Order F23-47

MINISTRY OF INDIGENOUS RELATIONS AND RECONCILIATION

Allison J. Shamas
Adjudicator

June 19, 2023

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Summary: An applicant made a request to the Ministry of Indigenous Relations and Reconciliation (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for all records and communications relating to himself and his company in the Ministry's possession. The Ministry withheld information under ss. 14 (solicitor-client privilege), 16(1)(a)(iii) and 16(1)(c) (harm to intergovernmental relations or negotiations) and various other sections of FIPPA. In Order F23-41, the adjudicator determined that the Ministry was not authorized to withhold some information under s. 14 and ordered the Ministry to produce that information to the OIPC so the adjudicator could determine whether the Ministry was authorized to withhold it under ss. 16(1)(a)(iii) or (c). In the instant order, the adjudicator determined that the Ministry was authorized to withhold some of the information that remained in dispute under s. 16(1)(a)(iii), but ordered the Ministry to disclose the balance of the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ss. 4(2), 16(1)(a)(iii) and 16(1)(c).

INTRODUCTION

[1] The applicant submitted a request to the Ministry of Indigenous Relations and Reconciliation (Ministry) for access to records about himself and his company.

[2] The Ministry disclosed the responsive records but withheld information under ss. 14 (solicitor-client privilege), 16(1)(a)(iii) and 16(1)(c), and various other sections of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to refuse access. Mediation did not resolve the matter and it proceeded to inquiry.

[4] The Ministry provided the records containing the information withheld under ss. 16(1)(a)(iii), 16(1)(c) for my review, but not the information withheld under s. 14. However, the Ministry's application of ss. 14 and 16 overlapped, and as a result I was also not able to review some information the Ministry had withheld under s. 16(1)(a)(iii) and (c).

[5] On May 26, 2023, I issued Order F23-41.[1] In Order F23-41, I determined that the Ministry was not authorized to withhold three records on the basis of s. 14. As the Ministry had also withheld these records under s. 16(1)(a)(iii) and (c), I ordered the Ministry to produce the three records (the Records) to the OIPC so that I could determine whether the Ministry was authorized to withhold them under ss. 16(1)(a)(iii) and (c).[2] In accordance with Order F23-41, the Ministry produced the three Records for my review.

[6] While only three Records remain in dispute, in considering the Ministry's application of ss. 16(1)(a)(iii) and (c) to these Records, I have the context provided by all of the records and other materials submitted in this inquiry.

ISSUES AND BURDEN OF PROOF

[7] The instant decision considers whether the Ministry is authorized to refuse to disclose the information in the Records under ss. 16(1)(a)(iii) and 16(1)(c) of FIPPA.

[8] Section 57(1) of FIPPA places the burden on the Ministry to prove that the applicant has no right of access to the information in dispute under ss. 16(1)(a)(iii) and 16(1)(c).

DISCUSSION

Background

[9] The applicant operates a company through which he seeks to provide Indigenous groups with "business and consulting solutions [related] to natural resource development."[3] In 2016, the applicant began representing a particular Indigenous group in respect of its negotiations with the BC government (Nation A).

[10] The Pipeline Project is a project in BC that crosses territories over which several Indigenous nations including Nation A have established or asserted rights and/or title (Affected Nations). As part of the environmental assessment

[1] 2023 BCIPC 49.
[2] The three records at issue in the instant decision are found at pages 19-22, 108-111 and 232-235 of phase 2 of 2 of the records. As a result of my determination in Order F23-41, the information in dispute does not include the attachments to these three records.
[3] Applicant's response, para. 4.

(EA) process for the Pipeline Project, the BC government consulted with the Affected Nations. The consultation process was complex and involved multiple BC government ministries and agencies including but not limited to the Ministry, the Environmental Assessment Office (Assessment Office), the Oil and Gas Commission (Commission), and the Ministry of Energy, Mines and Petroleum Resources (Ministry of Energy). Due to their overlapping responsibilities, representatives of these entities worked collaboratively on consultation issues in respect of the Pipeline Project.

[11] During the EA process, the Ministry led negotiations with Affected Nations on behalf of the Province. The Ministry sought to enter into pipeline revenue sharing agreements or pipeline benefits agreements (PBA) in exchange for the pipeline being located on each Affected Nation's territory. Nation A was involved in these negotiations.

[12] During negotiations regarding the Pipeline Project, the applicant became dissatisfied with the Ministry's conduct toward him. In response, he filed an access request with the Ministry broadly seeking all records relating to himself and his company in the Ministry's possession for the period from January 1, 2018 – November 18, 2019. It is the Ministry's response to this request that is at issue in this inquiry.

Records and Information at Issue

[13] The Records are three email chains that total 13 pages in length. They are email communications amongst representatives of the government entities involved in the Pipeline Project and Nation A. All three email chains relate to a leadership change within Nation A. The Ministry withheld all three Records in their entirety.

Section 16 - Harm to Intergovernmental Relations or Negotiations

[14] I will now consider the application of ss. 16(1)(a)(iii) and (c) to the information in the Records.

Recent Amendments to Section 16

[15] The BC Legislature recently amended ss. 16(1)(a)(iii) and (c) of FIPPA and the related definitions in Schedule 1 of FIPPA. These amendments took effect on November 25, 2021, after the Ministry made its decision about what information to withhold, but before the Ministry made its submissions.

[16] In Order F23-41, I determined that the applicable language was the language that was in effect at the time the Ministry made its decision about what information to withhold. For the reasons set out in paragraphs 108-111 of Order

F23-41, in considering the Ministry's application of s. 16 to the information that remains in dispute, I rely on the pre-amendment version of language.

Harm to Intergovernmental Relations – Section 16(1)(a)(iii)

[17] Section 16(1)(a)(iii) has two parts and the Ministry has the onus to prove both. The first question is whether the information at issue relates to an "aboriginal government." The second is whether disclosure of the information could reasonably be expected to harm the conduct of relations between the BC government and "aboriginal governments."

Part 1: "Aboriginal government"

[18] Prior to the amendments, Schedule 1 of FIPPA defined "aboriginal government" as "an aboriginal organization exercising governmental functions."

[19] It is well-established that while the term "aboriginal government" includes a "band" under the federal *Indian Act* the definition is not limited to bands or groups that have concluded self-government agreements or treaties.[4] Recently, the OIPC also accepted that where Indigenous nations are "clearly exercising a representative function" they are "aboriginal governments" for the purpose of s. 16(1)(a)(iii).[5]

[20] The information in the Records relates to Nation A.

[21] The Assistant Deputy Minister of Negotiations and Regional Operations Division for the Ministry (the ADM) gave evidence for the Ministry. He deposed that all of the Indigenous groups referenced in the records at issue in the inquiry negotiated with the Province regarding the Pipeline Project, and that in order to be involved in the negotiations, each group had to have asserted or established rights to territory crossed by the Pipeline Project. On this basis, the Ministry asserts that all Indigenous groups involved in the Pipeline Project satisfy the first part of s. 16(1)(a)(iii).

[22] The applicant provided extensive evidence and argument about Nation A's membership, governance structure, territorial rights, and negotiations with the Province. It is clear from the applicant's materials that he also accepts that Nation A has the right to exercise a representative function on behalf of Indigenous rights holders.

[4] Order F20-48, 2020 BCIPC 57, para. 190 citing Order 01-13, 2001 CanLII 21567 at para. 14, citing Order 14-1994, [1994] BCIPCD No. 17.
[5] Order F22-34, 2022 BCIPC 38 (CanLII), Order F23-06, 2023 BCIPC 7 (CanLII).

[23] Finally, I can see from the totality of the records at issue in the inquiry as a whole that Nation A in fact negotiated with the BC government in respect of the Pipeline Project and other issues.

[24] The definition of "aboriginal government" under FIPPA requires only that a group be "an aboriginal organization exercising governmental functions." Based on the parties' materials and the records themselves, I accept that Nation A asserted or established territorial rights on behalf of rights holders, and negotiated with the BC government on the basis of those rights. In my view, these facts satisfy the definition of "exercising a governmental function" within the meaning of s. 16(1)(a)(iii). Accordingly, I am satisfied that the information in the Records relates to "aboriginal governments" within the meaning of s. 16(1)(a)(iii).

Step 2: Evidence of "Harm"

[25] Section 16(1)(a)(iii) applies if disclosure could reasonably be expected to harm the conduct of relations between the Province and an aboriginal government.

[26] The Supreme Court of Canada describes the standard as "a reasonable expectation of probable harm." According to the Supreme Court, this standard is "a middle ground between that which is probable and that which is merely possible."[6] It "refers to an expectation for which real and substantial grounds exist when looked at objectively,"[7] and requires a risk of harm that is "well beyond the merely possible or speculative," but it "need not be proved on the balance of probabilities."[8]

Parties' Submissions

[27] Referencing the "history of mistrust"[9] between the Crown and Indigenous peoples and the importance of these relationships to the Province's ability to fulfill its obligations to Indigenous peoples, the Ministry submits that there is significant potential for harm due to the nature of the relationships at stake.

[28] With respect to the information in the three Records, the Ministry argues that communications that would reveal leadership changes within Nation A are particularly sensitive, and that disclosing such communications could harm BC's relationship with Nation A by breaching the trust and confidence necessary to engage in meaningful and successful negotiations.

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[6] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII) [*Merck Frosst*] at para. 201.
[7] *Merck Frosst, ibid* at para. 204.
[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 [*Ontario (Community Safety)*], at para. 54.
[9] Ministry initial submissions at para. 131.

[29] In support of its arguments, the Ministry relies on the evidence of the ADM. The ADM deposes that he has knowledge and experience about typical consultation and accommodation processes between the Ministry and Indigenous groups. In this regard, the ADM explains that prior to accepting the role as ADM, he held two Chief Negotiator roles within the Ministry, and that in his current role he is typically involved with supporting negotiation teams to be successful in their work.[10]

[30] He explains that it was necessary for Ministry staff and other government agencies involved in the Pipeline Project to be aware of the information in the Records in order to ensure that they were negotiating with the appropriate representatives of Nation A. However, he cautions that "the release of such information would reflect negatively on [Nation A], and would as a result harm [the Ministry's] relationship with [Nation A] and [its] ability to continue to engage successfully with them."[11]

[31] The Ministry also argues that in addressing the question of harm, the analysis should proceed from the well-established principle that disclosure of the information at issue to the applicant should be treated to disclosure to the world at large.

[32] The applicant argues that the information in the Records should be disclosed. In support of this position, the applicant relies on affidavit evidence from a current representative of Nation A in which the representative states that they do not wish their communications with the Ministry to result in the applicant's personal information being withheld.

[33] With respect to the question of harm, the applicant argues that because he has "ample records" in his possession which he "could have sought the Court of public opinion on" but chose not to, it is not appropriate that disclosure of information to him be treated as disclosure to the world at large.

Analysis and Findings

[34] In assessing the harm that could result from disclosure of the information in the Records to the applicant, my analysis proceeds from the well-established principle that disclosure of the information to the applicant should be treated as disclosure to the world. While the information at issue relates to Nation A, the applicant was not party to the email chains that comprise the Records.[12] In my

[10] Affidavit of ADM at paras. 2 and 3.
[11] Affidavit of ADM at para. 36.
[12] Based on the information in the records and the applicant's submissions, in my view it is improbable that he subsequently received a copy of these emails. I cannot provide more detail without disclosing the information at issue in this proceeding and information that the OIPC previously determined could be submitted *in camera.*

view, the applicant's assertions about his treatment of other information about Nation A, even if true, does not provide a sufficient basis to depart from the well-established principle that disclosure to the applicant should be treated as disclosure to the world.[13]

[35] The Records are three email chains amongst representatives of the Ministry, the Assessment Office, the Commission, the Ministry of Energy, and Nation A. Significant parts of the three email chains are duplicates of one another. The information found in the Records falls into two categories: correspondence information such as to, from and date lines and salutations, and substantive information such as the subject line and body of the email messages. The substantive information concerns a leadership change within Nation A.

[36] I will address the substantive information first.

[37] I accept the Ministry's evidence that the relationship between the Province and Indigenous groups is fragile and that meaningful negotiation requires some degree of trust and confidence.

[38] The Ministry did not provide sufficient evidence for me to fully comprehend the potential consequences of its release of information related to the leadership change in Nation A. While I cannot provide details without disclosing confidential information, I can see from the information in these and other withheld records, that the substantive information in the Records is the kind of information that many organizations would prefer to keep private. In addition, it appears from the context that Nation A only disclosed the information to the Ministry because it was necessary to negotiations. In my view, this context could provide an objective basis to support a finding that disclosure of the substantive information could erode the trust required for meaningful negotiation.

[39] However, I need not rely on the context alone. In light of his experience and familiarity with the information in dispute, I find the ADM's evidence to be persuasive. In particular, given my views about the nature of the information at issue, I accept the ADM's evidence that "the release of … information [related to the change in leadership of Nation A] would reflect negatively on [Nation A], and would as a result harm [the Ministry's] relationship with [Nation A] and [its] ability to continue to engage successfully with them."[14] Relying on the context and the evidence of the ADM, I find that the Ministry has established that requiring it to disclose information about the leadership of Nation A could reasonably be expected to harm the conduct of relations between the Province and Nation A.

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[13] For decisions considering substantially the same facts, see Order F23-07, BCIPC 7 at paras. 21 – 24 and Order F23-41, 2023 BCIPC 49 at paras. 125 – 128. See also Order 01-52, 2001 CanLII 21606 at para. 73 and Order F22-31, 2022 BCIPC 34, para. 80.
[14] Affidavit of ADM at para. 36.

[40] As the only information that remains in dispute relates to Nation A, I carefully considered the wishes of the current representative of Nation A that the representative's communications with the Ministry not result in the applicant's personal information being withheld. However, as the information at issue is fundamentally about Nation A not the applicant, the representative's wishes do not overcome the findings above.

[41] Thus, I find that the Ministry is authorized to withhold the substantive information in the Records under s. 16(1)(a)(iii). As a result of this finding, it is not necessary to consider whether the substantive information also qualifies for exemption under s. 16(1)(c).

[42] I come to the opposite conclusion, however, with respect to the correspondence information.

[43] The correspondence information is found in the to, from and date lines of the individual emails, and any salutations and greetings. It conveys nothing substantive other than the identities of the persons on the email chains and the dates when the emails were sent. It provides no information about the leadership of Nation A, and no information that, in my view, could reasonably be expected to impact, let alone harm the conduct of relations between the Province and an aboriginal government.

[44] The Ministry did not address the correspondence information in its submissions, and did not explain how this information could reasonably be expected to engage s. 16(1)(a)(iii). The Ministry provided the correspondence information to the applicant in a highly detailed table of records that it submitted to the OIPC.[15] It also disclosed similar information in the other records that it withheld under s. 16(1)(a)(iii) and that I considered in Order F23-41. Finally, I am not aware of any decisions in which the OIPC has found s. 16(1)(a)(iii) applies to this kind of information.

[45] For the reasons set out above, although I find that the Ministry is authorized to withhold the substantive information in the Records under s. 16(1)(a)(iii), I find that it is not authorized to withhold the correspondence information under s. 16(1)(a)(iii).

[15] The table of records containing the correspondence information is found on pages 40-59 (electronic numbering) of the Ministry's February 28, 2023 correspondence. The references to the Records that are at issue are found on pages 41-42, 49-50, and 58-59.

Harm to Intergovernmental Negotiations

[46] In light of my determination that the Ministry may not withhold the correspondence information under s. 16(1)(a)(iii), I must also consider whether the Ministry is authorized to withhold this information under s. 16(1)(c).

[47] The version of s. 16(1)(c) that was in effect at the relevant time provided that the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the conduct of negotiations relating to aboriginal self government or treaties.

[48] For reasons that are substantially the same reasons as those set out above, I see no valid basis to find that disclosure of the correspondence information could raise a reasonable expectation of probable harm to the conduct of negotiations relating to aboriginal self government or treaties. The information is unrelated to negotiations or treaties, and in my view, too inconsequential to engage s. 16(1)(c). The Ministry made no submissions in support of its decision to withhold this kind of information under s. 16(1)(c). It provided the information to the applicant in its records table, and disclosed similar information in other records that it withheld under ss. 16(1)(a)(iii) and (c). Again, I am unaware of any decisions in which the OIPC has held that this kind of information could reasonably be expected to harm the conduct of negotiations relating to aboriginal self government or treaties.

[49] I find that the Ministry is not authorized to withhold the correspondence information under s. 16(1)(c).

[50] Section 4(2) of FIPPA provides that if information that is excepted from disclosure can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. While the information described above is inconsequential, the applicant is nonetheless entitled to it because the parts of the records that contain information covered by s. 16(1)(a)(iii) can reasonably be severed in accordance with s. 4(2).

CONCLUSION

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

1. I confirm that the Ministry is authorized to refuse to disclose the information it withheld from the Records under ss.16(1)(a)(iii) and (c) in part.
2. I require the Ministry to give the applicant access to the correspondence information in the Records. I have highlighted the information that the

Ministry is required to disclose to the applicant in a copy of the Records which accompanies the Ministry's copy of this order.

3. The Ministry must concurrently provide the OIPC registrar of inquiries with a copy of its cover letter and the information identified in paragraph item 2 above when it sends the information to the applicant.

Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by **August 1, 2023**.

June 19, 2023

ORIGINAL SIGNED BY

Allison J. Shamas, Adjudicator

OIPC File No.: F20-82551