



Order F21-36

## MINISTRY OF FINANCE

Erika Syrotuck  
Adjudicator

August 10, 2021

CanLII Cite: 2021 BCIPC 44  
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 44

**Summary:** The applicant requested records from the Ministry of Finance (Ministry) relating to two meetings on specific dates. The Ministry withheld three sets of presentation slides in their entirety under s. 12(1) (Cabinet and local public body confidences). The adjudicator found that s. 12(1) applied to most, but not all, of the information in dispute.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss.12(1), and 12(2)(c).

### INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Finance (Ministry) for records from and about meetings held on two specific dates involving the Minister, the Deputy Minister, another named individual and “others”. In response, the Ministry withheld the responsive records in their entirety under s. 12(1) (Cabinet and local public body confidences).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry’s decision. Mediation did not resolve the issues and the matter proceeded to inquiry.

### ISSUE

[3] The issue in this inquiry is whether the Ministry is required to refuse to disclose the information at issue under s. 12(1) of FIPPA. The Ministry has the burden to prove that s. 12(1) applies to the information in dispute.<sup>1</sup>

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<sup>1</sup> Section 57(1) of FIPPA.

## DISCUSSION

### *Records at issue*

[4] The records at issue are three sets of presentation slides. One set is about one topic, and the remaining two are about a different topic. The Ministry has withheld all of the information in each set of slides.

### *Section 12(1) – cabinet confidences*

[5] Section 12(1) of FIPPA requires a public body to refuse to disclose 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.

[6] Section 12(2) states that subsection (1) does not apply to:

(a) information in a record that has been in existence for 15 or more years,

(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(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.

[7] The purpose of s. 12(1) is to widely protect the confidence of Cabinet communications.<sup>2</sup> Explaining the rationale for protecting cabinet confidences, the Supreme Court of Canada has said 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>3</sup>

[8] I will first decide if the requirements of 12(1) are met before turning to whether any circumstances in s. 12(2) apply. To satisfy s. 12(1), the information

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<sup>2</sup> *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para 41.

<sup>3</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para. 18.

at issue, if disclosed, would have to reveal the substance of deliberations of the Executive Council or any of its committees.

*Committee of the Executive Council*

[9] The Ministry submits that the presentations at issue were prepared for the then Minister to present policy proposals to the Priorities and Planning Committee of Cabinet at a June 15, 2016 meeting.<sup>4</sup>

[10] As s. 12(1) only applies to the Executive Council or any of its committees, I must first determine whether the Priorities and Planning Committee is a Committee of the Executive Council under s. 12(1).

[11] Under s. 12(5), the Lieutenant Governor in Council may designate a committee for the purposes of s. 12.

[12] The Ministry submits that, at the time the records at issue were created, the Priorities and Planning Committee was designated as a committee for the purposes of s. 12 under the *Committees of the Executive Council Regulation*<sup>5</sup> (Regulation). The Ministry says that it is not necessary for a committee to be designated at the time of the access request, only at the time the records were created.<sup>6</sup>

[13] I confirm that, under the Regulation, the Priorities and Planning Committee was designated as a committee for the purpose of s. 12 at the time the records were created. In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, the BC Supreme Court concluded that s. 12(1) protection is not lost if the designation is later repealed.<sup>7</sup>

*Section 12(1) – substance of deliberations*

[14] Having found that the Priorities and Planning Committee was, at the relevant time, a Committee of the Executive Council, I turn to whether the information in dispute would reveal the substance of deliberations.

[15] In the context of s. 12(1), the phrase “substance of deliberations” refers to the body of information that the Executive Council or any of its committees considered (or would consider in the case of submissions not yet presented) in making a decision.<sup>8</sup>

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<sup>4</sup> Ministry's initial submissions at para. 25. See also Affidavit of the Senior Executive Director of the Policy and Legislation Division, Ministry of Finance at para. 8

<sup>5</sup> BC Reg 229/2005, s. 1(n).

<sup>6</sup> Ministry's initial submissions at para. 26 citing *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 112 at paras. 90-92.

<sup>7</sup> 2011 BCSC 112 at para. 90.

<sup>8</sup> *Aquasource*, *supra* note 4 at para. 39.

[16] The Ministry submits that the presentation slides would reveal the substance of deliberations. In support of this argument, the Ministry provided affidavit evidence from the Senior Executive Director of the Policy and Legislation Division, Ministry of Finance (Senior Executive Director) and the Records Management Officer, Cabinet Operations for the Office of the Premier (Records Management Officer).

[17] The Senior Executive Director says that they attended the Priorities and Planning Committee meeting on the date in question, and at the meeting, the Minister presented the slides at issue.<sup>9</sup> The Senior Executive Director says that the committee then deliberated on the policy proposals contained in the presentation slides.<sup>10</sup>

[18] The Records Management Officer says that they reviewed two records of decision and each one references policy decisions related to each of the topics of the presentation slides.<sup>11</sup> The Records Management Officer also says that both records of decision refer to a presentation on the second topic on the date in question.<sup>12</sup>

[19] I understand that the presentation slides at issue are not the finalized versions submitted to the Priorities and Planning Committee. The Ministry submits that the records at issue in this inquiry are virtually identical to the final version of the presentation slides.<sup>13</sup> The Records Management Officer states that the changes are to the background design and a dollar figure.<sup>14</sup> Based on this evidence, I accept that the presentation slides at issue are nearly identical to the final versions presented to the Priorities and Planning Committee.

[20] I am satisfied that all three sets of slides contain information that formed the substance of deliberations of the Priorities and Planning Committee. Specifically, I am persuaded by the evidence of the Senior Executive Director that they attended the committee meeting and that the committee deliberated about the content of the presentations.

[21] Although not raised by the parties, I have considered whether disclosing the titles and headings on the presentation slides would reveal the substance of

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<sup>9</sup> Affidavit of the Senior Executive Director of the Policy and Legislation Division, Ministry of Finance at paras. 11 and 12.

<sup>10</sup> *Ibid.* at para. 13.

<sup>11</sup> For clarity, one record of decision references one topic and the second record of decision references the other. See Affidavit #1 of the Records Management Officer, Cabinet Operations, Office of the Premier at paras. 20 and 21.

<sup>12</sup> Affidavit #1 of the Records Management Officer, Cabinet Operations, Office of the Premier at para. 22.

<sup>13</sup> Ministry's initial submissions at para. 28.

<sup>14</sup> *Ibid.* at paras. 15 and 16.

deliberations of the Committee. Past orders have said that s. 12(1) does not apply to titles and other general information about the topics of discussion.<sup>15</sup> In my view, the vast majority of the headings on each slide would reveal the substance of deliberations.

[22] However, I am not satisfied that disclosing the balance of the headings, the title page for each set of slides and the slide numbers would reveal the substance of deliberations. The titles of the sets of presentation slides only reveal the general topics of discussion. The balance of the headings do not reveal the substance of deliberations because they are generic and lacking in detail. I do not see how the slide numbers could reveal the substance of deliberations. As a result, I find that s. 12(1) does not apply to this information.

*12(2)(c) - Background analysis*

[23] As noted above, s. 12(2) outlines circumstances where s. 12(1) does not apply. Section 12(2)(c) is at issue in this inquiry.

[24] Section 12(2)(c) says that 12(1) does not apply where the purpose of the information is to provide background explanations or analysis to the Executive Council or its committees, and one of the criteria (i) through (iii) are met.

[25] “Background explanations” include everything factual that Cabinet used to make a decision, and “analysis” includes discussion about the background explanations but not analysis of policy options presented to Cabinet.<sup>16</sup> Section 12(2)(c) does not apply to background explanations or analysis interwoven with the substance of deliberations.<sup>17</sup>

[26] The Ministry submits that the background explanations and analysis are inextricably interwoven with the policy proposals.<sup>18</sup>

[27] The applicant says that the Ministry is applying s. 12 too broadly, specifically that the Ministry does not appear to have considered whether the information at issue is truly background explanation or analysis under s. 12(2)(c).<sup>19</sup>

[28] I have reviewed the information in dispute and in my view, the purpose of the vast majority of the information in dispute is clearly to present an analysis of policy options. There is some information that is introductory or conclusory, but it

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<sup>15</sup> For example, Order F19-17, 2019 OIPC 19 at para. 48.

<sup>16</sup> Order 48-1995, BCIPD No. 21 at para. 13. This approach was confirmed by the BC Court of Appeal in *Aquasource supra* note 4.

<sup>17</sup> *Aquasource supra* note 4 at para. 50.

<sup>18</sup> Ministry’s initial submissions at para. 33.

<sup>19</sup> Applicant’s submissions at para. 13.

is closely tied to the policy options. In short, I find that none of the information is background explanations or analysis.

[29] I note that the Ministry and applicant did make arguments on whether the criteria (i) through (iii) have been met. However, given my finding that none of the information is background analysis or explanations, I decline to discuss them.

[30] In summary, s. 12(2) does not apply to the information in dispute.

## **CONCLUSION**

[31] For the reasons given above, under s. 58 of FIPPA,

1. I require the Ministry to refuse access, in part, to the records in dispute under s. 12(1), subject to item 2 below.
2. I require the Ministry to give the applicant access to the highlighted information in the copy of the records I have provided along with this order.
3. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described in item 2 above.

[32] Under s. 59, the Ministry of Finance is required to comply with this order by September 22, 2021.

August 10, 2021

## **ORIGINAL SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: F16-67888