members and MASC described above, the Ministry clearly has control of Panel records within the meaning of the Act. The Ministry has not denied this—so far as it goes—but denies control on the ground that it is inconsistent with the Panel’s terms of reference and the contracting parties’ understanding that the Panel would operate independently from government.

[75] The statement of legislative purposes in the Act reads as follows:

- 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
 - (a) giving the public a right of access to records,
 - (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves,
 - (c) specifying limited exceptions to the rights of access,
 - (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
 - (e) providing for an independent review of decisions made under this Act.

[76] The means by which the Act secures these purposes include the expansive definitions of “record” and “public body” that the Legislature included in the Act and the deliberately undefined concepts of records that are “in the custody or under the control” of a public body.

[77] The significance of public body custody or control of records is not isolated to s. 3(1). Section 4(1), for example, provides that a person who makes an access request under s. 5 “has a right of access to any record in the custody or under the control of a public body” and s. 30 provides that a public body “must protect personal information in its custody or under its control ...”. There are also many other references in the Act to public body custody or control of records or information.

[78] No distinction is made in the Act between the meaning of custody or control as it relates to different types of records or information. As a practical matter, most records contain a variety of types of information and many contain both personal and non-personal information.

[79] Clearly, “control” is the anchor, throughout the Act, for the law’s application to records and information in circumstances where contractors are performing services for public bodies. When WCEL made its access request, “employee” was defined in Schedule 1 to include, in relation to a public body, “a person retained under contract to perform services for the public body”. As the Commissioner observed in his report on the implications of the *USA Patriot Act*⁷²:

Outsourcing is not inconsistent with FOIPPA. It is contemplated by the extended definition of “employee” ... and by section 33(f), which permits disclosure to an “employee” of personal information in the custody or under the control of a public body where the disclosure is necessary for the performance of the employee’s duties.

The fact that outsourcing is contemplated by FOIPPA does not, however, authorize a public body to do so in circumstances that would reduce security arrangements for personal information below those required of the public body directly. A public body cannot contract out of FOIPPA either directly or by outsourcing its functions. The decision to outsource does not change the public body’s responsibilities under FOIPPA. Nor does it change public and individual rights in FOIPPA, which are not balanced against any ‘right’ to outsource.

Section 30 requires public bodies to make reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal of personal information. When a public body contracts out functions, it must ensure that there will be reasonable security arrangements for the personal information that it discloses to the contractor and that the contractor collects or generates in fulfilling the outsourced function. The public body’s responsibilities under section 30, and the required standard of security, are constants, with or without outsourcing.

Submissions to us from the BC government and from contractors alike agree that, when a contractor possesses personal information in connection with outsourcing of public body functions, the personal information continues to be under the public body’s control under FOIPPA. They emphasize that their diligence in this respect includes fashioning contract terms that embody FOIPPA obligations, thereby ensuring that the personal information “enjoys substantially the same protection it enjoyed prior to being made available to an outsourcing partner”. The public body is bound to comply with FOIPPA and the contractor is contractually bound not to disclose information without the authority of the public body.⁷³

[80] During the preparation of that report, the Legislature amended the Act to expressly prohibit contractors from disclosing personal information collected, generated or used to

⁷² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁷³ Office of the Information and Privacy Commissioner for British Columbia, October 2004, *Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing*, p. 100 (footnote excluded).

provide contract services for public bodies, unless permitted by the Act.⁷⁴ The definition of “employee” in Schedule 1 of the Act was amended to include “a volunteer and a service provider”, with the latter term defined as “a person retained under a contract to perform services for a public body”. Section 33(f) was moved to s. 33.2(e). Section 31.1 was added, providing that the requirements and restrictions established by Part 3 also apply to employees, officers and directors of a public body, and to employees and associates of an employee of a public body that is a service provider. Section 22(4)(e), which provides that disclosure of information about the position, functions or remuneration of an “employee” is not an unreasonable invasion of his or her personal privacy, remained the same. These amendments, which post-date WCEL’s access request, reinforced the role of “control”, then and now, as the foundation of the applicability of the Act when services are being performed for public bodies by contractors.

[81] Further, earlier decisions and other materials⁷⁵ have identified indicators of “control” such as these:

1. The record was created by an employee, officer or member of the public body in the course of his or her duties
2. The record was created by an outside consultant for the public body
3. The public body possesses the record, either because it has been voluntarily provided or pursuant to a statutory or other requirement
4. An employee, officer or member of the public body possesses the record for the purposes of his or her duties
5. The record is specified in a contract to be under the control of a public body
6. The content of the record relates to the public body’s mandate
7. The public body has a right of possession of the record
8. The public body has authority or a duty to regulate the record’s use and disposition
9. The public body has relied on the record to a substantial extent
10. The record is integrated with other records held by the public body
11. A contract permits the public body to inspect, review, possess or copy records produced received or acquired by the contractor as a result of the contract

[82] These indicators can be useful but they are not exhaustive.⁷⁶ A statutory provision that imposes obligations on a public body respecting a particular record or type of record will obviously be relevant to the analysis.⁷⁷ Control may also be established considering functions of a public body that impliedly entail obtaining or compiling information.⁷⁸

⁷⁴ S.B.C. 2004, c. 64.

⁷⁵ Order 02-29, [2002] B.C.I.P.C.D. No. 29, para. 17, Order 04-19, [2004] B.C.I.P.C.D. No. 19, para. 43, and the *Policy and Procedures Manual* issued by the Ministry of Management Services.

⁷⁶ See, for example, Order 02-29 at para. 19.

⁷⁷ *Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.).

⁷⁸ *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (S.C.).

A factor that is significant in one context may not be in another context. The physical integration of a record with other records held by a public body, for example, may not be a telling factor in contracting-out situations where contractors often hold records that are received or produced in the performance of the contract services.

[83] In *Ontario (Criminal Code Review Board) v. Doe*,⁷⁹ the Ontario Criminal Code Review Board had a statutory obligation to keep a record of its proceedings, but the court reporter who created and physically possessed the backup tapes of those proceedings was an independent contractor and the contract for services did not address control of backup tapes. Referring to *Neilson v. British Columbia (Information and Privacy Commissioner)*,⁸⁰ and acknowledging that *Neilson* was about records kept by an employee and not an independent contractor, the Ontario Court of Appeal ruled that the Board's obligation to keep a record of its proceedings related to all forms of records and transcripts, including backup tapes that might have to be referred to in the event of a dispute over the accuracy of a record or transcript. The Board's duty to maintain a record of its proceedings and provide access to records under its control was not, and could not be, avoided by contracting out court reporting services, however silent or deficient the contractual terms as to control of backup tapes might be. The Court clearly considered that labelling the court reporter as "independent" was meaningless when the function that the court reporter fulfilled was part of the public body's functions. O'Connor J.A. said this for the Court:

[35] The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does, it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfill its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

[36] In argument, the Board placed a great deal of reliance on this court's decision in *Walmsley*. In my view, *Walmsley* is distinguishable. In that case, the request was made to the Ministry of Attorney General to provide documents in the personal possession of individual members of the Judicial Appointments Committee. In holding that the documents were not under the control of the Ministry, this court pointed out that the Advisory Committee was set up to provide recommendations for judicial appointments that were to be arrived at independently and at arm's length from the

⁷⁹ (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.).

⁸⁰ [1998] B.C.J. No. 1640 (S.C.).

Ministry. Further, in *Walmsley*, there was no statutory control or contractual basis upon which the Ministry could assert the right to possess or dispose of the documents. The situation in this appeal is very different. The court reporter is specifically hired to fulfill the statutory duty of the Board to keep a record and to make transcripts available, if requested. Although the court reporter is an independent contractor, she plays an integral part in fulfilling the mandate of the Board under the Criminal Code. Unlike the situation in *Walmsley*, the court reporter's function is part of the Board's function. The court reporter has no independent role. She does not operate "independently or at arms length" from the Board.

[84] I conclude that a public body cannot contract out of its obligations under the Act, or immunize records from its control under the Act, by contracting out a function and labelling it "independent" or failing to enter into adequate contractual arrangements to ensure compliance with the Act.⁸¹

[85] In this case, the Panel's assignment to provide advice to the Minister on whether offshore oil and gas activity can be undertaken in a scientifically sound and environmentally responsible manner was clearly related to the functions and mandate of the Ministry. The Panel's work consisted of tasks and work phases that the Ministry stipulated in the Panel's terms of reference, and these were not limited to the report that the Panel was required to submit by January 15, 2002.

[86] I will now continue with my analysis of the question of Ministry control of Panel records under four headings.

Ministry evidence and documentation

[87] I will first consider the Ministry's evidence that tight timelines prevented the "customizing" of the contracts to fully reflect the agreements between the Ministry, Panel members and MASC. This evidence does not credibly explain the state of the contracts.

[88] Between the direction from the Premier's office in early August—which was promptly acknowledged at the deputy ministerial level—and the announcement of the Panel terms of reference on October 19, 2001, there was as much time for the Ministry to prepare contracts as the Panel had to complete all of its work between October 19 and the January 15, 2002 deadline. The preparation of contracts did not require the contractors' names, which could have been inserted when the membership was finalized on October 18, or the final form of the Panel's terms of reference that would be attached as a schedule. In any case, the contracts were not executed until late November and early December 2001 and they are not complicated.

⁸¹ See Order 00-47, [2000] B.C.I.P.C.D. No. 51, paras. 10-45, *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 219 (C.A.), para. 11, *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, (1997), 4 Admin L.R. (3d) 96 (T.D.), para. 26, Order 01-20, [2001] B.C.I.P.C.D. No. 21, para. 81, and *Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.).

[89] Patrick O'Rourke maintained in his evidence that, if the Ministry had wanted to see draft versions of the Panel report, it would have used language imposing a requirement of that nature.⁸² This apparent availability and dedication of time for document preparation also does not square with there not being enough time to prepare contracts that suited the Ministry's intentions.

[90] The affidavits of the signatories to the contracts and the affidavit of Tracy-Jo Reid as to her conversation with Derek Muggeridge do not clearly state whether the signatories read the contracts before signing them. Certainly, given their qualifications and their appreciation of the importance of the Panel's work, they might be expected to have read the contracts before signing them. Considering the position and training of Patrick O'Rourke, it also seems plausible that, whether or not he specifically read the contracts before signing, he would have known the terms of the contracts with the Panel members because they are the standard terms for government service contracts. On the other hand, one would not expect any of these individuals to knowingly sign a contract that did not reflect their intentions.

[91] In his affidavit, Patrick O'Rourke uses the first person plural, 'we', as regards the Ministry's preparation of the contracts and the decisions to use the terms that it did. I conclude that he personally, and the Ministry through him and any other Ministry staff who were involved in preparing the contracts, were aware of the terms of the contracts when Patrick O'Rourke signed them on behalf of the Ministry. I also conclude that Patrick O'Rourke did not, at the time he signed, put his mind to the implications of the terms of the contracts for material produced or received as a result of the contracts.

[92] With respect to the Panel members and Rod Dobell at MASC, I conclude that they may or may not have read the terms and conditions of their contracts before signing them but that, in any case, the focus of the Panel members' attention was on the development and formulation of their substantive scientific conclusions without government interference, not on other aspects of the Panel's relationship with the Ministry.

[93] WCEL says the note attributed to Ron Burleson in the minutes of the October 30, 2001 meeting—that Panel members should be aware their recorded communications may be subject to requests under the Act—shows that Ministry staff, Panel members and MASC contemplated the applicability of the Act to the Panel records.⁸³ The Ministry and Patrick O'Rourke (in his second affidavit) say the note was no more than an alert to Panel members that recorded communications between them and Ministry officials that were in the custody of the Ministry could be subject to access requests under the Act.⁸⁴

[94] I am not satisfied that the note signifies that Ministry officials or Panel members were contemplating Panel records being subject to access requests under the Act, but I am also not satisfied the note has the limited meaning attributed to it by the Ministry. I conclude from

⁸² Paras. 41-42, O'Rourke affidavit.

⁸³ Paras. 4(c), 44, WCEL's initial submission.

⁸⁴ Para. 1, Ministry's reply submission; paras. 3-5, second O'Rourke affidavit.

the note that, at the very least, the Ministry was alive, not long before the execution of the contracts, to the prospect of the Act applying to recorded communications of the Panel and Ron Burleson was to check into the matter. The evidence does not disclose whether he did check the issue, or the result if he did, but in my view the note adds supporting context to my conclusion that the Ministry, and Patrick O'Rourke personally, were aware of the terms in the contracts when they were signed.

[95] Having regard to the affidavits of David Strong and Patricia Gallagher—Tracy-Jo Reid's affidavit on information and belief from Derek Muggeridge is silent on this point—I conclude that the Panel members, though present at the October 30, 2001 meeting, likely did not specifically address their minds to the status of Panel records under the contracts or under the Act.

[96] I find that the Ministry controlled the Panel's appointment, remuneration and terms of reference, as well as MASC's engagement, remuneration and terms of reference. Through the Panel's terms of reference, the Ministry also directed the timeframe and steps to completion for the Panel's work. Nothing in the evidence indicates, I should stress here again, that the Ministry in any way directed or exerted influence over the Panel's work or its substantive conclusions on the matters assigned to it.

[97] The Ministry's submissions focus on the contract terms that provide for Ministry access to and, in the case of the service contracts, exclusive ownership of, material produced or received by the contractor as a result of the contract. I agree with WCEL that other contract provisions—those that point to Ministry control of Panel records, preclude informal contract modifications or give contract terms precedence over conflicting schedules to the contracts—would also have to be disregarded to sustain the Ministry's position that it does not control Panel records within the meaning of the Act.

[98] The parties disagree about whether the emails in evidence show that the Ministry controlled whether the Panel publicly released David Strong's December 14, 2001 letter to the Minister and whether the Panel submitted its report for peer review.

[99] WCEL says that the emails show the Ministry directed or advised the Panel not to publicly disclose David Strong's December 14, 2001 letter to the Minister. In his reply affidavit, Patrick O'Rourke says that he contacted MASC only to determine if the Panel "planned to publicly release the letter" and Justin Longo at MASC said that they did not plan to do so. Patrick O'Rourke denies directing, advising or instructing MASC not to publicly disclose the letter.⁸⁵ There is no evidence from the Panel or MASC on this point. I conclude that the Ministry took a significant interest in whether David Strong's December 14, 2001 letter to the Minister was publicly disclosed and was not shy about communicating its interest to the Panel. On the evidence before me, however, I am unable to agree with WCEL that the Ministry directed the Panel as to how to treat the letter.

⁸⁵ Paras. 7-11, second O'Rourke affidavit.

[100] The Panel considered peer review important. Was it free to submit material for peer review after January 15, 2002? Or, by not assenting to Rod Dobell’s suggestion that the report could be submitted for peer review between January 15, 2002 and its public release by the Ministry (which ended up being on May 1, 2002), did the Ministry exercise control over whether the Panel could release material for peer review before the Ministry publicly released the report submitted on January 15, 2002?

[101] I find that the Ministry did control logistical strictures that it knew precluded peer review of the Panel report. The Ministry imposed, and stuck to, the January 15, 2002 deadline for a one-and-only report from the Panel, with the result that, “if the Panel wanted to conduct a peer review, it would have had to have that completed prior to that date” and “after the receipt of that report, the Ministry required nothing further from the Panel or Maritime”.⁸⁶ The Ministry wanted the Panel report by January 15, 2002, with the result that, as David Strong’s May 2, 2002 email says, “the draft report became the final report”, without peer review.

[102] Again, none of this is to say that the Ministry directed or influenced the Panel’s substantive conclusions. As I have already said, I find no indication that the Ministry exerted influence over the Panel’s development and formulation of its substantive findings.

[103] I conclude that there is abundant evidence—in the Panel’s terms of reference, the contract provisions and other materials before me—that Panel records are under Ministry control within the meaning of the Act.

[104] I realize that Panel members say they never intended, and never thought to discuss with the Ministry, that the Ministry would be entitled to access or copy Panel records. Patrick O’Rourke provides complementary evidence on behalf of the Ministry. These witnesses say that Ministry access to Panel records was not part of the contracts respecting the work of the Panel because it “would have been inconsistent with the Ministry’s commitment that the Panel would operate independently of government in preparing its report”.⁸⁷

[105] I see this evidence in two ways.

[106] First, I give it no weight if tendered as the witnesses’ opinions or conclusions about whether Panel records are under the control of the Ministry within the meaning of the Act. An individual’s desire or understanding that legislation does not or should not apply does not make it so.

[107] Second, I consider that the value of this evidence, as evidence, and the force of the Ministry’s position on control, hinges on the propositions that:

⁸⁶ Paras. 16, 18, second O’Rourke affidavit.

⁸⁷ Para. 15, Strong affidavit. Also see, para. 12, Gallagher affidavit and paras. 25, 31-34, 38-39, second O’Rourke affidavit.

1. Ministry control of Panel records within the meaning of the Act is inconsistent with the statement in the Panel terms of reference that the Panel “will operate independently from Government”;
2. In any event, in a contract-for-services situation, the parties’ agreement about the status of records received or produced as a result of the contract is determinative of whether the public body has control of those records within the meaning of the Act.

Panel independence

[108] I will now deal with the proposition that Ministry “control” of Panel records within the meaning of the Act is inconsistent with the statement in the Panel terms of reference that the Panel “will operate independently from Government”.

[109] The Panel consisted of three scientific experts appointed by the Minister and retained by contract with the Ministry to advise the Minister on Ministry-stipulated issues in a report and prepared in accordance with Ministry-stipulated work phases.

[110] In saying that the Panel would operate independently from government, I do not take the Panel’s terms of reference to refer to the constitutional value of judicial independence as, for example, summarized in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*.⁸⁸ As explained in *Ocean Port*, the requirement of independence applies to courts, but not administrative tribunals. It certainly does not apply to the Panel, which was not a judicial or quasi-judicial body or even a decision-making body at all.⁸⁹

[111] The Ministry wanted the Panel’s substantive findings to be developed and formulated without government influence, as did the Panel members. This objective did not flow from a constitutional law requirement, statutory provision or common law requirement such as a principle of natural justice or procedural fairness. It was grounded in the Panel’s terms of reference and the Ministry contracts with the Panel members and MASC. The Ministry decision under review was that the Panel records were not in Ministry custody or control under the Act having regard to “the contractual relationship with the third party who prepared all of the draft materials”.

⁸⁸ [2001] 2 S.C.R. 781.

⁸⁹ I am aware that the British Columbia Court of Appeal held in two cases, *Doern v. British Columbia (Police Complaint Commissioner)* (2001), 203 D.L.R. (4th) 295 (appeal quashed as moot (2003), 227 D.L.R. (4th) 295 (S.C.C.)) and *Sekela v. British Columbia (Police Complaint Commissioner)* (2001), 206 D.L.R. (4th) 747, that a form of service contract similar to the contracts between the Ministry and the Panel members was invalid when used to appoint adjudicators under the *Police Act*. The facts and considerations in those cases, which did not involve the Act, were different from those in this inquiry. The adjudicators were appointed by statute to exercise specific statutory adjudicative powers. The contracts were found to be invalid, not because the parties had not agreed to them, but because they were “hopelessly inappropriate” to the appointment of an adjudicator who “is to carry out what are essentially judicial duties” under the *Police Act*.

[112] The Panel’s terms of reference, the contracts and the other Ministry documentation are entirely consistent with the fact that the Panel members were service providers to the Ministry—scientific experts retained to advise the Minister by means of a report on specific issues, prepared in accordance with Ministry-imposed work phases and timing.

[113] The Ministry connects control of records within the meaning of the Act with influence over the Panel’s development or formulation of its substantive findings. I agree with WCEL that objective scientific advice and recommendations from the Panel and Ministry control of Panel records under the Act are not mutually exclusive conditions. The authority to direct a process or outcome associated with a record may be an indicator of control with the meaning of the Act. It is not, however, a precondition of control or a result of control.

[114] The premise of the Act is that the accountability of public bodies is fostered by public scrutiny of records, subject to limited exceptions. The proposition that Ministry control of Panel records under the Act is inconsistent with the Panel developing or formulating substantive conclusions free from Ministry influence—and, by inference, inconsistent with the Ministry obtaining objective and balanced advice from the Panel—in my view, subverts the purposes of the Act. Many professionals and experts provide services to public bodies, as employees or as independent contractors, with the public body having custody or control under the Act of the materials the employees or contractors receive, use or create in providing those services (including records containing personal information). It simply does not follow that the objectivity or excellence of their work for those public bodies is compromised by accountability to the public through access to information and protection of personal privacy under the Act.

[115] It was important, to be sure, for the Panel to develop and formulate its substantive findings without interference by the Ministry. That goal appears to have been accomplished. As I have said, authority to direct a process or outcome associated with a record, if present, may be an indicator of control with the meaning of the Act, but it is not a precondition of control or a result of control.

[116] The Ministry says that the Panel’s freedom from government influence would have been compromised if the Ministry had sought access to the Panel’s work while it was in progress. That never happened, however, and WCEL’s access request was not made until well after the Panel submitted its report on January 15, 2002.

[117] In any case, under s. 66 of the Act, the Minister could have delegated his duties, powers and functions as head of the Ministry under the Act in relation to the Panel. He could have made that delegation to David Strong, the Panel chair. Delegation was a complete answer to any practical or perceived Ministry concerns about its officials and staff having actual access to the Panel records.

[118] Ministry “control” of Panel records under the Act was not inconsistent with the Panel’s development and formulation of its substantive conclusions without government

influence. I reject the contention that provisions in the contracts for Ministry access and ownership of Panel records were inconsistent with the Panel's terms of reference.

Contracts for services

[119] That is not the end of the matter, as the Ministry has also argued that, in a contract-for-services situation, the contracting parties' agreement about the status of records received or produced as a result of the contract is determinative of whether the public body has control of those records within the meaning of the Act. Put another way, the Ministry argues that a public body can contract out of the Act as regards records received or produced under a contract between it and another.

[120] The Ministry considers that the concept of control in the Act enables, and is intended to enable, a public body and a contractor to agree on the status under the Act of records that the contractor receives or produces in performing contract services for the public body. As the Ministry has put it: "the Commissioner must enforce the will of the parties to those contracts, i.e. their understanding of what those agreements entailed with respect to the issue of whether the Ministry has control over the records at issue".⁹⁰ The Ministry's position is that the determination of whether records produced or received by the contractor in performing the services for the public body are under the control of the public body is simply a function of agreement between the contracting parties, which, as we see here, they may clarify, reformulate or contradict, even after an access request has been made under the Act.

[121] I agree with the Ministry that the parol evidence rule in contract law does not stand in the way of contracting parties' mutual recognition that their written contract contains an unintended provision, but I do not think this assists the Ministry in this inquiry. The meaning of control in the Act must be consonant with the stated purposes of the Act. It must reflect the many references in the Act to public body custody or control of records or information. It must reflect the reality, which is recognized in the Act, that public bodies often contract for services.

[122] The Ministry does not see how public access to records that it has not seen could make it more accountable.⁹¹ I do not agree that the Act's purpose of public body accountability to the public through access to records is negated by inadvertent or intended avoidance of actual knowledge of the contents of records. I also do not agree that it is consonant with the purposes of the Act for a public body's control of records, and thus accountability under the Act, to be negated by the device of using contract consultants or other service providers to create and control records and keep them out of the possession and actual knowledge of the public body. In my view, it would be inimical to the objects of the Act for records to be immunized from the Act's application and protections because a public body contracts for services and fails—by design or neglect, before or after the fact—to provide for any or adequate contractual control of records that the contractor receives or produces in performing the contract services for the public body.

⁹⁰ Para. 45, Ministry's reply submission.

⁹¹ Para. 38, Ministry's reply submission.

[123] The issue is not whether the Legislature could enact language in the Act that defines “control” of records in accordance with the will of the parties to a contract for services for a public body. The issue is whether the Legislature has done so and, in my view, it has not.

Conclusion

[124] I conclude that the Panel records are under the control of the Ministry within the meaning of the Act and the Ministry is required to comply with the Act by processing WCEL’s request under s. 4(1) of the Act for access to the Panel records.

[125] **3.4 Ministry’s Response Regarding Its Records**—I will now deal with the Ministry’s response relating to records in its custody.

Withholding of “not responsive” information

[126] The Ministry withheld some information from otherwise responsive records on the ground that the information did not relate to the Panel report or its public release. No exceptions were applied to this information. This issue relates to the Ministry’s compliance with s. 6(1) of the Act which reads:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[127] WCEL questioned the Ministry’s authority to treat some information within a responsive record as not responsive and suggested that information withheld in this way is likely to be generally related to the request. According to WCEL:

... the Act does not contemplate the severing of documents to exclude portions of document[s] which would otherwise be releasable when other portions of the documents do fall within the scope of a request....

...

...[Section 4], and the Act’s definition of “record”, presume that records will be produced in their entirety, and will only be severed where necessary to allow the disclosure of materials which would otherwise be exempted under Division 2 of Part 1 of the Act.

Statements made about a matter that is subject of a request need to be understood in their proper context. The Ministries’ approach to these documents would require the Applicant to guess at what topics might be generally related to the documents requested in order to obtain intact documents.⁹²

⁹² Pages 19-20, WCEL’s initial submission.

[128] There are two issues here. Identifying information that is not responsive to an access request is a sensible way of dealing with a record that contains information on a variety of topics, only some of which relate to the access request.⁹³ Applying this practice to impose an unreasonably narrow reading on an access request is another matter and of course not acceptable.

[129] The information the Ministry considered to be not responsive to WCEL's access request is marked on the Ministry records provided to the inquiry. I have concluded that the "not responsive" information was correctly identified in pp. 12 (top half), 13 and 68-69 of the Ministry records.

[130] It was, however, incorrectly identified in pp. 1-2, 12 (bottom half), 14-16, 18-21, 45, 51-58, 60-67 and 70-84, where the scope of the WCEL access request, particularly part (c), was unreasonably narrowed. In this respect, the Ministry did not comply with its s. 6(1) duty to assist WCEL. The information the Ministry withheld as not responsive in these pages was in fact responsive to WCEL's access request. With the exception of p. 18, from which no other information was withheld, the information that was incorrectly treated as not responsive relates to surrounding information on those pages that the Ministry withheld under s. 13 or s. 16, or sometimes both. The information withheld on p. 18 is innocuous and publicly-known information that is responsive to WCEL's access request.

[131] **3.5 Applicability of Section 12**—The Ministry says s. 12(1) of the Act clearly requires it to deny access to one paragraph in a February 8, 2002 email (at p. 12 of the Ministry records) because the information is a recital by Ken Dobell, Secretary to Cabinet, of discussion that he personally witnessed at the Cabinet table. WCEL suggests that the Ministry has interpreted s. 12(1) too broadly and that s. 12(2)(c) might apply to permit disclosure because the Panel report has been made public and implemented.

[132] The relevant parts of s. 12 read as follows:

Cabinet and local public body confidences

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.

(2) Subsection (1) does not apply to...

(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

(ii) the decision has been made public,

⁹³ Previous orders have engaged this practice. See, for example, Order 04-37, [2004] B.C.I.P.C.D. No. 38, paras. 8-11, Order 04-15, [2004] B.C.I.P.C.D. No. 15, paras. 40-41 and Order 02-25, [2002] B.C.I.P.C.D. No. 25, para. 22.

- (iii) the decision has been implemented, or
- (iv) 5 or more years have passed since the decision was made or considered.

[133] The Ministry has accurately described and characterized the information it withheld under s. 12(1). Applying the leading decisions and orders respecting this exception,⁹⁴ I agree with the Ministry that disclosure of the paragraph in question would reveal the “substance of deliberations” of Cabinet and that s. 12(2) does not apply to exclude the operation of s. 12(1). The information reveals deliberations of Cabinet respecting offshore oil and gas. It neither reveals content of the Panel report, which has been made public, nor is it in the nature of background explanations or analysis for Cabinet’s consideration in making a decision. I find that s. 12(1) requires the Ministry to refuse to give WCEL access to this information.

[134] **3.6 Applicability of Section 16**—Most of the disputed information in the Ministry records has been withheld under s. 16(1)(a)(i) of the Act. Some of it was received by the Ministry in discussion with the government of Canada and has also been withheld under s. 16(1)(b). I concluded above that the information the Ministry withheld on the basis that it was not responsive to the access request in pp. 1-2, 12 (bottom half), 14-16, 18-21, 51-58, 60-67 and 70-84 of the Ministry records was responsive and, except for p. 18, relates to surrounding information that the Ministry withheld under s. 13 or s 16, or sometimes both. The following discussion concerns the information in pp. 1-2, 12 (bottom half), 14-17, 19-20 and 51-85⁹⁵ that the Ministry either incorrectly excluded as not responsive to WCEL’s access request or withheld under s. 16(1).

[135] The relevant parts of s. 16(1) read as follows:

Disclosure harmful to intergovernmental relations or negotiations

- 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
- (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
 - (i) the government of Canada or a province of Canada; ...
 - (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies....

[136] The standard of proof for the reasonable expectation of harm test in s. 16(1) (harm to intergovernmental relations or negotiations) or s. 17(1) (harm to financial or economic

⁹⁴ *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.), Order 01-02, [2001] B.C.I.P.C.D. No. 2, and Order 02-38, [2002] B.C.I.P.C.D. No. 38.

⁹⁵ It should be noted that pp. 50-85 of the Ministry records include several copies, including drafts, of the same documents.

interests) is discussed in Order 02-50⁹⁶ and I will not repeat it here. To the extent that the Ministry has relied, not only on s. 16(1)(a) but also on s. 16(1)(b), the discussion of “received in confidence” in Order 01-13⁹⁷ is also relevant.

[137] WCEL is skeptical about the applicability of s. 16(1) but is not in a position to provide a specific response to the Ministry’s evidence and argument on this exception, since that material was provided almost entirely on an *in camera* basis. WCEL says that the mere fact that the federal and provincial governments are concerned with offshore oil and gas development is not sufficient to justify application of this exception. Nor is the fact that discussions between the levels of government are ongoing, or were ongoing when the access request was made. Referring to Order 02-50, WCEL also correctly notes that a mere prospect that the government of Canada may be unhappy if information is released is not sufficient.⁹⁸

[138] I am unable to discuss the Ministry’s evidence and argument⁹⁹ in any detail without revealing the very sensitivities and concerns that caused it to conclude that disclosure of the information could reasonably be expected to harm relations between the governments of British Columbia and Canada or reveal information received in confidence from the government of Canada. I have considered the Ministry’s evidence and submissions carefully and conclude that they establish that disclosure of this information could reasonably be expected to harm relations between British Columbia and Canada, both at the time of the access request and going forward. The Ministry has satisfied me that the importance and unresolved nature of the offshore oil and gas exploration issue and the dynamics of intergovernmental relations continue to make the federal-provincial relationship in this area sensitive and vulnerable to harm from disclosure of these records of intergovernmental discussions and proposed or contemplated strategies.

[139] With respect to the Ministry’s exercise of its discretion to continue to rely on s. 16(1),¹⁰⁰ I think its consideration of the potential financial implications for the provincial government would, standing alone, pertain more to s. 17(1) than s. 16(1). However, there is some relevance for s. 16(1) too and the Ministry’s other considerations adequately support its decision to apply s. 16(1).

[140] **3.7 Applicability of Section 13**—The Ministry applied s. 13(1)—the exception for records that would reveal advice or recommendations developed by or for a public body—to withhold information in pp. 1-2, 15, 21, 31-32, 40-41, 45, 47-49 of the Ministry records.

[141] I need not, and will not, address whether s. 13(1) applies to pp. 40-41 and 47-49 as the information on these pages was personal information that the Ministry also withheld

⁹⁶ [2002] B.C.I.P.C.D. No. 51, paras. 111-112, 124-137.

⁹⁷ [2001] B.C.I.P.C.D. No. 14, paras. 21-25.

⁹⁸ Paras. 77-83, initial submission; paras. 126-135, reply submission.

⁹⁹ Pages 30-40, initial submission; paras. 64-98, O’Rourke affidavit, paras. 5-36, 38-39, Maranda affidavit.

¹⁰⁰ Para. 21, Reid affidavit.

under s. 22(1) (which is not in issue in this inquiry) or to the information on pp. 1-2 and 15 (since I have already confirmed that s. 16(1) applies to it).

[142] This leaves the applicability of s. 13(1) to portions of pp. 21, 31-32 and 45 of the Ministry records. In considering this issue, I have had regard to previous orders such as Order 02-38.¹⁰¹

[143] WCEL says that s. 13(1) is not intended to protect material that outlines messaging for the media, including the development of backgrounders concerning the Panel and its mandate. WCEL also emphasizes s. 13(2), which lists types of information or records to which s. 13(1) does not apply and says that it is unfair for the Ministry to, at this late stage, introduce a claim that s. 13(1) applies to the information on p. 45 that it had withheld on the basis that it was not responsive to WCEL's access request.¹⁰²

[144] Pages 21 and 31-32 are emails between Ministry officials regarding the public release of the Panel terms of reference on October 19, 2001. Information about release strategy was withheld under s. 13(1) on these pages and some, on p. 21, was incorrectly treated as not responsive to the access request. The Ministry maintains that the information involved is advice under s. 13(1) and says that s. 13(2) does not apply here.¹⁰³ The information is mundane in nature, but I have to agree that it concerns specific advice about a course of action, which resulted in Ministry officials considering and making a decision in that regard. As the Commissioner said in Order 02-38:

[128] ... the Ministry has chosen to keep secret under s. 13(1) information that, to a notable degree, deals with public relations issues, *i.e.*, the Ministry has withheld advice or recommendations about how ministers should or could communicate to citizens what government was doing in their name and why. This information about communications strategies or positions is not of any particularly earth-shattering quality, especially now that Cabinet's decision has been implemented and made public. But the Ministry has chosen to stand its ground under s. 13(1), as it is entitled to do...

[145] The information withheld on p. 45 is a suggested strategic course of action that I also agree constitutes advice under s. 13(1). The question of whether this information was responsive to the access request was not perfectly clear and the nature of the strategic advice involved is substantive. It would have been preferable if the Ministry had raised s. 13(1) at an earlier stage but I am not prepared to preclude it from relying upon this exception in the circumstances, having regard to the significant interests at play as reflected in this particular record.

[146] **3.8 Applicability of Section 25(1)**—WCEL suggested that the Ministry had not considered its obligations under s. 25(1) to disclose, without delay, information in the public interest or a risk of significant harm to the environment, whether or not an access request has been made.¹⁰⁴ Section 25 is not mentioned in WCEL's request for review or the notice for

¹⁰¹ [2002] B.C.I.P.C.D. No. 38, paras. 101-150.

¹⁰² Paras. 73-76, initial submission; paras. 113-121, reply submission.

¹⁰³ Paras. 4.59-4.72, initial submission; para. 53, reply submission.

¹⁰⁴ Pages 19-20, WCEL's reply submission.

this inquiry. I have, however, reviewed the disputed information in the Ministry records to determine the applicability of s. 25(1). Considering and applying previous orders,¹⁰⁵ I find no grounds for urgent disclosure of information about a risk of significant harm to the environment or for any other reason clearly in the public interest.

4.0 CONCLUSION

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

1. The Panel records are under the control of the Ministry within the meaning of ss. 3(1) and 4(1) of the Act and I require the Ministry to comply with the Act by processing WCEL's request under s. 4(1) of the Act for access to the Panel records;
2. I require the Ministry to refuse to give WCEL access to the information the Ministry withheld under s. 12(1) of the Act on p. 12 of the Ministry records;
3. I confirm the Ministry's decision that it is authorized to refuse to give WCEL access to the information on pp. 1-2, 12 (bottom half), 14-20 and 50-85 of the Ministry records that the Ministry either incorrectly treated as not responsive to WCEL's access request or withheld under s. 16(1);
4. I confirm the Ministry's decision that it is authorized to refuse to give WCEL access to the information on pp. 21, 31-32 and 45 of the Ministry records that the Ministry either incorrectly treated as not responsive to WCEL's access request or withheld under s. 13(1) of the Act; and
5. The Ministry is not required or authorized to refuse to give WCEL access to the information on p. 18 of the Ministry records that the Ministry incorrectly treated as not responsive to WCEL's access request.

February 1, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

OIPC File No. F02-15862

¹⁰⁵ See Order 02-38, [2002] B.C.I.P.C.D. No. 38, paras. 30-67; Order 02-50, [2002] B.C.I.P.C.D. No. 51, paras. 84-93; and Order 03-28, [2003] B.C.I.P.C.D. No. 28, paras. 22-30.