



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
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Order F14-55

**MINISTRY OF FINANCE**

Caitlin Lemiski  
Adjudicator

December 23, 2014

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**Summary:** The applicant requested records from the Ministry of Finance related to the government's decision to contribute funding towards a National Soccer Development Centre at UBC. The Ministry withheld some information, citing Cabinet confidences under s. 12 of FIPPA and harm to third party business interests under s. 21 of FIPPA. The adjudicator determined that the Ministry is required to refuse to disclose some information under s. 12 because it would reveal the substance of Treasury Board deliberations, either directly or by inference. Section 12 does not require the Ministry to refuse to disclose subject headings. Section 21 does not require the Ministry to refuse to disclose parts of a business case report.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 12 and 21(1).

**Authorities Considered:** **B.C.:** Order F14-56, 2014 BC IPC 60 (CanLII); Order F08-17, 2008 CanLII 57360 (BC IPC); Order F09-26, 2009 CanLII 66959 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order 01-02, 2001 CanLII 21556 (BC IPC). **Alberta:** Order F2013-23 2013 CanLII 52667 (AB OIPC).

**Cases Considered:** *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII).

## INTRODUCTION

[1] This inquiry involves a request for records from the applicant to the Ministry of Finance (the “Ministry”) for “[t]he application, business case report, evaluation, contract and approval letter”<sup>1</sup> regarding the government’s decision to contribute funding for a National Soccer Development Centre (“the NSDC”) in partnership with the Whitecaps Football Club (“Whitecaps”) at the University of British Columbia (“UBC”). The applicant also requested this information from the Ministry of Community Sport and Cultural Development (“MCSCD”), which I address in Order F14-56 that is issued concurrently to this order.<sup>2</sup>

[2] The Ministry responded by providing records to the applicant. Some of the records contained severing. These include a business case report for the NSDC, a Treasury Board submission, two Treasury Board briefing notes, three letters and an undated, unattributed page of notes. The Ministry severed information in these records under s. 12 (Cabinet and local public body confidences) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).<sup>3</sup> It also severed some of this information under s. 21 (disclosure harmful to business interests of a third party).

[3] The applicant was not satisfied with the Ministry’s response. He requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision. Mediation did not resolve the issues in dispute, and this matter proceeded to inquiry. A Notice of Inquiry was issued to the applicant, the Ministry and the Whitecaps as an appropriate third party.

[4] After the Notice of Inquiry was issued, the Ministry released some of the information in dispute.<sup>4</sup> The inquiry proceeded regarding the remaining information under Part 5 of FIPPA. All parties provided initial submissions, and the Ministry and the Whitecaps also made reply submissions.

## ISSUES

1. Is the Ministry required to refuse to disclose information under s. 12(1)?
2. Is the Ministry required to refuse to disclose information under s. 21(1)?

[5] The Ministry bears the burden of proof in this case.<sup>5</sup>

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<sup>1</sup> Applicant’s request to the Ministry, submitted electronically.

<sup>2</sup> Order F14-56, 2014 BC IPC 60 (CanLII).

<sup>3</sup> Public body’s letter of reply to the applicant.

<sup>4</sup> Public body’s submissions at para. 1.04.

<sup>5</sup> See s. 57(1) of FIPPA.

## DISCUSSION

[6] **Background**—In 2009, the Province of British Columbia (the “Province”) issued a press release publicly committing \$17.5 million towards the creation of an NSDC to be built in John Oliver Park in Delta.<sup>6</sup> It would have provided new training opportunities for non-professional players and attract major sports events.<sup>7</sup> Ultimately, plans to build the NSDC in Delta did not proceed. After plans to build the NSDC in Delta fell through, information already released to the applicant shows that the Treasury Board advised MCSCD that it would not recommit funding for the NSDC unless MCSCD first provided the Treasury Board with a submission that set out a business case for the NSDC as well as other details about the scope and cost of the project.<sup>8</sup>

[7] In February 2012, the Whitecaps submitted a business case report to MCSCD. Using information from that report, MCSCD made a Treasury Board Submission in July 2012 requesting \$17.5 million for the NSDC.<sup>9</sup>

[8] On September 6, 2012, the applicant made his request as follows:

The application, business case, evaluation, contract and approval letter for the Province of B.C.’s \$14.5 million contribution and conditional \$3 million future contribution toward the National Soccer Development Centre/Vancouver Whitecaps FC training centre at UBC Thunderbird Park (which was announced Sept. 6, 2012).<sup>10</sup>

[9] Information already disclosed to the applicant in the September briefing note shows that the Treasury Board approved the funding request, subject to conditions, and states that on the date the applicant requested the records, MCSCD issued a press release announcing the project.<sup>11</sup> I do not have a copy of the press release before me or submissions from the parties about the press release; therefore I do not know precisely what the Ministry disclosed. The Ministry has withheld from the disputed records the wording of the Treasury Board’s decision about funding the NSDC, including details of that decision.

[10] At the time submissions for this inquiry were received, UBC and the Whitecaps had not finalized an agreement to build the NSDC at UBC.<sup>12</sup>

[11] **Records in Dispute**—The records in dispute are a business case report for the NSDC, a Treasury Board submission, two Treasury Board briefing notes (which I refer to below as the September and the July briefing note), three letters

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<sup>6</sup> Records p. 28 (May 2, 2009 press release).

<sup>7</sup> Treasury Board submission - at p. 34 of the records.

<sup>8</sup> Page 29 of the records.

<sup>9</sup> Page 33 of the records and the public body’s initial submission at para. 4.28.

<sup>10</sup> Applicant’s request for records.

<sup>11</sup> Page 2 of the records.

<sup>12</sup> Whitecaps’ initial submission at para. 8.

and an undated, unattributed page of notes. The Ministry is withholding some information in these records under s. 12 only and other information under both ss. 12 and 21.

## Preliminary Matter

### *Disclosure in the public interest*

[12] The applicant submits that s. 25 applies to the records in dispute. Section 25 requires public bodies to disclose information when it is in the public interest and when there is an urgent and compelling need to do so. The applicant did not raise s. 25 in his request for a review of the Ministry's decision,<sup>13</sup> and it is not listed as an issue in the OIPC Fact Report that was issued to the parties at the start of this inquiry.<sup>14</sup> Further, based on my review of the records and on the evidence and submissions before me, I am not persuaded that any of the information reveals any urgent and compelling need to disclose information under s. 25.<sup>15</sup> Therefore, I am not going to consider the applicant's submission with respect to s. 25 any further.

[13] I will now consider whether s. 12 applies to the records in dispute, then I will consider whether s. 21 applies.

[14] **Cabinet Confidences**—Section 12 requires public bodies to withhold information that reveals the substance of the deliberations of Cabinet or one of its committees. The Supreme Court of Canada has affirmed the purposes of s. 12 and has stated that “[t]hose charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny.”<sup>16</sup> The Ministry submits, and I accept, that the Treasury Board is a committee of Cabinet for the purposes of s. 12.<sup>17</sup>

[15] The parts of s. 12 relevant to this inquiry are as follows:

- 12(1)** The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or

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<sup>13</sup> Applicant's request for review.

<sup>14</sup> OIPC Fact Report.

<sup>15</sup> My reasoning and conclusions are consistent with those of Commissioner Denham in Order F11-25 at paras. 26-28. (I note that in that Order, the public body objected to the applicant's late raising of s. 25.)

<sup>16</sup> *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57, (at para. 18) as quoted in Order 02-38.

<sup>17</sup> Public body's initial submission at para. 4.18. The Committees are listed in s. 1 of the *Committees of the Executive Council Regulation*. In this Order, my references to Cabinet include any of its committees, including the Treasury Board.

regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to

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- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
  - (i) the decision has been made public,
  - (ii) the decision has been implemented, or
  - (iii) 5 or more years have passed since the decision was made or considered.

[16] Examining the wording of this section, information that reveals the substance of deliberations of Cabinet must not be disclosed. This may include advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to Cabinet. Information listed in s. 12(2) is not subject to s. 12(1).

#### *Substance of deliberations*

[17] What is meant by “substance of deliberations” is central to determining whether s. 12 applies in this case.

[18] In *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*,<sup>18</sup> the BC Court of Appeal upheld the OIPC’s decision that s. 12 applied to a report that Cabinet had considered before banning new water exports. The report consisted of text, appendices, summary tables and a financial impact assessment. It contained a variety of options. Aquasource, a water export company, received the report after requesting the information Cabinet considered before implementing the ban.

[19] In *Aquasource*, the Court of Appeal held that “...the class of things set out after “including” in s. 12(1) extends the meaning of “substance of deliberations” and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications.”<sup>19</sup> The Court held that restricting s. 12 to Cabinet’s thoughts about a particular issue would not make sense because the evidence before them was that Cabinet does not record individual votes or views consistent with the “time-honoured practice based on the constitutional

<sup>18</sup> *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

<sup>19</sup> *Aquasource* at para. 41.

conventions of Cabinet solidarity and collective responsibility”.<sup>20</sup> The Court determined that the appropriate test for s. 12 is: “[d]oes the information sought to be disclosed form the basis for Cabinet deliberations?”<sup>21</sup>

[20] In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*,<sup>22</sup> the BC Supreme Court reviewed Order F08-17.<sup>23</sup> In that case, an applicant requested subject and agenda item headings of Cabinet Committee meetings. The OIPC Adjudicator determined that s. 12 did not apply. In upholding Order F08-17, the Court stated:

94 The OP [public body] submits that the records at issue that identify the topics of discussion of the committees would allow someone to draw an accurate inference about the "substance of deliberations" of Cabinet or a Cabinet committee.

95 The IPC Delegate concluded that the severed words do not consist of "descriptions" of the issues or topics of discussion, but are "a barebones series of subjects or agenda items". She concluded that there is no "substance" to them and that they reveal no "deliberations".

96 The OP submits that the headings describe the specific issues to be discussed and therefore reveal the substance of deliberations. Having reviewed the records in dispute, I cannot agree with that submission. In my view, the IPC Delegate's characterization that "there is no 'substance' to them and they reveal no 'deliberations'" is reasonable.

97 In my view, the conclusion of the IPC Delegate, that headings that merely identify the subject of discussion without revealing the "substance of deliberations" do not fall within the s. 12(1) exception, was a reasonable decision. I can find no reviewable error with regard to Order F08-17.

[underline in original]

[21] The Court's decision in *BC Attorney General* confirms that unless information reveals deliberations, either directly or by inference, s. 12 does not apply.

### **Analysis of s. 12**

[22] I will consider whether s. 12 applies to the disputed information in three parts:

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<sup>20</sup> *Aquasource* at para. 40.

<sup>21</sup> *Aquasource* at para. 48.

<sup>22</sup> *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII) 2011 BCSC 112 (CanLII).

<sup>23</sup> In that case, the Court also reviewed Order F08-18.

- First, I will consider whether s. 12 applies to the Treasury Board’s funding decision (the “decision information”). The decision information appears in a letter from the Treasury Board to MCSCD and in the September briefing note.
- Second, I will consider whether s.12 applies to information severed in records that did not come before Cabinet.
- Third, I will consider whether s. 12 applies to information in records that came before Cabinet, including the rest of the information severed from the records that contain decision information.

*Does s. 12 apply to decision information?*

[23] The decision information appears in two places in the records. It appears in a letter from the Treasury Board to MCSCD informing the Ministry of the Treasury Board’s decision, and it appears again in the September briefing note. In both cases, I have determined that the Ministry must withhold the information because disclosing it would allow an individual to make accurate inferences about the substance of Cabinet’s deliberations.

[24] In the case of the decision information appearing in the letter from the Treasury Board to MCSCD, the Ministry submits that this letter was not prepared for submission or submitted to the Treasury Board. The Ministry submits, however, that disclosing it “would permit the drawing of accurate inferences with respect to information protected by section 12(1) in the Treasury Board Submission and the July TBS Briefing Note.”<sup>24</sup> The Ministry cites Order F05-28 in support. In that Order, former Commissioner Loukidelis determined that s. 12(1) applied to records discussing Cabinet decisions:

11 The Premier's Office says that, if the information it has severed under s. 12(1) were disclosed, it would reveal information that formed the basis for Treasury Board deliberations. It says this information is found in documents submitted to Treasury Board (a Cabinet committee), documents originating from the Chair of Treasury Board and documents referring to such information. One document is identified as an attachment to a submission to Treasury Board, the Premier's Office says, and it is obvious from the face of the records that disclosure would reveal the substance of Cabinet deliberations. Section 12(2) does not, it argues, apply (paras. 4.11-4.19, initial submission).

12 My review of these records discloses that they consist mainly of communications with Treasury Board about Treasury Board decisions and communications asking for a Treasury Board decision or approval. They also include some records that relate to Treasury Board decisions.

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<sup>24</sup> Public body’s initial submission at para. 4.31.

13 Previous decisions have held that Treasury Board is a committee of Cabinet. Having reviewed the records, I am readily satisfied that they fall under s. 12(1) as interpreted in Order 02-38 and *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* and must be withheld on that basis.

[Footnotes omitted]

[25] In this case, I have applied the former Commissioner's reasoning in Order F05-28 and have determined that the Ministry must continue to withhold the decision information appearing in the letter from the Treasury Board to MCSCD, because disclosing this information would reveal, by inference, the substance of Cabinet's deliberations.

[26] In the case of the decision information appearing in the September briefing note, I have similarly determined that the Ministry must continue to withhold this information under s. 12. In this case, the Ministry submits that the information was prepared for submission and submitted to Cabinet.<sup>25</sup> The Ministry submits that the September briefing note was "included in the body of information that Treasury Board considered in making a decision. As such, the Ministry submits that the Section 12 Information in those records is clearly protected by s. 12(1) of the Act."<sup>26</sup> I accept the Ministry's submission that this information is the type that is clearly protected by s. 12(1). The Ministry must continue to withhold it.

[27] In reaching my decision that this information must not be disclosed, I have considered s. 12(2) and have determined that none of the exceptions apply. In *Aquasource*, the Court described the relationship between ss. 12(1) and 12(2) as follows:

[50] ... The two provisions cannot be read as watertight compartments and the Commissioner was correct in harmonizing them. He accepted the government's submission that the exception relates to the purpose for which the information is given: if it is to provide background or analysis and is not interwoven with any of the items listed in s. 12(1), the information can be disclosed. ..."

[28] In this case, the only parts of s. 12(2) that could possibly apply are ss. 12(2)(c)(i) or 12(2)(c)(ii). I have determined that neither of these subsections apply because the purpose of this information is not to present background explanations or analysis to Cabinet; it is the wording of the decision itself.

[29] I will next consider whether s. 12 applies to information in records that did not come before Cabinet.

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<sup>25</sup> Public body's initial submission at para. 4.25.

<sup>26</sup> Public body's initial submission at para. 4.23.



*Does s. 12 apply to records that did not come before Cabinet?*

[30] The Ministry has also severed information about the NSDC contained in the business case report, portions of three letters, and in an unattributed page containing notes about field time use for the NSDC. The Ministry submits that these records “were neither prepared for submission to, or submitted to, Treasury Board for its deliberations.”<sup>27</sup> It calls these records the “Other Records”. The Ministry elaborates on why it believes s. 12 applies as follows:

... the Ministry submits that the evidence demonstrates that the disclosure of the Section 12 Information in the Other Records would allow someone to accurately infer the substance of Treasury Board deliberations, including the substance of information prepared for submission and submitted to Treasury Board, in the Treasury Board Submissions and the July and September TBS [Treasury Board] Briefing Notes. The Section 12 Information in the Other Records is found in those latter records and/or the information in the latter records was derived from the Section 12 Information in the Other Records.<sup>28</sup>

[31] I will consider the Ministry’s argument as I examine each of these records in turn.

[32] **The business case report**—The Ministry withheld some information from the business case report, which includes funding and construction information, a risk mitigation table, and a Letter of Intent between the Whitecaps and UBC that is attached as an appendix to the business case report. The Ministry submits that disclosing the information withheld from the business case report would “allow someone to accurately infer the substance of recommendations and advice, including options and the implications of options submitted to Treasury Board through the submission of [the] Treasury Board Submission and the July [Treasury Board] briefing note.”<sup>29</sup>

[33] I have compared the information severed from the business case report with the records that came before Cabinet. For the most part, it is the same information. The Executive Director of the Treasury Board staff deposed that the Treasury Board staff used the business case report to write a briefing note for Cabinet.<sup>30</sup> Based on this evidence, I accept that, for the most part, the information severed from the business case report was submitted to Cabinet. Even if it was submitted to Cabinet, in order for s. 12 to apply, the Ministry must demonstrate that disclosing the information would reveal the substance of Cabinet deliberations, either directly or by inference.

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<sup>27</sup> Public body’s initial submissions at para. 4.25.

<sup>28</sup> Public body’s initial submission at para. 4.25.

<sup>29</sup> Public body’s initial submission at para. 4.30.

<sup>30</sup> Affidavit of the Executive Director of the Treasury Board staff at para. 11.

[34] In Order F09-26, Senior Adjudicator Francis reviewed a business case report that was not submitted or prepared for submission to Cabinet. She determined that s. 12 applied to it because it was used to develop records that were submitted to the Treasury Board and disclosing the business case report would reveal the substance of Cabinet's deliberations.<sup>31</sup> In this case, much of the information withheld from the business case report is financial or is related to the scope of the project. Different options are presented. The business case report also contains information about various commitments made by parties towards the project. Disclosing this information would, in my view, reveal Cabinet's thinking and certain assumptions Cabinet relied on in reaching its decision and would therefore allow someone to infer the substance of their deliberations. I have determined that s. 12(2) does not apply because the information in the business case report was not prepared for the purpose of presenting background explanation or analysis to Cabinet. For these reasons, I find that s. 12 applies to most of the information in the business case report and the Ministry must continue to withhold it.

[35] In a few instances, I have determined that s. 12 does not apply to information severed in the business case report's table of contents because there is no substance to the information and it does not reveal any deliberations. This information is similar to the agenda item headings the Court considered in *BC Attorney General*, discussed above. The Ministry is also not required to withhold parts of the Letter of Intent between the Whitecaps and UBC (which appears as an appendix to the business case report). This includes information about how UBC and the Whitecaps intend to conduct operations together with respect to the NSDC. From my review of the records, these details appear nowhere in the contents of the Cabinet submission and the briefing notes. The evidence does not support a conclusion that disclosing this information could, even by inference, reveal the substance of Cabinet's deliberations.

[36] **August 2, 2012 letter**—The Ministry withheld portions of an August 2, 2012 letter from the Whitecaps to MCSCD. The Ministry disclosed the first page, which describes the table on the second page that summarizes field use allocation. That table, as well as a similar table on the next page, have been severed in their entirety. The information in these tables also appears in the September briefing note. I find therefore, that this information was submitted to Cabinet. This alone does not mean that s. 12 applies, because the information must also, directly or by inference, reveal the substance of Cabinet's deliberations. The Ministry submits that the information in these tables "relates directly to the issues that were deliberated upon by Treasury Board ...".<sup>32</sup> After reviewing the information, I agree with the Ministry's characterization of this information. The tables contain different options with respect to community use models, and disclosing this information would enable accurate inferences to be made about the substance of Cabinet's deliberations. I have determined that

<sup>31</sup> Order F09-26 at paras. 20-21.

<sup>32</sup> Public body's initial submission at para. 4.34.

s. 12(2) does not apply to this information because it relates directly to the substance of Cabinet's deliberations and therefore it cannot be characterized as background explanations or analysis.

[37] **The August 31, 2012 letter**—The second letter is dated August 31, 2012. This letter is also from the Whitecaps to MCSCD. Like the August 2, 2012 letter, it was not prepared for submission to Cabinet nor was it submitted to Cabinet. The title of the letter, already disclosed, is "Community Use Agreement – Whitecaps National Soccer Development Centre".<sup>33</sup>

[38] I am satisfied, based on my knowledge of what is in the Treasury Board submission and the briefing notes, that some – but not all – of the severed information in this letter was submitted to Cabinet. In either case, the information reveals the Whitecaps' thinking regarding community usage. It is consistent with information severed from the September briefing note on whether to accept the community use agreement.

[39] It is apparent from the topic heading of the September briefing note, already disclosed, that community use was a subject that the Treasury Board was deliberating on. For these reasons, I am satisfied that the severed contents of this letter would reveal the substance of Cabinet's deliberations if it was disclosed. I find that s. 12(2) does not apply because this letter was not prepared for the purpose of presenting background explanations or analysis to Cabinet.

[40] **Undated community usage letter**—The Ministry severed part of a letter from the Treasury Board to MCSCD. This letter discloses details about the Treasury Board's decision to approve the community use agreement. The fact that the Treasury Board approved the agreement is already known to the applicant because the part of the letter the Ministry disclosed reads; "I am writing to inform you that I have accepted, as submitted, the community usage agreement for the National Soccer Development Centre."<sup>34</sup> However, I am satisfied that the rest of the letter must remain severed under s. 12(1) because disclosing this information would reveal, by inference, the substance of what Cabinet deliberated on. I am not satisfied that any of the exceptions in s. 12(2) apply because the purpose of this information is not to present background explanations or analysis to Cabinet, it is details of the decision itself.

[41] **The undated, unattributed page**—The Ministry severed the entirety of a page containing numerical estimates and notes about community usage.<sup>35</sup> It submits that disclosing it would permit accurate inferences about what Treasury Board deliberated on.<sup>36</sup> The Ministry has described this page as being

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<sup>33</sup> At p. 10 of the records.

<sup>34</sup> At p. 1 of the records.

<sup>35</sup> At p. 19 of the records.

<sup>36</sup> Public body's initial submissions at para. 4.25.

part of the August 2, 2012 letter,<sup>37</sup> however the other five pages of the letter are on Whitecaps letterhead and the letter does not refer to this page as an appendix or otherwise make reference to it.

[42] Most of the information severed in this record appears in the September 27<sup>th</sup>, 2012 Treasury Board briefing note on community usage. I am therefore satisfied that this information was submitted to Cabinet. The contents of the September 27, 2012 briefing note and the Ministry's submissions support a conclusion that Cabinet deliberated on this information.

[43] There are some numbers on this page representing field use estimates which do not appear in the Cabinet records. Although Cabinet may not have deliberated on them, they appear alongside numbers that were. I am therefore satisfied that disclosing them would allow someone to accurately infer the substance of Cabinet deliberations. I find that s. 12(2) does not apply because the purpose of the record is not to present background explanations or analysis to Cabinet. The Ministry is not required to disclose this information.

*Does s. 12 apply to the information in Cabinet records?*

[44] The Ministry severed information appearing in the July and September briefing notes and a Treasury Board submission (the "Cabinet records"). In addition to the decision information that I have already considered, the Ministry severed policy considerations, options, and recommendations. I will now decide to what extent s. 12 applies to this information.

[45] The Executive Director of the Treasury Board staff deposed that both briefing notes were prepared by Treasury Board staff and were submitted to the Treasury Board.<sup>38</sup> The Ministry submits that government's Core Policy and Procedures Manual required MCSCD to make the submission to the Treasury Board<sup>39</sup> and that the Treasury Board submission was submitted to the Treasury Board.<sup>40</sup> Based on this evidence, I am satisfied that this information was submitted to Cabinet.

[46] The fact that a record was submitted to the Treasury Board does not mean that s. 12 applies. In Order 01-02, former Commissioner Loukidelis quoted with approval his predecessor who stated in Order No. 48-1995 that "I do not automatically assume that Cabinet submissions in all cases reflect the "substance of Cabinet deliberations" without some at least inferential evidence."<sup>41</sup>

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<sup>37</sup> Public body's initial submissions at para. 4.04.

<sup>38</sup> Affidavit of the Executive Director of the Treasury Board staff at para. 10.

<sup>39</sup> Public body's initial submission at para. 4.22.

<sup>40</sup> Public body's initial submission at para. 4.04.

<sup>41</sup> Former Commissioner Flaherty in Order No. 48-1995 as quoted in Order 01-02 at para 10.

[47] I will now consider whether s. 12 applies to the information in each record.

[48] **The Treasury Board submission**—In the case of the Treasury Board submission,<sup>42</sup> the Ministry severed options and recommendations. The Ministry submits that this information “relates directly to the issues that were to be deliberated upon by [the] Treasury Board.”<sup>43</sup> It contains project details and proposed terms that the Treasury Board would have had to deliberate on before making a decision. I am satisfied that disclosing most of this information would reveal the substance of Cabinet deliberations or allow accurate inferences about what Cabinet deliberated.

[49] In considering whether s. 12(2) applies, the Court in *Aquasource* held that s. 12(2) information interwoven with s. 12(1) information must not be disclosed.<sup>44</sup> I have followed the Court’s reasoning here. Although s. 12(2) would normally apply to some of this information, it is interwoven with other information such that it cannot be disclosed without revealing the substance of Cabinet’s deliberations.

[50] The information to which I have determined s. 12(1) does not apply however, are subject headings. Consistent with the Court’s decision in *BC Attorney General*, I have determined that disclosing this information will not reveal the substance of deliberations, either directly or by inference.

[51] **The July briefing note**—The severed briefing note information includes policy considerations and recommendations related to whether to fund the NSDC. Applying the same analysis that I used when determining whether s. 12 applies to information in the Treasury Board submission, I find that disclosure of nearly all of the information the Ministry severed would reveal the substance of deliberations. The exceptions are the headings the Ministry severed and some draft date and sign-off information. The Ministry is not required to refuse access to this information under s. 12 because it does not reveal the substance of Cabinet’s deliberations, either directly or by inference. In regards to s. 12(2), although some of the information falls within the exception in s. 12(2)(c)(i), it is interwoven with s. 12(1) information and therefore it cannot be disclosed.

[52] **The September briefing note**—The information severed from this briefing note includes analysis and options related to whether to approve the community use agreement. The Ministry submits that, consistent with *Aquasource*, this information was “included in the body of information that Treasury Board considered in making a decision.”<sup>45</sup>

[53] Applying the same analysis that I used with the other Cabinet records, I find that s. 12 requires the Ministry to continue to withhold most of the

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<sup>42</sup> At p. 33 of the records.

<sup>43</sup> Public body’s initial submission at para. 4.24.

<sup>44</sup> As discussed at para. 63 of Alberta Order F2013-23.

<sup>45</sup> Public body’s initial submissions at para. 4.24.

information. In regards to s. 12(2), the Deputy Secretary to the Treasury Board deposed that she believes this information “relates directly to the issues that were deliberated upon by Treasury Board, and as such, cannot be characterized as “background” information.”<sup>46</sup> I agree. This includes information about the community use agreement that could otherwise be disclosed under the exception in s. 12(2)(c)(i); however it is interwoven with information to which s. 12(1) applies, therefore it cannot be disclosed.

[54] As with the other Cabinet records I have considered, s. 12 does not apply to the headings and some draft date and sign-off information the Ministry severed, including headings in Appendix A.

[55] In summary, I have determined that the Ministry must continue to withhold almost all of the information it severed from the Cabinet submission and the briefing notes because disclosing this information would, directly or by inference, reveal the substance of Cabinet deliberations. Any information to which s. 12(2) applies cannot be released because it is interwoven with information to which s. 12(1) applies. Section 12 does not apply to most of the headings and some draft date and sign-off information; the Ministry must disclose this information.

## Section 21

[56] **The business case report**—The Ministry applied s. 21 to some of the information in the business case report to which I have determined that s. 12 does not apply (“the remaining information”). This includes items in the table of contents and parts of the Letter of Intent between the Whitecaps and UBC. As I have determined that s. 12 does not apply to this information, it is necessary to consider whether s. 21 applies to this information.

[57] Section 21 requires public bodies to withhold information if disclosing it could reasonably be expected to significantly harm a third party’s business interests. The parts of s. 21 relevant to this inquiry are:

- 21(1) The head of a public body must refuse to disclose to an applicant information
  - (a) that would reveal
    - (i) trade secrets of a third party, or
    - (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
  - (b) that is supplied, implicitly or explicitly, in confidence, and
  - (c) the disclosure of which could reasonably be expected to

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<sup>46</sup> Affidavit of the Deputy Secretary to the Treasury Board at para. 11.

- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
- ...
- (ii) result in undue financial loss or gain to any person or organization ...

[58] For s. 21 to apply, the information must be of a type as set out in s. 21(1)(a), it must be supplied implicitly or explicitly in confidence as set out in s. 21(1)(b), and disclosing it must be reasonably expected to cause one of the harms set out in s. 21(1)(c). In this case, the Ministry submits that ss. 21(1)(c)(i) and (iii) apply.<sup>47</sup>

[59] The Ministry submits that it “made a decision to apply section 21(1) on the basis of representations made to it by the [Whitecaps] at the time of the original application.”<sup>48</sup> The Ministry further submits that in cases where a public body has applied s. 21, the third party is in the best position to provide evidence.<sup>49</sup> The Whitecaps submit that s. 21 applies to tables the Ministry has severed, as well as a sentence on page 11 of the business case report and paragraph 22 of the Letter of Intent, which is attached as an appendix to the business case report.<sup>50</sup>

[60] As I have already determined that s. 12 applies to the parts of the business case that the Whitecaps submit is subject to s. 21, I do not need to consider whether s. 21 also applies to this information. I will therefore only consider the Ministry’s submission regarding s. 21 as it applies to the remaining information, as they are the only party that is arguing that s. 21 applies to it.

[61] The Ministry submits that the information in the business case report is commercial.<sup>51</sup> I agree. The items in the table of contents and parts of the Letter of Intent relate to information about a proposed business relationship that has a commercial or financial component. I find that the remaining information is commercial or financial information.

[62] Turning to whether the business case was supplied, the Ministry submits that the Whitecaps supplied the business case.<sup>52</sup> One of the records the Ministry has already disclosed to the applicant is a cover letter from the Whitecaps supplying the business case to the Minister.<sup>53</sup> I find that the business case was supplied.

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<sup>47</sup> Public body’s initial submissions at para. 4.46.

<sup>48</sup> Public body’s initial submissions at para. 4.46.

<sup>49</sup> Public body’s initial submissions at para. 4.45.

<sup>50</sup> Whitecaps’ initial submission at para. 7.

<sup>51</sup> Public body’s initial submission at para. 4.38.

<sup>52</sup> Public body’s initial submission at para. 4.40.

<sup>53</sup> At p. 40 of the records.

[63] In regards to whether the remaining information was supplied implicitly or explicitly in confidence, in its submissions for this inquiry, the Ministry refers me<sup>54</sup> to the affidavit of the Executive Director of the Sport Branch for MCSCD<sup>55</sup> who deposes that:

Although nothing explicit was communicated between the Ministry and the Whitecaps with respect to the issue of confidentiality, I believe that both [the Whitecaps and MCSCD] understood that the information supplied by the Whitecaps to the Ministry was being supplied for the sole purpose of seeking Treasury Board [approval] for funding for the Centre. As such, I believe that there was the expectation on the part of both the Ministry and the Whitecaps that such information could potentially be put before Treasury Board for its confidential deliberations and that such information would be treated confidentially.<sup>56</sup>

[64] As there is no assertion of explicit confidentiality here, the Ministry's argument is that the business case was supplied implicitly in confidence. In Order 01-36, former Commissioner Loukidelis set out the criteria to be considered in determining whether information was supplied implicitly in confidence:

[26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.<sup>57</sup>

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<sup>54</sup> Public body's initial submission at para. 4.18.

<sup>55</sup> That affidavit was prepared for the inquiry into the applicant's request for the same records to MCSCD and resulted in Order F14-56.

<sup>56</sup> Affidavit of the the Executive Director of the Sport Branch for MCSCD, prepared for the inquiry resulting in Order F14-56. At para. 16.

<sup>57</sup> Order 01-36 at para. 26.



[65] In this case, the Ministry has not supplied evidence supporting the Executive Director of the Sport Branch's belief that the Whitecaps and MCSCD understood that the business case was communicated on the basis that it was to be kept confidential or treated in a confidential manner. Given that the Whitecaps made submissions at this inquiry but take the position that s. 21 does not apply to this information, this suggests that the information was not communicated to the public body on the basis that it was confidential and that it was to be kept confidential. In addition, the cover letter from the Whitecaps to the Minister supplying the business report does not make any mention of confidentiality and does not suggest that it was prepared for a purpose which would not entail disclosure. In regards to the information in the Letter of Intent, as UBC is a signatory to it,<sup>58</sup> I assume that it too has a copy. Given these circumstances, I am not satisfied that this information was supplied explicitly or implicitly in confidence. I therefore find that s. 21 does not apply to this information and the Ministry must disclose it. This includes the items the Ministry severed from the table of contents of the business case report and portions of information on pages 1, 2 (in its entirety), 3, 7, 9 and 10 of the Letter of Intent.

## **CONCLUSION**

[66] I have determined that s. 12 applies to decision information appearing in a letter from the Treasury Board to MCSCD and in the September briefing note because someone could draw accurate inferences about the substance of Cabinet's deliberations from this information. I have also determined that s. 12 applies to most of the information severed from the business case report except for information severed from the table of contents and parts of the Letter of Intent. I find that s. 12 applies to information in the August 2 and August 31 letters, to a page containing notes on community use, and to most of the information in the Cabinet records the Ministry severed, except for headings and sign off information. I find that s. 21 does not apply to information to which I determined s. 12 does not apply because that information was not supplied explicitly or implicitly in confidence.

## **ORDER**

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

1. Subject to para. 2 below, the Ministry is required to continue to withhold the information it has withheld under s. 12 of FIPPA.

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<sup>58</sup> Information in the business case report (the title of appendix 5) already disclosed to the applicant discloses that UBC is a party to the Letter of Intent.

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2. The Ministry is required to disclose the information highlighted in yellow in the records which accompany the Ministry's copy of this Order.
  3. The Ministry is required to disclose the portions of the disputed information that I have provided that I have highlighted in yellow before February 6, 2015, pursuant to s. 59 of FIPPA. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 23, 2014

**ORIGINAL SIGNED BY**

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Caitlin Lemiski, Adjudicator

OIPC File No.: F13-52367