

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 85-1996
February 26, 1996**

INQUIRY RE: A refusal by the Office of the Premier to disclose Cabinet records related to Roberts Bank and the Boundary Bay area

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on December 15, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by Karl Friedmann of PolicyWorks (the applicant) of a decision by the Office of the Premier (the public body) to deny access under sections 12, 16, and 17 of the Act to portions of Cabinet records concerning Roberts Bank Lands, Roberts Bank Backup Lands, or Roberts Bank Provincial Farmland, with the exception of any portions in those records related to the Vancouver Ports Corporation. In general, these parcels of land are located in and around the Corporation of Delta, south of the Vancouver airport. The applicant also asked me to consider whether the Office of the Premier met its statutory obligation to the applicant in its efforts to search for relevant records.

The applicant submitted a request to the Office of the Premier for records providing background information and analysis concerning the B.C. Harbours Board, Roberts Bank Lands, Roberts Bank Backup Lands, or the Roberts Bank Provincial Farmland for the period 1980 to 1994. The Office of the Premier first disclosed a series of relevant Cabinet records from the years 1990 to 1993. It later disclosed a second set of records from the period 1978 to 1981. This inquiry concerns the exceptions applied to the first set of records only and the adequacy of the search for records during the entire request and review processes.

2. Issues under review

This inquiry originally concerned the application of sections 12(1), 16(1), and 17(1) of the Act to portions of Cabinet records related to Roberts Bank and the B.C. Harbours Board. But, in his submission, the applicant only contested certain section 12 severances. This inquiry

also considers whether or not the Office of the Premier conducted an adequate search for the requested records.

The relevant sections of the Act read as follows:

Cabinet confidences

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

(2) Subsection (1) does not apply to

...

- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
 - (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.

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part thereof. In this case, the Office of the Premier has to prove that the applicant has no right of access to the information in dispute under section 12.

3. The context of this case and the records in dispute

The context of this case goes back almost thirty years when the government, through the B.C. Harbours Board, expropriated land in Delta for various purposes of economic development. When a good part of this reserve land was not used in this manner, it was put in a land reserve and then leased back to the original owners. When the applicant in this case was the first Ombudsman of the province, some of these landowners complained to him. After an investigation, he recommended that the government return the unused land, but the government refused. In 1995 the government changed the terms of the leases from one year to twenty, with a ten-year renewal option. (Submission of the Office of the Premier, pp. 6, 7)

The records in dispute are certain severed portions of extracts of minutes of the meetings of various Cabinet committees and other related Cabinet records for the period February 1990 to June 1993. The general subject matter of the records is Roberts Bank and the Boundary Bay area.

The records are numbered 1 through 19 in a list prepared by the Office of the Premier and sent to the applicant on July 26, 1995. However, items 11, 12, 13, 15, and 16 are not at issue. The actual records in dispute are discussed further below in the context of the four specific severances that the applicant finally chose to contest at the inquiry stage.

4. The Office of the Premier's case

I discuss the general and specific arguments of the Office of the Premier at appropriate points in this order.

5. The applicant's case

The applicant is not convinced that he has received all of the Cabinet records that he has requested. He has not received material for certain time periods, although he admits the possibility that none exist:

Support for the Applicant's expectation that the issue of privatization or re-sale of the expropriated lands was considered by Cabinet or a Cabinet committee is based on the belief that such an important change of policy would not occur unless approved by Cabinet or a Cabinet committee. (Submission of the Applicant, p. 5)

I discuss below the submissions of the applicant on the application of specific sections of the Act and on specific severances.

6. Discussion

Section 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.

The purpose of this mandatory exception, to protect the "substance of deliberations" of Cabinet, is straightforward. I have considered it previously in Order No. 33-1995, February 2, 1995, p. 5 (the definition and scope of a Cabinet "submission") and No. 48-1995, July 7, 1995, p. 9 (the meaning of the "substance of deliberations.") (See Submission of the Office of the Premier, pp. 8-10)

The Ministry argues in this particular case that in "some circumstances, factual information and the emphasis given to that information could implicitly reveal the advice or policy considerations provided in the record, thereby revealing the substance of deliberations. We submit that such is the case in this inquiry." (Submission of the Office of the Premier, paragraph 5.21) In my Order No. 48-1995, p. 10, I agreed that disclosure of a record would "reveal" the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of those deliberations"

The applicant has, in fact, not contested, or even argued, the application of this section to certain severed material. (Submission of the Applicant, p. 6)

Section 12(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 have discussed the meaning of “background explanations or analysis” in Order No. 33-1995, p. 4, and Order No. 48-1995, p. 11. Applying section 12(2), the Office of the Premier has disclosed almost one-half of the records in dispute. It argues that: “Revealing any of the other information would reveal the substance of deliberations of cabinet.” (Submission of the Office of the Premier, paragraphs 5.24-5.26)

The applicant emphasizes that this section does not exempt Cabinet submissions themselves:

Cabinet submissions precede Cabinet deliberations. Deliberations may or may not follow the Cabinet submission. It is conceivable that Cabinet submissions are not discussed at all by Cabinet or a Cabinet committee. We do not know and it probably varies from case to case and from time to time. As the writing of a Cabinet submission precedes Cabinet deliberations, the Cabinet submission should not be presumed to reveal something that had not occurred as yet at the time the Cabinet submission was written. The claim that a Cabinet submission or parts of it would reveal the substance of Cabinet deliberations therefore requires proof in each specific instance. (Submission of the Applicant, p. 7)

I have applied section 12(2) below to the actual severances in dispute. I have especially kept in mind below the distinction that I sought to establish in Order No. 48-1995, p. 12 between policy considerations and “background explanation and analysis.”

The perceived interest of the applicant

The Office of the Premier believes that the applicant is primarily interested in the government’s decision not to return the land in controversy to private ownership. It states:

That question is not addressed in the Record. This is to say, therefore, that if the Record was released in its entirety, which is not possible due to the application of the Act, the Applicant would have no more information on the question in which he is particularly interested than he does now. (Submission of the Office of the Premier, paragraph 5.8)

The applicant has contested the Office of the Premier’s effort to characterize why he wants access to the records in dispute and has asked me to disregard it. (Submission of the Applicant, p. 5) I agree with the applicant on this point. But I also accept the Office of the Premier’s response that using the information it received during the mediation process about why

the applicant wanted access to records aided in an otherwise difficult search. (Reply Submission of the Office of the Premier, paragraph 5)

Section 6(1): The head of a public body must make every reasonable effort to assist applicants
....

The applicant asked me to consider whether the Office of the Premier conducted an adequate search for relevant records under this section. The Office of the Premier submits that a Portfolio Officer from my Office discussed the actual search with the Director of Cabinet Operations and a Cabinet Officer, who are responsible for all such searches: “The purpose was to see how the search was being undertaken and if the search was being done in accordance with the Act. The Portfolio Officer appeared completely satisfied that a reasonable search had been conducted.” (Submission of the Office of the Premier, pp. 3, 4; also pp. 13, 14)

I discussed several criteria for establishing the reasonableness of a search in Order No. 30-1994, November 30, 1994, which the Ministry states that it has complied with in the present matter. (Submission of Office of the Premier, pp. 13, 14) It has conducted three separate searches of records obtained from Cabinet Operations, Cabinet Planning Secretariat:

The Applicant believes there was an inadequate search as he has received letters from Cabinet Ministers stating the matter was talked about in Cabinet. While something may have been spoken to in Cabinet, it does not mean a record exists. The Public Body has completed an honest and forthright search based on the criteria provided by the Applicant. The obligations [imposed] on the Public Body by the Act and any previous orders of the Commissioner have been met. (Submission of Office of the Premier, p. 14)

I am satisfied with the reasonableness of the Office of the Premier’s search in the present inquiry.

Review of the records in dispute

The Office of the Premier provided the inquiry, by way of affidavit, with a detailed listing of each type of record disclosed or withheld under the relevant portions of section 12. See Affidavit of James S. Kennedy, paragraphs 10 to 13. It estimated that its use of section 12(2)(c) resulted in the disclosure of about 48 percent of all of the information in the records in issue.

I am reasonably concerned about the nature of the *in camera* submissions made in both the arguments and affidavits of the Ministry in this case. They explain why certain severing occurred, but I have trouble accepting that these attempts at “rationales” should be confidential. I cannot give specific examples without revealing information submitted on an *in camera* basis. But I want to urge those representing public bodies to restrict the contents of *in camera* submissions and affidavits to what must remain truly confidential.

For the purposes of the inquiry, the applicant has asked me to review the appropriateness of only four specific severances carried out by the Office of the Premier under section 12.

1. Extract from minutes of the meeting of the Deputy Ministers' Committee on Sustainable Development (DMCSD) dated 1990.10.22, and attached draft Executive Summary and Cabinet Submission

The applicant argued that the severance of three lines from the "background" section on page 2 of the draft Cabinet submission was inappropriate and that it should be released under section 12(2)(c). I agree with him.

The applicant further submitted that the information severed on pages 2, 3, and 4 of the same document under the title "Discussion" may constitute "analysis" and thus be releasable under section 12(2)(c). I find that disclosure of this analytical information does not constitute release of the "substance of deliberations" of Cabinet, since there is no evidence that Cabinet actually discussed these background points. The material does not comprise "advice, recommendations, policy considerations or draft legislation or regulations" In fact, I think it is best described in the language of this section as "background explanations," since the rubric under which most of it appears is "provincial priorities and mandates." The rest has been excepted from a discussion of "study procedures" for a proposed study of the area. This clearly falls into the category of "background explanations or analysis." Were such information to be protected as "policy considerations," it should be labelled as such and clearly fall within appropriate contents for such a rubric.

I order the release of this severed material under the headings of "Background" and "Discussion" on pages 2 to 4.

2. Extract from the minutes of the meeting of Cabinet dated 1990.11.07 and attached extracts

The 51 pages of this document are the largest of the records in dispute. The applicant noticed, correctly, that the Cabinet submission described in No. 1 above is essentially the same as the Cabinet submission from the Ministry of Crown Lands in No. 2. Thus the same severed material on pages 2 to 4 should be released for the same reasons ("background information and analysis") outlined in No. 1 above.

The applicant also seeks the release in its entirety of a report titled "A Review of Provincial Issues and Provincial Participation Relative to the Study of 'Human Activity and the Environment in the Boundary Bay Area.'" It contains approximately 17 pages. The applicant suggests that the report "appears to be from an *ad hoc* Provincial committee chaired by the Ministry of Crown Lands, not a Cabinet Committee. There is no hint of Cabinet deliberations. There is no mention of Cabinet. There is no advice or recommendation to Cabinet." (Submission of the Applicant, pp. 8, 9)

The Office of the Premier has identified this record as accompanying a Cabinet submission and describes it as including "detailed issues," "detailed recommendations and policy considerations," and a "recommended approach." (Submission of the Office of the Premier, pp. 4, 5) It was prepared by representatives of nine provincial Ministries in 1990 and was

background for Cabinet to consider. The Office of the Premier correctly asserts that the Cabinet submission “clearly calls Cabinet’s attention to the appended report.” (Reply Submission of the Office of the Premier, paragraph 9)

Pages 2 to 6 contain a listing of “mandate related issues” affecting the interests of nine provincial ministries in a proposed study. I conclude that this information falls into the category of “policy considerations” and should not be disclosed to the applicant.

Pages 7 to 10 are “concerns” of the same Ministries with the structure and procedure of the proposed study and with respect to study participation. I am of the opinion that this information falls into the category of “policy considerations” and should not be disclosed to the applicant.

Pages 12 to 14 and Table II describe specific study requirements and roles for various participating Ministries. Most of this material has been disclosed. Primarily financial information about dollar amounts and costs has been severed. I fail to see any basis on which such information may be withheld under section 12 and order its disclosure to the applicant.

No. 3: Extract from the minutes of the meeting of Cabinet dated April 3, 1991

The applicant asserts that the Boundary Bay Area Study, prepared by the Ministry of Crown Lands and dated April 2, 1991, “does not on the face of it appear to be a Cabinet submission. It is submitted that the severance in the Table of Contents and portions of p. 1 entitled ‘Background’ are inappropriate.” (Submission of the Applicant, p. 9)

The Cabinet minute indicates that this material was submitted to Cabinet. The Boundary Bay Area Study is itself subtitled “summary briefing material.” I therefore order its disclosure to the applicant.

The applicant is contesting the severance of three lines in the Table of Contents and five lines in the first page of “Background,” and I can find no reason under section 12 of the Act that this information should not be disclosed to him under section 12(2)(c).

No. 4: Extract from the minutes of the meeting of Cabinet dated 1993.06.30,

This portion of records comprises 38 pages. The applicant is concerned about a Cabinet submission on Boundary Bay dated 93-06-21. Pages 4 to 5 present a listing of provincial interests in the study area. Page 6 presents a series of land use and related challenges. The applicant correctly noted that these severed pages appear in the “background” portion of the Cabinet submission and are therefore inappropriately withheld from him under section 12(1). (Submission of the Applicant, p. 9) I agree with him that “background explanations or analysis” presented “to the Executive Council or any of its committees for its consideration in making a decision” should now be disclosed, and I order their disclosure.

The Cabinet submission also includes a draft communications strategy of the Ministry of Environment, Lands and Parks. Information concerning objectives, messages, target groups, recommended strategy, budget, and distribution have been severed. The Office of the Premier has described this as “a mix of recommendations made to Cabinet, the rationale for preferring a recommended course of action, and detailed description of those recommendations.” (Affidavit of J.S. Kennedy, p. 9)

This draft communications strategy was submitted to Cabinet. I am of the view that this information falls into the category of “information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations ...” and thus should not be disclosed to the applicant.

7. Order

I find that the Office of the Premier is not required to refuse access to parts of the records, as outlined above, under section 12. Under section 58(2)(a), I require the Office of the Premier to give the applicant access to those parts of the records which were inappropriately severed.

I also find that the Office of the Premier is required to refuse access to the remaining parts of the records, as outline above, under section 12(1). Under section 58(2)(c), I require the Office of the Premier to refuse access to those parts of the records in dispute.

David H. Flaherty
Commissioner

February 26, 1996