



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F15-48

MINISTRY OF JOBS, TOURISM AND SKILLS TRAINING

Caitlin Lemiski
Adjudicator

September 3, 2015

CanLII Cite: 2015 BCIPC 51

Quicklaw Cite: [2015] B.C.I.P.C.D. No. 51

Summary: The applicant requested records from the Ministry of Jobs, Tourism and Skills Training related to the provincial government's decision to fund the Times of India Film Awards. The Ministry withheld some information in the responsive records, including information from a contract, citing Cabinet confidences under s. 12 of FIPPA. The adjudicator determined that the Ministry is required to withhold some information under s. 12 because disclosing it would reveal the substance of Treasury Board deliberations, but that the remaining information must be disclosed because s. 12 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(5); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: **B.C.:** Order 8-1994, 1994 CanLII 1093 (BC IPC); Order 33-1995, [1995] B.C.I.P.C.D. No. 4 (QL); Order 00-39, 2000 CanLII 14404 (BC IPC); Order 01-02, 2001 CanLII 21556 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC); Order F07-11, 2007 CanLII 30396 (BC IPC); Order F08-17, 2008 CanLII 57360 (BC IPC); Order F09-26, 2009 CanLII 66959 (BC IPC); Order F10-23, 2010 BCIPC 34 (CanLII); Order F14-51, 2014 BCIPC 55 (CanLII); Order F14-55, 2014 BCIPC 59 (CanLII).

Cases Considered: *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA); *Babcock v. Canada (Attorney General)*, [2002] 3 SCR 3, 2002 SCC 57 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII).

INTRODUCTION

[1] This inquiry involves a request to the Ministry of Jobs, Tourism, Skills and Training (the “Ministry”) for records related to the provincial government’s decision to fund the 2013 Times of India Film Awards (“Awards”).¹

[2] The Ministry withheld some information in records that were responsive to the applicant’s request under s. 12 (Cabinet and local public body confidences), s. 13 (policy advice or recommendations), and s. 17 (disclosure harmful to the financial or economic interests of a public body) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The applicant was not satisfied with the Ministry’s response to his request. 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 so this matter proceeded to inquiry.

[3] After the OIPC issued the Notice of Inquiry, the Ministry released some of the information it was withholding.² For the remaining withheld information, the Ministry is only relying on s. 12 (Cabinet and local public body confidences) of FIPPA.³

[4] The Ministry made initial and reply submissions to the inquiry, and the applicant made initial submissions.

ISSUE

[5] The issue in this inquiry is whether the Ministry must refuse to disclose information under s. 12(1) of FIPPA. The Ministry has the burden of proof, under s. 57(1) of FIPPA, to establish that s. 12(1) requires it to refuse to disclose the requested information.

DISCUSSION

[6] **Background** — In June 2012, the Times Group, a media company, approached the British Columbia government with a proposal to host the Awards in BC.⁴ Treasury Board agreed to provide funding to hold the event. Consequently, the Ministry entered into a contract with BCCL International

¹ Orders F15-48 (Ministry of Jobs, Tourism and Skills Training), and F15-47 (Ministry of Finance), each relate to an applicant’s request for records related to the Times of India Film Awards.

² Public body’s initial submission at para. 2.03.

³ Public body’s initial submission at para. 3.02.

⁴ Public body’s reply submission at para. 9. Information released to the applicant on p. 3 of the Treasury Board Submission in dispute at this inquiry states that the Times Group is the common name given to Bennett Coleman and Company Limited.

Events Private Limited, part of the Times Group, to hold the Awards.⁵ In January 2013, the applicant submitted his request to the Ministry for records related to the government's decision to fund the Awards.

[7] **Records in Dispute** — There are 168 pages of records in dispute at this inquiry. They are as follows:

1. A Treasury Board submission with eight appendices. One of the appendices is a draft contract (“Unsigned Contract”),⁶ and another contains five undated “documents of understanding” (“Undated Documents of Understanding”);⁷
2. A letter containing details of Treasury Board's decision (“Decision Letter”);
3. A signed and dated contract between the Ministry and BCCL International Events Private Limited (“Signed Contract”);
4. Five dated documents of understanding (“Dated Documents of Understanding”).⁸

[8] The Ministry has severed substantial amounts of information in these records, citing s. 12.

[9] **Cabinet Confidences (s. 12)** — Section 12(1) states:

- 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.

[10] In *Babcock v. Canada (Attorney General)*, 2002 SCC 57, the Supreme Court of Canada stated that the purpose of exempting Cabinet deliberations from disclosure under access to information legislation is 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.”⁹

⁵ The name of the company has already been disclosed to the applicant. Page 104 of the records in dispute and the Ministry's reply submission at paras. 8 and 9.

⁶ The public body has already disclosed in its submissions that a draft copy of the contract was included as an attachment to the Treasury Board Submission (para. 4.36 of the public body's initial submissions).

⁷ Public body's initial submission at para. 4.01. The public body describes the documents of understanding attached to the Treasury Board submission as being undated.

⁸ The version date appears at the footer of each page of the Dated Documents of Understanding.

⁹ *Babcock v. Canada (Attorney General)*, 2002 SCC 57, (at para. 18) as quoted in Order 02-38.

[11] In *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA), the British Columbia Court of Appeal determined the appropriate test for questions under s. 12(1) is: Does the information sought to be disclosed form the basis for Cabinet deliberations?¹⁰

[12] In this case, recognizing the purposes of protecting Cabinet confidentiality, I must therefore consider whether the information the Ministry is withholding formed the basis for Cabinet deliberations. Previous Orders have said that in some circumstances, this will be clear from information that has been submitted directly to a Cabinet committee, but in other cases there may be inferential evidence or other surrounding circumstances that confirm that disclosing the information at issue would “reveal” the substance of deliberations.¹¹

[13] **Position of the parties** — The Ministry’s position is that s. 12(1) requires the Ministry to withhold the information in dispute, as disclosing it would reveal the substance of Treasury Board deliberations.¹²

[14] The applicant submits that the Ministry is using s. 12(1) as a means of withholding information that the Ministry would otherwise be required to disclose under FIPPA, such as information in a contract.¹³

[15] **Analysis** — I will now consider whether s. 12(1) requires the Ministry to continue to withhold the disputed information.

Designation as an Executive Committee

[16] The Ministry submits that Treasury Board is a committee of the Executive Council designated under s. 12(5) of FIPPA.¹⁴ Section 12(5) states that the Lieutenant Governor in Council by regulation may designate a committee for the purposes of s. 12(1). I agree that Treasury Board has this designation, which means that it is a committee of Executive Council within the meaning of s. 12.

Records submitted to Treasury Board

[17] The Ministry’s Executive Director, Strategic Initiatives, Tourism and Small Business Division (“Executive Director, Strategic Initiatives”) was involved in

¹⁰ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) at para. 48.

¹¹ In Order F10-23, 2010 BCIPC 34 at para 16; Order F09-26, 2009, CanLII 66965 at para. 23.

¹² Public body’s initial submission at para. 4.44.

¹³ Applicant’s initial submission at para. 30.

¹⁴ Public body’s initial submission at para. 4.15. The Committees are listed in s. 1 of the *Committees of the Executive Council Regulation*. In this Order, my references to Cabinet include Treasury Board.

drafting the Treasury Board submission. She deposes that the Undated Documents of Understanding and the Unsigned Contract were attached to the Treasury Board submission, and that all three were put before Treasury Board for consideration.¹⁵

[18] The Executive Director of the Treasury Board Staff (“Executive Director, Treasury Board Staff”) deposes that the Chair of Treasury Board (the “Chair”) reviewed the Undated Documents of Understanding, the Unsigned Contract, and the Treasury Board submission on November 27, 2012 at a Treasury Board minor meeting and made a decision called a minor minute. The minor minute was then presented to the full Treasury Board, and the full Treasury Board ratified the Chair’s decision on November 28, 2012.”¹⁶

[19] Based on this evidence, I am satisfied that the Treasury Board submission and appendices (which include the Undated Documents of Understanding and the Unsigned Contract) were submitted to the Chair at a minor meeting. I consider the process of submitting records to the Chair at a minor meeting to be submitting records to Treasury Board for the purposes of s. 12.¹⁷ Therefore, I am satisfied that these records were submitted to Treasury Board.

[20] In considering whether s. 12(1) requires the Ministry to withhold information severed from records submitted to Treasury Board, I have considered the following from Order 33-1995, where former Commissioner Flaherty determined that information severed from a Cabinet submission was “clearly” within the scope of s. 12(1).¹⁸ He made the following statement, which was subsequently referred to with approval by the Court in *Aquasource*:

...a Cabinet submission, by its nature and content, comes within the ambit of s. 12(1).

It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal' the substance of Cabinet deliberations[,] because it would permit the drawing of accurate inferences with respect to the deliberations (Argument for the Public Bodies, pp. 9-10).¹⁹

[21] However, the British Columbia Court of Appeal in *Aquasource* also quoted Commissioner Flaherty’s assertion in Order 8-1994 that “I do not automatically

¹⁵ Affidavit of the Ministry’s Executive Director, Strategic Initiatives, Tourism and Small Business Division at paras. 4 and 8.

¹⁶ Affidavit of the Executive Director, Treasury Board Staff at paras. 9, 10 and 13 and the public body’s initial submission at para. 4.25.

¹⁷ See Order F14-51 2014 BCIPC 55 (CanLII), at paras. 22-23, citing with approval Order F07-11, 2007 CanLII 30396 (BC IPC).

¹⁸ Order 33-1995 at p. 8.

¹⁹ Order 33-1995 at p. 6, as quoted in *Aquasource* at para. 48.

assume that Cabinet Submissions in all cases reflect the “substance of Cabinet deliberations” without some at least inferential evidence.”²⁰

[22] Taken together, I conclude that these excerpts from Order 33-1995 and Order 8-1994, as quoted in *Aquasource*, mean that records submitted to Cabinet will normally be protected from disclosure under s. 12(1), so long as there is at least some inferential evidence that disclosure would reveal the substance of Cabinet deliberations.

[23] In this case, I am satisfied that most of the information severed from the Treasury Board submission and appendices (which include the Undated Documents of Understanding and the Unsigned Contract) formed the basis for Treasury Board deliberations and must be withheld under s. 12(1). The information severed includes details related to funding and hosting the Awards, which Treasury Board considered as part of its decision making process.²¹ In these circumstances, disclosing this information would allow someone to make accurate inferences about the substance of Treasury Board deliberations.

[24] However, consistent with the findings made in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*,²² I have determined that s. 12(1) does not apply to some of the titles, headings, and basic topic information the Ministry severed from the Treasury Board submission and appendices. It would not be possible to understand what the deliberations of Treasury Board were from reading this information. I have highlighted this information in the copy of the records that I am providing to the Ministry with this order.

Records not submitted to Treasury Board

The Decision Letter

[25] The Decision Letter is from the Chair of the Treasury Board to the Minister. The Ministry has disclosed the part of the Decision Letter that reveals that Treasury Board decided to approve funding to host the Awards, but it has severed the part of the Decision Letter following the words “subject to”. The Ministry submits that s. 12(1) applies to this information because it would

²⁰ *Aquasource* at para. 36 quoting from Order 8-1994 at p. 10.

²¹ Public body's initial submission at paras. 4.18 and para. 9 of the affidavit of the Ministry's Executive Director, Strategic Initiatives, Tourism and Small Business Division, which refers to the Decision Letter at p. 103 of the disputed records.

²² *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), para. 96-100. In that case, the British Columbia Supreme Court affirmed the Adjudicator's decision in Order F08-17 that disclosing agenda item headings (in that case, of Cabinet Committee meetings) did not reveal the substance of deliberations of those meetings.

reveal “the very substance” of Cabinet deliberations.²³ Previous orders have determined that s. 12(1) may still apply to information in a record that was not submitted to Cabinet if disclosing the information would reveal information that is protected by s. 12(1).²⁴

[26] In this case, the Executive Director, Treasury Board Staff deposes that the Decision Letter reflects Treasury Board’s approval of the decision at issue.²⁵ Beyond that, the Ministry does not provide evidence to support its assertion that disclosing the severed parts of the Decision Letter would reveal the substance of Treasury Board deliberations.

[27] In determining whether s. 12(1) applies to the information withheld from the Decision Letter, I have considered the severed parts of the Decision Letter as a form of evidence.²⁶ The details of Treasury Board’s decision (which are revealed by the withheld information) in this case are evidently the product of deliberations leading to that decision. Therefore I am satisfied that disclosing the information in the Decision Letter that the Ministry has severed following the words “subject to” would reveal the substance of Treasury Board’s deliberations. For these reasons, I find that the Ministry is required to continue to withhold the information it has severed from the Decision Letter. This is consistent with Order F05-28, where former Commissioner Loukidelis found that s. 12(1) applied to records submitted to Treasury Board and records originating from the Chair of the Treasury Board, which contained information about Treasury Board decisions.²⁷

The Signed Contract

[28] The Ministry has withheld parts of the Signed Contract describing what services the contractor will provide and what the contractor will be paid.²⁸ The Ministry has also severed the titles of several Documents of Understanding that are listed in an Appendix to the Signed Contract. The Ministry submits that a draft version of the Signed Contract (the Unsigned Contract) was part of a Treasury Board submission.²⁹ The Ministry does not submit that the Signed Contract was ever put before Treasury Board.

[29] The Ministry refers to Order F09-26³⁰ in support of its position that information in a record not submitted to Cabinet may still be protected under

²³ Public body’s initial submissions at para. 4.33.

²⁴ See Order 01-02, 2001 CanLII 21556 (BC IPC); Order F14-55, 2014 BCIPC 59 (CanLII).

²⁵ Affidavit of the Executive Director, Treasury Board Staff at para. 14.

²⁶ See Order 00-39, 2000 CanLII 14404 (BC IPC) at p. 4.

²⁷ Order F05-28, 2005 CanLII 30678 (BC IPC) at paras. 11 to 13.

²⁸ Public body’s initial submission at para. 4.38.

²⁹ Affidavit of the Executive Director, Strategic Initiatives, at para. 8.

³⁰ Order F09-26, 2009 CanLII 66965 (BC IPC).

s. 12(1).³¹ In that case, the Ministry of Transportation and Infrastructure withheld a business case for a bridge project that was later used as a basis for developing several records that were submitted to Treasury Board. The Ministry argued that disclosing the business case would therefore allow someone to draw accurate inferences about the contents of records submitted to Treasury Board that form the basis of Treasury Board's deliberations.³²

[30] This case is different than Order F09-26 in at least two respects. First, the Ministry does not say whether the information in the Unsigned Contract was used as a basis for developing information severed from the Signed Contract.

[31] Second, in this case, the Ministry is effectively arguing that accurate inferences about Cabinet deliberations can be made using information in contracts that postdate Cabinet meetings. If the test in *Aquasource* were interpreted in this way, then any contract that had ever passed over the Cabinet table could conceivably be prohibited from public disclosure under FIPPA for the purpose of protecting Cabinet confidences. In my view, this result is inconsistent with the test in *Aquasource*, which requires the information “form” the basis of Cabinet deliberations. Even assuming that the Unsigned Contract was used as a basis for the Signed Contract, the Signed Contract was formed after Cabinet deliberated on the Unsigned Contract. As such, there are no inferences that could reliably or accurately be drawn from the Signed Contract about what Cabinet deliberated on regarding the Unsigned Contract.

[32] A distinction must be drawn here between the information that the Ministry seeks to protect from the Decision Letter and the information in the Signed Contract. Both records were created after Cabinet deliberated on the Treasury Board submission. The difference is that the information in the Decision Letter directly reveals what Cabinet deliberated on because it is a narrative of what took place at a Treasury Board meeting. By contrast, the information withheld from the Signed Contract would not directly reveal to the applicant what took place at the Treasury Board meeting, and it is not possible in this case to make accurate inferences about what information formed the basis of Cabinet deliberations from reading information in a contract that was formed after those deliberations took place.

The Dated Documents of Understanding

[33] The Ministry has severed the entire contents of the Dated Documents of Understanding under s. 12. The Ministry does not argue that these records were put before Cabinet. The Ministry argues that disclosing the Dated Documents of Understanding would allow someone to make accurate inferences about the substance of Cabinet deliberations because they contain “advice,

³¹ Public body's initial submission at paras. 4.41 and 4.42.

³² Order F09-26, 2009 CanLII 66959 (BC IPC), at para. 20.

recommendations, and options available to the Province, that were submitted to Treasury Board for its consideration.”³³

[34] The Ministry does not say what information in the Dated Documents of Understanding was submitted to Treasury Board or in what way Treasury Board would have known about this information. The Ministry also does not say that the Dated Documents of Understanding were based on the Undated Documents of Understanding (which were appended to the Treasury Board submission). Even if they were, it is evident from my review of the records that the Dated Documents of Understanding were finalized after Cabinet deliberated on the Treasury Board submission.

[35] The Ministry has not shown that the information severed from the Dated Documents of Understanding formed the basis of Treasury Board deliberations, or how disclosing this information would reveal the substance of Treasury Board deliberations, either directly or by inference. Therefore, I find that s. 12(1) does not apply to it.

Section 12(2)(c) Exceptions

[36] Section 12(2) provides exceptions to s. 12(1) where a public body must not withhold information under s. 12(1). The applicant contends that the Ministry is applying s. 12(1) too broadly and that it has not adequately considered the exceptions to it in s. 12(2)(c).³⁴ The Ministry argues that s. 12(2)(c) does not apply.³⁵

[37] Section 12(2)(c) is as follows:

- (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.

[38] In this case, the Ministry has disclosed that Treasury Board approved funding to host the Awards and the Awards have already been held, therefore the decision has been made public and it has been implemented.

³³ Public body’s initial submission at para. 4.40.

³⁴ Applicant’s initial submissions at para. 37.

³⁵ Public body’s initial submission at para. 4.05.

[39] The key question in this case, then, in regards to s. 12(2)(c) is whether the purpose of the information I have found reveals the substance of deliberations is to present background explanations or analysis to Cabinet or any of its committees for their consideration in making a decision.

[40] In considering whether s. 12(2)(c) applies, I have followed the approach set out by former Commissioner Flaherty in Order 48-1995. He stated:

..."Background explanations" include, at least, everything factual that Cabinet used to make a decision. "Analysis" includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it. Records prepared for submission to Cabinet should not be presumed to automatically reveal the substance of deliberations and must be considered for release to an applicant under section 12(2)(c).³⁶

[41] On appeal of that Order, the Court in *Aquasource* affirmed the former Commissioner's interpretation:

...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. ...³⁷

[42] In this case, I find that the purpose of some of the information that I found reveals the substance of deliberations is clearly not to present background explanations or analysis. For example, the information severed from the Decision Letter contains a series of "subject to" conditions of Treasury Board's decision to fund the Awards. This is information communicating Cabinet's decision to the Ministry, not information prepared for the purpose of providing background analysis or explanations. Further, other information severed from the appendices to the Treasury Board submission, including the Unsigned Contract and the Undated Documents of Understanding, is not background information. That is because it is detail about issues directly related to funding and hosting the Awards. I therefore find that s. 12(2)(c) does not apply to this information.

³⁶ No. 48-1995 [1995] B.C.I.P.C.D. No. 21, at p. 13.

³⁷ *Aquasource* at para. 50.

[43] In other instances, the disputed information is analysis of background or explanations, but it is so interwoven with s. 12(1) information I find that it cannot be reasonably severed. For example, there is information withheld in the “Background” section of the Treasury Board submission³⁸ related to funding and hosting the Awards, but this information is directly intertwined with policy considerations. The result is that none of the information can be disclosed without revealing the substance of Treasury Board’s deliberations.

CONCLUSION

[44] I have determined that s. 12(1) requires the Ministry to continue to withhold most of the information it severed from the Treasury Board submission and appendices because disclosure would reveal the substance of Cabinet deliberations. However, I have determined that s. 12(1) does not apply to some topic headings and titles in the appendices because they only reveal the subject of what Treasury Board discussed, not the substance of Treasury Board’s deliberations, either directly or by inference. I also find that disclosing the information withheld from the Decision Letter following the words “subject to” would reveal the substance of Treasury Board’s deliberations, so s. 12(1) applies. In addition, I have determined that s. 12(1) does not require the Ministry to withhold the severed parts of the Signed Contract or the Dated Documents of Understanding because the Ministry has not provided evidence that disclosing this information would reveal the substance of Treasury Board deliberations, either directly or by inference. Finally, I have also determined that none of the exceptions in s. 12(2) apply to the information to which I have determined s. 12(1) applies.

ORDER

[45] For the reasons given above, under s. 58 of FIPPA, I order that:

1. Subject to para. 2 below, the Ministry is required to withhold the information it has withheld under s. 12 of FIPPA.
2. The Ministry is required to disclose the portions of the disputed information that I have highlighted in yellow on or before October 19, 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.

September 3, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-53161

³⁸ At p. 3 of the disputed records.