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Order F14-56

MINISTRY OF COMMUNITY SPORT AND CULTURAL DEVELOPMENT

Caitlin Lemiski
Adjudicator

December 23, 2014

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Summary: The applicant requested records from the Ministry of Community Sport and Cultural Development related to the government's decision to contribute funding towards a National Soccer Development Centre at UBC. The Ministry withheld some information in responsive records stating that it is required to refuse to disclose the information, citing Cabinet confidences under s. 12 of FIPPA and harm to third party business interests under s. 21 of FIPPA. The Ministry also withheld a small amount of other information, stating that disclosure would be an unreasonable invasion of a third party's personal privacy under s. 22 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. Further, s. 22 requires the Ministry to refuse to disclose employment history information about a Ministry employee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12, . 21(1) and 22(1).

Authorities Considered: B.C.: Order F14-55, 2014 BC IPC 59 (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 F12-01, 2012 BCIPC 1 (CanLII); 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 by the applicant to the Ministry of Community Sport and Cultural Development (“the Ministry”) for “[t]he application, business case, evaluation, contract and approval letter”¹ regarding the government’s decision to contribute funding for a National Soccer Development Centre (“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 Finance (“Finance”), which I address in Order F14-55 that is issued concurrently to this order.²

[2] The Ministry responded by providing records to the applicant. Information is severed from some of these records. Records with severed information include an email from the Whitecaps to the Ministry, an email from Ministry staff to Finance staff, a business case report for the NSDC, a letter from the Whitecaps to the Ministry, a Treasury Board submission, and a briefing note. The Ministry severed parts of these records under s. 12 (Cabinet confidences) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).³ It also severed some of this information under s. 21 (disclosure harmful to business interests of a third party) and s. 22 (disclosure harmful to personal privacy).

[3] The applicant 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.⁴ The inquiry proceeded regarding the remaining information. All parties provided initial submissions, and the Ministry and the Whitecaps also made reply submissions.

ISSUES

1. Is the Ministry required to refuse access to information under s. 12(1)?
2. Is the Ministry required to refuse access to information under s. 21?
3. Is the Ministry required to refuse access under s. 22?

¹ Applicant’s request to the Ministry, submitted electronically.

² Order F14-55, 2014 BC IPC 59 (CanLII).

³ Public body’s letter of reply to the applicant.

⁴ Public body’s initial submissions at para. 1.05.

[5] The Ministry bears the burden of proof in this case with respect to ss. 12 and 21. In the case of s. 22, it is up to the applicant to prove that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.⁵

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.⁶ The NSDC was to facilitate the Whitecaps’ entry into Major League Soccer, provide new fields for community use, and attract major sports events.⁷ Ultimately, plans to build the NSDC in Delta did not proceed. In 2012, the Whitecaps identified UBC as a possible new site for the NSDC.⁸ The Whitecaps submitted a business case to the Ministry and requested funding.⁹ The Ministry asked the Treasury Board to approve a capital grant of \$17.5 million to UBC for the NSDC.¹⁰

[7] 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).¹¹

[8] Although the applicant stated in his request that funding for the NSDC had been announced, I do not have a copy of an announcement before me, therefore I do not know precisely what the Ministry disclosed.

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

[10] **Records in Dispute**—The records in dispute include a business case report for the NSDC, an August 31, 2012 letter from the Whitecaps to the Ministry (the “letter”), a Treasury Board submission, and a July 26, 2012 briefing note (“briefing note”) that were also in dispute in Order F14-55, which dealt with the applicant’s same request to a different public body. In this case, there is also an

⁵ See s. 57 of FIPPA.

⁶ Records at p. 28 (May 2, 2009 press release).

⁷ Page 73 of the records.

⁸ Page 68 of the records.

⁹ Page 4 of the records.

¹⁰ Page 72 of the records.

¹¹ Applicant’s request for records.

¹² Whitecaps’ initial submission at para. 8.

email from the Whitecaps to the Ministry and an email from Ministry staff to Finance staff that are in dispute.

Preliminary Matter

Late raising of the public interest override

[11] 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,¹³ 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.¹⁴ 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. 25.¹⁵ Therefore, I am not going to consider the applicant's submission with respect to s. 25 any further.

[12] I will now consider whether s. 12 applies to the records in dispute, then I will consider whether ss. 21 and 22 apply.

[13] **Cabinet Confidences**—Most of the records severed under s. 12 in this case are the same records that were also severed under s. 12 in the records before me that gave rise to Order F14-55. My analysis of s. 12 therefore often duplicates my analysis in that decision.

[14] 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.”¹⁶ The Ministry submits, and I accept, that the Treasury Board is a committee of Cabinet for the purposes of s. 12.¹⁷

¹³ Applicant's request for review.

¹⁴ OIPC Fact Report.

¹⁵ 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.)

¹⁶ *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57, (at para. 18) as quoted by former Commissioner Loukidelis in Order 02-38.

¹⁷ 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.

[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 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
- (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] As in Order F14-55, 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*,¹⁸ 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”

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

and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications.”¹⁹ 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 conventions of Cabinet solidarity and collective responsibility”.²⁰ 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?”²¹

[20] In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*,²² the BC Supreme Court reviewed OIPC Order F08-17.²³ 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 the substance of deliberations, either directly or by inference, s. 12 does not apply.

¹⁹ *Aquasource* at para. 41.

²⁰ *Aquasource* at para. 40.

²¹ *Aquasource* at para. 48.

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

²³ In that case, the Court also reviewed Order F08-18.

Analysis of s. 12 in this case

[22] **Records that are the same as in Order F14-55**—The Ministry applied s. 12 to parts of the business case report for the NSDC, the Treasury Board submission, the briefing note, and the letter. These same records were at issue in Order F14-55 and Finance applied the same severing in that case that the Ministry has applied here.²⁴

[23] **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, given to Treasury Board through the submission of [the] Treasury Board Submission.”²⁵

[24] 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 Ministry’s Sports Branch deposed that the business case report “provided the foundation for the drafting of the Treasury Board Submission.”²⁶ 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.

[25] 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.²⁷ 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

²⁴ Two pages of tables in the letter from the Whitecaps to the Ministry appeared in a different letter in Order F14-55, but they are the same pages of tables and they were severed the same here as that Order.

²⁵ Public body’s initial submission at para. 4.30.

²⁶ Affidavit of the Executive Director of the Ministry’s Sports Branch at para. 14.

²⁷ Order F09-26 at paras. 20-21.

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.

[26] 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 records that came before Cabinet. The evidence does not support a conclusion that disclosing this information could, even by inference, reveal the substance of Cabinet's deliberations.

[27] **The Treasury Board submission**—In the case of the Treasury Board submission,²⁸ the Ministry severed options and recommendations. The Executive Director of the Ministry's Sport Branch deposed that this record was "prepared for review and decision by Treasury Board and was submitted to Treasury Board staff."²⁹ The Ministry refers me³⁰ to submissions prepared by Finance for the inquiry that resulted in Order F14-55. That Ministry's submissions state that the Treasury Board Submission was submitted to the Treasury Board.³¹ Based on this evidence, I am satisfied that this information was submitted to Cabinet.

[28] 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."³²

[29] The submissions of Finance referred to by the Ministry are that this information "relates directly to the issues that were to be deliberated upon by [the] Treasury Board..."³³ It contains project details and proposed terms that the Treasury Board would have had to deliberate on before making a decision. I am

²⁸ At p. 72 of the records.

²⁹ Affidavit of the Executive Director of the Sport Branch at para. 17.

³⁰ Public body's initial submission at para. 4.19.

³¹ Public body's initial submission at para. 4.20.

³² Former Commissioner Flaherty in Order No. 48-1995 as quoted in Order 01-02 at para. 10.

³³ Submissions of the Ministry of Finance at para. 4.24, as referred to in the submissions of the Ministry at para. 4.19.

satisfied that disclosing most of this information would reveal the substance of Cabinet deliberations or allow accurate inferences about what Cabinet deliberated.

[30] 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.³⁴ 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.

[31] 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.

[32] **The briefing note**—The severed briefing note information includes policy considerations and recommendations related to whether to fund the NSDC. The Ministry refers me³⁵ to evidence sworn by the Executive Director of the Treasury Board staff who deposed that the briefing note was prepared by Treasury Board staff and was submitted to the Treasury Board.³⁶ 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.

[33] **The letter**—The letter is from the Whitecaps to MCSCD. 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".³⁷ The letter reveals the Whitecaps' thinking regarding community usage.³⁸ I am satisfied, based on evidence deposed *in camera* by the Executive Director of the Ministry's Sports Branch,³⁹ that disclosing the severed parts of this letter would reveal the substance of

³⁴ See para. 63 of Alberta Order F2013-23.

³⁵ Public body's initial submission at para. 4.19.

³⁶ See the affidavit of the Executive Director of the Treasury Board staff at para. 10. That affidavit was prepared for the inquiry into the applicant's request for the same records to Finance and resulted in Order F14-55.

³⁷ See p. 95 of the records.

³⁸ Information in the letter at p. 98 of the records, already disclosed to the applicant, states: "We trust this clarifies our commitment [to community usage]."

³⁹ See the affidavit of the Executive Director of the Ministry's Sport Branch at para. 19.

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.

[34] **The Ministry email**—The Ministry severed an email from Ministry staff to Finance staff.⁴⁰ The email contains information about a decision the Treasury Board made and actions the Ministry took or will take as a result of that decision. The Ministry submits that this information would reveal, either directly or by inference, the substance of the Treasury Board's deliberations.

[35] In Order F14-55, I decided that information about a Cabinet decision would reveal, by inference, the substance of Cabinet's deliberations. Consistent with my reasons in Order F14-55, which applied the reasoning set out by former Commissioner Loukidelis in Order F05-28, I find that s. 12(1) applies to the information the Ministry has severed in this email. There is also other information in the email that is about what actions the Ministry will take in relation to what Cabinet has decided. This information must also continue to be withheld under s. 12(1), because it is possible to discern, by inference, the substance of Cabinet's deliberations if this information were disclosed. Section 12(2) does not apply to this information because the purpose of the information is not to present background explanations or analysis.

Section 21

[36] **The business case report**—As in Order F14-55, 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.

[37] 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

⁴⁰ Page 94 of the records.

- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - ...
 - (iii) result in undue financial loss or gain to any person or organization ...

[38] 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.⁴¹

[39] In this case, 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.”⁴² 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.⁴³ The Whitecaps submit that s. 21 applies to tables the Ministry has severed, as well 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.⁴⁴

[40] 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.

[41] The Ministry submits that the information in the business case is commercial.⁴⁵ 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.

[42] Turning to whether the business case was supplied, the Ministry submits that the Whitecaps supplied the business case.⁴⁶ One of the records the Ministry has already disclosed to the applicant is a cover letter from the Whitecaps

⁴¹ Public body’s initial submissions at para. 4.48.

⁴² Public body’s initial submissions at para. 4.47.

⁴³ Public body’s initial submissions at para. 4.46.

⁴⁴ Whitecaps’ initial submission at para. 6.

⁴⁵ Public body’s initial submission at para. 4.39.

⁴⁶ Public body’s initial submission at para. 4.40.

supplying the business case to the Minister.⁴⁷ I find that the business case was supplied.

[43] In regards to whether the remaining information was supplied implicitly or explicitly in confidence, the Ministry's Executive Director of the Sport Branch, deposed 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.⁴⁸

[44] 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.⁴⁹

⁴⁷ Page 4 of the records.

⁴⁸ Affidavit of the the Executive Director of the Sport Branch at para. 16.

⁴⁹ Order 01-36 at para. 26.

[45] In this case, the Ministry has not supplied evidence supporting the Executive Director of the Sport Branch's belief that the Whitecaps and the Ministry 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 case 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,⁵⁰ 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, 3, 7, 9 and 10 of the Letter of Intent.

Section 22

[46] **The Whitecaps' email**—Section 22 requires public bodies to withhold the personal information of third parties if disclosing it would be an unreasonable invasion of their personal privacy. The Ministry is withholding part of a sentence in an email from the Whitecaps to Ministry staff. The Ministry submits that “[t]he information relates to employment leave taken by an employee.”⁵¹

[47] Under s. 57(2) of FIPPA, the burden is on the applicant to prove that disclosure would not be an unreasonable invasion of a third party's personal privacy. The applicant made no submissions regarding s. 22. Given the mandatory nature of s. 22 and the purpose of this section in protecting unreasonable disclosures of personal information, I have considered whether s. 22 applies.

[48] In Order F12-01, Senior Adjudicator McEvoy considered whether s. 22 applied to employment leave information. He summarized the application of s. 22 as follows:

Numerous orders have considered the application of s. 22, for example, Order 01-53.⁵² First, the public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party

⁵⁰ 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.

⁵¹ Public body's initial submission at para. 4.54.

privacy under s. 22(4). If s. 22(4) does not apply, then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy.⁵³

[49] In that case, Adjudicator McEvoy determined that the information was personal information and that none of the factors in s. 22(4) applied. He determined that there was a presumption against disclosing the personal information because it related to an individual's employment history as set out in s. 22(3)(d) of FIPPA, and that there were no relevant circumstances favoring disclosure of the information, therefore the public body was required to withhold it.

[50] I take the same approach here as in Order F12-01. In this case, the information is clearly personal information because it is about a named employee's leave. None of the factors in s. 22(4) apply. I have determined that s. 22(3)(d) creates a presumption against disclosure in this case because the information relates to this individual's employment history, and that there are no factors in s. 22(2) or otherwise that favour disclosure. I have determined that s. 22 applies and the Ministry is required to continue to withhold this information.

CONCLUSION

[51] I have determined that s. 12 applies to most of the severed information in the Treasury Board submission and the briefing note, except for subject headings as well as draft date and sign-off information. Section 12 also applies to severed information in a letter from the Whitecaps to the Ministry. I find s.12 applies to most of the information severed in the business case report except for parts of the table of contents and parts of the Letter of Intent. Section 12 also applies to information in an email from Ministry staff to Finance staff. 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. Section 22 applies to information in an email containing an employee's employment history information.

ORDER

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

⁵³ Order F12-01 at para. 34.

1. Subject to para. 2 below, the Ministry is required to continue to withhold the information it has withheld under ss. 12 and 22 of FIPPA.
2. The Ministry is required to disclose the information highlighted in yellow in the records which accompany the Ministry's copy of this Order.

[53] 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

Caitlin Lemiski,
Adjudicator

OIPC File No.: F13-52370