



Order F23-75

## OFFICE OF THE PREMIER

Carol Pakkala  
Adjudicator

September 18, 2023

CanLII Cite: 2023 BCIPC 90  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 90

**Summary:** The applicant requested access to records held by the Office of the Premier (“Office”) of its correspondence with Pacheedaht First Nation (Pacheedaht) representatives regarding forestry in Pacheedaht lands. The Office responded and withheld some information pursuant to s. 16(1)(a)(iii) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found the Ministry was not authorized to refuse access under s. 16(1)(a)(iii).

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

### INTRODUCTION

[1] This inquiry is about a request by a community news organization, Capital Daily, to the Office of the Premier (Office) for records of correspondence with Pacheedaht First Nation (Pacheedaht) representatives regarding forestry in Pacheedaht territory.

[2] The Office disclosed some information in the responsive records but withheld one page under s.16 (disclosure harmful to intergovernmental relations or negotiations) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] Capital Daily asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry’s decision. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry. The Office provided written submissions and evidence, and Capital Daily a brief email statement in reply.

## Preliminary Matter

[4] The Office asserts that it relies on sections 16(1)(a)(iii) and on s.16(1)(b) (reveal information received in confidence) in this inquiry.<sup>1</sup> Section 16(1)(b) was not listed in the OIPC's Fact Report or in the Notice of Inquiry.

[5] Past OIPC orders have consistently said that parties may only add new issues into the inquiry if permitted to do so by the OIPC.<sup>2</sup> The OIPC's notice of inquiry and its *Instructions for Written Inquiries*<sup>3</sup> clearly explain the process for adding new issues to an inquiry.

[6] The Office did not seek prior approval to add s. 16(1)(b). I am not persuaded by the record before me that it would be fair to add this new issue or that there is any exceptional circumstance to warrant adding s. 16(1)(b). Therefore, I decline to add s.16(1)(b). I have however, considered the Office's evidence about information received in confidence as it relates to the issue of harm to intergovernmental relations or negotiations under s. 16(1)(a)(iii).

## ISSUE

[7] The issue to be decided in this inquiry is whether the Office is authorized to withhold the information in dispute under s. 16(1)(a)(iii) of FIPPA.

[8] Section 57(1) provides that the Office has the burden of proving the applicant has no right to access the information.

## DISCUSSION

### Background

[9] Pacheedaht territory, on the southwest coast of Vancouver Island, encompasses the Fairy Creek watershed (Fairy Creek) containing old-growth forest. Proposed logging activities in Fairy Creek have been, and continue to be, the subject of intense public interest, protests, and court injunctions.<sup>4</sup>

[10] On April 12, 2021, Pacheedaht released a public statement about its forest stewardship within its territory.<sup>5</sup> Prior to releasing this statement,

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<sup>1</sup> Office's initial submissions at para 7.

<sup>2</sup> For example, see Order F12-07, 2012 BCIPC 10 at para 6; Order F10-27, 2010 BCIPC 55 at para 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).

<sup>3</sup> Available online: <https://www.oipc.bc.ca/guidance-documents/1744>.

<sup>4</sup> For example: *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BSCS 605.

<sup>5</sup> Records, p. 5.

Pacheedaht shared with the Office a draft of the statement that had not received final approvals within the Pacheedaht government.<sup>6</sup>

### Information in Dispute

[11] There are a total of nine pages of records consisting of emails and attachments. The Office withheld one page of the records under s. 16. This one page is described in the Ministry's evidence as "The Draft Statement from Pacheedaht."<sup>7</sup>

### Harm to Intergovernmental Relations or Negotiations, s.16

[12] Section 16(1)(a)(iii) allows a public body to withhold information where disclosure could reasonably be expected to harm intergovernmental relations or negotiations with an Indigenous governing entity.

### Recent amendments

[13] Section 16(1)(a)(iii) (and related definition in Schedule 1) of FIPPA was amended November 25, 2021.<sup>8</sup> Before the amendment, and at the time the Office made its decision on Capital Daily's access request, s. 16(1)(a)(iii) said "an aboriginal government" rather than its current wording of "Indigenous governing entity."

[14] Before the amendments, Schedule 1 of FIPPA said that "aboriginal government" means "an aboriginal organization exercising governmental functions." The recent amendments removed that definition and substituted the following definition:

"Indigenous governing entity" means an Indigenous entity that exercises governmental functions, and includes but is not limited to an Indigenous governing body as defined in the *Declaration on the Rights of Indigenous Peoples Act*,<sup>9</sup>

[15] As detailed below, I have decided s. 16(1)(a)(iii) in relation to the language in effect at the time the Office made its decision (prior to the amendments). However, my analysis applies equally to the amended provisions.

[16] Section 16(1)(a)(iii) has two parts. The Office has the burden of proving both parts. The first part is whether the information at issue relates to an

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<sup>6</sup> Records, p. 2. Affidavit of Ministry's Assistant Deputy Minister at para 8.

<sup>7</sup> Affidavit of the Office's then Assistant Deputy Minister, p. 2.

<sup>8</sup> By the *Freedom of Information and Protection of Privacy Amendment Act*, SBC 2021 c 39 s. 8(a).

<sup>9</sup> *Ibid* s. 47(a).

“aboriginal government.” The second part is whether disclosure of the information in dispute could reasonably be expected to harm the conduct of relations between the government and the “aboriginal governments.”

### **Aboriginal government**

[17] As mentioned above, before it was amended, Schedule 1 of FIPPA defined “aboriginal government” as an aboriginal organization exercising governmental functions. Previous orders have found that an “aboriginal government” includes, at the very least, a “band”<sup>10</sup> under the federal *Indian Act*<sup>11</sup>. Pacheedaht are a band under the *Indian Act*.<sup>12</sup> I find that Pacheedaht are an aboriginal government for the purpose of s. 16(1)(a)(iii).

### **Harm**

[18] 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”, thereby protecting government-to-government relationships.

[19] The Supreme Court of Canada has clearly established that the phrase “could reasonably be expected to” means that the standard of proof is a “reasonable expectation of probable harm.”<sup>13</sup> This standard means that a public body must show that the likelihood of the harm occurring is “well beyond” or “considerably above” a mere possibility.

[20] The Office submits that significant weight should be given to subjective evidence of a reasonable expectation of probable harm. The Office further says that there should be someone from government who provides sworn or affirmed testimony that there is a reasonable expectation of probable harm to the relationship. The Office submits there is no objective evidentiary replacement for that opinion.<sup>14</sup> I reject this submission. The Supreme Court noted that the amount and quality of evidence needed to meet the standard will ultimately depend on the nature of the issue and the “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”<sup>15</sup> It is a contextual analysis.

[21] For the reasons that follow, I am not satisfied the Office has met its burden of showing a reasonable expectation of probable harm. The Office asserts the

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<sup>10</sup> Order 01-14, 2001 CanLII 21567 (BCIPC) at para 14; Order F20-48, 2020 BCIPC 57 at para 190; Order F21-45, 2021 BCIPC 53 at para 74.

<sup>11</sup> *Indian Act*, RSC 1985 c.1-5.

<sup>12</sup> Office’s initial submissions, para 31.

<sup>13</sup> *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para 54 (*Community Safety*) citing *Merck Frosst v Canada (Health)* 2012 SCC 3 at paras 197 and 199.

<sup>14</sup> Office’s initial submissions at para 45.

<sup>15</sup> *Community Safety* citing *FH v McDougall*, 2008 SCC 53 at para 40.

reasonable expectation of probable harm here is to its ability to manage its relationship with Pacheedaht if the record at issue in this inquiry is disclosed publicly.<sup>16</sup>

[22] By way of background, the Office provided extensive submissions about the history and the importance of the special relationship between the Crown and Indigenous peoples. The Office stresses the principles of the honour of the Crown<sup>17</sup> and the constitutionally protected nature of its relationships with Indigenous groups<sup>18</sup>. The Office further says that these relationships must have trust, confidence, and respect<sup>19</sup> and that the consequences of a breakdown in those relationships is unquantifiable<sup>20</sup>.

[23] Regarding the specific information in dispute, the Office offers affidavit evidence from its then Assistant Deputy Minister (ADM). The ADM affirms his belief that the draft press release was provided in confidence and as a courtesy by Pacheedaht.<sup>21</sup> The Office does not provide evidence from Pacheedaht confirming the reason(s) for providing the draft. The ADM further affirms that when the Office received the access request that is the subject of this inquiry, the Office consulted with Pacheedaht and that:

During this consultation it became clear that releasing the draft statement, that had been provided to the Province while it was still subject to internal approvals within the Pacheedaht government, would harm the government-to-government relationship with Pacheedaht: Pacheedaht's trust in the Province would be diminished if the Province were to release a document that was provided to the Province in confidence and as a courtesy.<sup>22</sup>

[24] The ADM does not say what he learned from Pacheedaht during the consultation i.e., why it became clear to him that it would harm the government-to-government relationship. He goes on to talk about how, without a trust-based relationship, it is more challenging for the Province to fulfill its constitutional obligations to Pacheedaht. The example he offers to support this opinion is that Pacheedaht might not want to tell the Province vital information for fear the Province will subsequently disclose that information publicly.<sup>23</sup>

[25] As noted above, the Office did not provide any evidence supporting its position on s. 16(1)(a)(iii) from Pacheedaht, despite the fact the evidence before

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<sup>16</sup> Office's initial submissions at para 48.

<sup>17</sup> Office's initial submissions at paras 36-37.

<sup>18</sup> Office's initial submissions at para 41.

<sup>19</sup> Office's initial submissions at para 43.

<sup>20</sup> Office's initial submissions at para 44.

<sup>21</sup> Affidavit of the Office's then Assistant Deputy Minister at para 10.

<sup>22</sup> *Ibid*, at para 13.

<sup>23</sup> *Ibid*, at para 14.

me indicates that they clearly had discussions about the request for access to records.<sup>24</sup>

[26] Capital Daily commented on the government's concerns over Pacheedaht's right to privacy and confidentiality by saying that Pacheedaht's "draft statement is not the target of this inquiry: it's the government's hand in shaping it."<sup>25</sup>

[27] For the reasons that follow, I find the Office's submissions and evidence of a reasonable expectation of probable harm are speculative and insufficient.

[28] I find that disclosure of sensitive and contentious information that might adversely affect the government-to-government relationship is a relevant factor to consider in a s. 16(1)(a)(iii) analysis. I considered that logging activity in the Fairy Creek watershed is particularly sensitive and contentious. I also considered that Pacheedaht's final public statement on Forest Stewardship may have been sensitive and contentious. I reviewed the withheld draft public statement in light of these considerations.

[29] My review of the draft indicates that it is different primarily in form rather than in substance from the final version that was publicly released. The factual details are the same. Further, there are no comments or suggested edits within the draft that would reveal any sensitive or confidential positions of the Office or of Pacheedaht. The draft was sent to the Office attached to an email with no indication that its contents were sensitive and should be treated confidentially.<sup>26</sup> The Office does not discuss whether any harm to the government-to-government relationship occurred from the release of the final statement and does not adequately explain how a subsequent disclosure of this information in the form of the draft version at issue here could reasonably be expected to now result in the alleged harm.<sup>27</sup>

[30] I conclude that the Office has not established a direct link between the disclosure of the information at issue and the harm that the Office alleges could occur.

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<sup>24</sup> *Ibid*, at paras 11-13.

<sup>25</sup> Applicant's reply submission.

<sup>26</sup> Records, p. 1.

<sup>27</sup> For a similar conclusion on information already known, see Order F21-45, 2021 BCIPC 53 (CanLII) at para 80.

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## CONCLUSION

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

1. I require the Office to give the applicant access to the information I considered under s. 16(1)(a)(iii), namely, the draft statement at page 2 of the records.
2. The Office must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the page disclosed to the applicant in accordance with item 1 above.

[32] Pursuant to s. 59(1) of FIPPA, the Office is required to comply with this order by **November 1, 2023**.

September 18, 2023

### ORIGINAL SIGNED BY

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Carol Pakkala, Adjudicator

OIPC File No.: F21-86193