Order F23-87

OFFICE OF THE PREMIER

Carol Pakkala
Adjudicator

October 17, 2023

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Summary: The Office of the Premier (Office) requested that the adjudicator correct an error in Order F23-75 (Order). The adjudicator found the Order did not fully dispose of an issue due to an inadvertent procedural error. The adjudicator issued this new order and held that s. 16(1)(b) did not authorize the Office to withhold the information at issue.

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

INTRODUCTION

[1] In Order F23-75 issued September 18, 2023 (Order), I held that the Office of the Premier (Office) was not authorized to withhold the information in dispute under s. 16(1)(a)(iii) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). In my Order, I declined to consider the Office's submissions on s. 16(1)(b) on the basis that the Office had not sought prior approval to add s. 16(1)(b) to the inquiry. I considered the Office's evidence about information received in confidence only as it related to the issue of harm to intergovernmental relations or negotiations under s. 16(1)(a)(iii).[1]

[2] After the Order was issued, the Office wrote to say that the Order was incorrect in stating the Office did not seek prior approval to add s. 16(1)(b) to the inquiry. The Office pointed to its email request to the Office of the Information and Privacy Commissioner (OIPC) wherein it identified that there was an omission in the investigator's Fact Report for this inquiry (Fact Report) and it asked for s. 16(1)(b) to be added. Upon review of the matter, I could see that the

[1] Order F23-75, 2023 BCIPC 90 (CanLII) at para 6 [Order].

OIPC had inadvertently overlooked the Office's request and had not decided whether to add s. 16(1)(b) into the inquiry.

[3] The purpose of this order is to decide whether s. 16(1)(b) authorizes the Office to withhold the information dispute already considered under s. 16(1)(a)(iii) in my Order.

Preliminary matters

Functus officio – jurisdiction to reconsider

[4] Orders issued under s. 58 of FIPPA are final and binding. Generally speaking, once an administrative tribunal has made a final and binding decision on a matter, it is considered to be "*functus officio*" and cannot revisit that decision. However, in *Chandler v Alberta Association of Architects*, the Supreme Court of Canada said that the application of the doctrine of *functus officio* must be more flexible and less formalistic in respect to the decisions of administrative tribunals. The Court said that administrative decision makers have the power to reconsider or amend a judgment in limited circumstances, including "if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose."[2]

[5] The Office took the position that I am not *functus officio* on the s. 16(1)(b) issue and that I have the power to fix the error. The applicant made no submissions on whether I was *functus officio* but did object to the passage of time and said the inquiry should not be drawn out any longer.

[6] I concluded that there was a procedural error on the part of the OIPC that resulted in me not being able to complete my statutory duty and decide all issues raised by the inquiry. On the basis of this error, I find that I am not *functus officio* on the s. 16(1)(b) issue.

Motivation

[7] The Office and the applicant address the motivation behind the withholding of the information in dispute. This issue is not relevant to this inquiry, and I decline to consider it.

Other sections

[8] The Office makes submissions on the role of FIPPA exceptions such as ss. 21 and 22 in the context of public bodies being able to protect records of significance to third parties. The Office also makes submissions on how past

[2] *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848.

orders have found draft documents were properly withheld under s. 13. These sections are not at issue in this inquiry, so I decline to address those submissions.

ISSUE

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

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

DISCUSSION

Background

[11] 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.[3]

[12] On April 12, 2021, Pacheedaht released a public statement about its forest stewardship within its territory.[4] Prior to releasing this statement, Pacheedaht shared with the Office, via email attachment, a draft of the statement.[5]

Information in Dispute

[13] 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" (Draft).

Evidence

[14] Regarding the Draft, the Office offers affidavit evidence from its then Assistant Deputy Minister (ADM). The ADM affirms his belief that the Draft was provided in confidence and as a courtesy by Pacheedaht.[6] The ADM does not affirm the basis for his belief.

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[3] For example: *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BSCS 605.
[4] Records, p. 5.
[5] Records, p. 2.
[6] ADM's affidavit at para 10.

[15] The Office provided no other corroborating evidence regarding the issue of "received in confidence" despite being given the opportunity to do so. For example, the Office does not provide evidence from the ADM on the reasons for his belief or from Pacheedaht on the sharing of the Draft.

Disclosure harmful to intergovernmental relations - supplied in confidence, s.16(1)(b)

[16] Section 16(1)(b) allows a public body to refuse to disclosure of information if the disclosure could reasonably be expected to reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies. The purpose of s. 16(1)(b) is to "promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions."[7]

[17] Section 16(1)(b) requires a public body to establish two things: that disclosure would reveal information it received from a government, council or organization listed in s. 16(1)(a) or one of their agencies, and that the information was received in confidence.[8]

[18] The first part of the test is satisfied in that Pacheedaht is a government within the meaning of s. 16(1)(a).[9] The second part of the test is to consider whether the information was received in confidence from Pacheedaht. This analysis looks at the intentions of both parties, in all the circumstances, in order to determine if the information was "received in confidence."[10]

[19] Past OIPC orders have said there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information.[11] In Order No. 331-1999, former Commissioner Loukidelis provided a non-exhaustive list of factors that may be considered to determine if the information was "received in confidence," including the nature of the information, explicit statements of confidentiality, evidence of an agreement or understanding of confidentiality and objective evidence of an expectation of or concern for confidentiality.[12] I have considered these factors in my analysis below.

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[7] Order F19-38, 2019 BCIPC 43, para 107, citing Order No. 331-1999, page 7.
[8] Order F17-30, 2017 BCIPC 32 (Can LII), para 35 citing Order 02-19, 2002 CanLII 42444 (BC IPC), para 18 and Order No. 331-1999, 1999 CanLII 4253 (BCIPC) at pp.6-9.
[9] I conducted the analysis and made this finding in my Order at para 11.
[10] Order F23-07, 2023 BCIPC 8 (CanLII) at para 76 citing Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p. 8.
[11] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p. 8; Order F19-38, 2019 BCIPC 43 (CanLII) at para 116.
[12] Order No. 331-1999, 1999 CanLII 4253 (BC IPC) at p. 8.

Office Submissions

[20] The Office submits that the Draft was received by the Office in confidence from Pacheedaht. The Office offers the affidavit evidence referenced above in support of its position. The Office submits the ADM's belief that the information was sent and received in confidence is based on the government-to-government relationship.[13] This submission is presumably based on inference as the ADM does not affirm the basis of his belief.

[21] The Office submits the following principles for consideration: [14]

- Hearsay evidence is admissible and a failure to accord it adequate weight can constitute a reviewable error.
- The best evidence should be given the most weight, which it says is the ADM's affidavit because of his position and proximity to the records.
- Substitution of an adjudicator's opinion or belief for that of the public body with expertise in the subject matter, is unreasonable. Further, in the absence of any evidence contradicting that submitted by a public body there is no proper basis upon which to simply refuse to accept its evidence.
- A reviewing court may intervene if a decision is unreasonable because it is not "justified in light of the facts" or when "the decision maker has fundamentally misapprehended or failed to account for the evidence before it."

[22] On the basis of the above principles, the Office submits that it is appropriate for the Commissioner to accept and give considerable weight to what it says is uncontroverted evidence that the information in dispute was sent to the Office in confidence.

[23] The Office also says that the information in dispute is of the type that is broadly recognized by reasonable people as confidential in nature. The Office further says it can be inferred that it was treated as confidential as it was not forwarded or shared.

[24] The Office submits that requiring evidence from the Pacheedaht in the context of s.16(1)(b) itself would place an unreasonable burden on the Pacheedaht government that was not contemplated by the Legislature.[15] The Office further submits that to burden the Pacheedaht, who are an Indigenous

[13] Office's additional submissions at para 31.
[14] Office's additional submissions at paras 14-16 citing *R. v. Hamdan*, [2017] BCJ No 986 at para 65 and *Mason v Canada (Citizenship and Immigration),* 2023 SCC 21 at para 73*.*
[15] *Ibid* at para 18.

governing entity of a modest size, with participation in the Commissioner's inquiry to ensure that records they provide to the Province in confidence are kept confidential is unreasonable.[16]

Applicant's submissions

[25] The applicant submits the following principles for consideration:[17]

- Saying something is confidential is not enough. There must be objective grounds to support the assertion of confidentiality.
- Saying a relationship is based on trust, confidence, and respect does not mean that all correspondence within that relationship should be protected from disclosure on the basis of it having been conducted in confidence.
- Even explicit statements of the expectation of confidentiality by the supplier of information may not be sufficient under s. 16(1)(b).

[26] The applicant says that at no point in the emails between the Office and Pacheedaht — neither in the subject line, nor the body of the emails, nor in the attachment names or (unredacted) contents — is there any wording that even suggests the Draft was provided in confidence, let alone stated as a requirement for the correspondence to take place.[18]

[27] The applicant further says that the other relevant circumstances make it plain that any implication of confidentiality expired. These circumstances are that the details have since been released publicly and that the document pertains to a protest that is years past its peak.

Analysis

[28] For the reasons that follow, I find the affidavit evidence presented by the Office to be insufficient to discharge its burden of proving the information in dispute was received in confidence.

[29] I give the Office's affidavit evidence some weight, but this evidence only asserts the ADM's *belief* that the Draft was provided in confidence and as a courtesy.[19] The ADM does not identify how he came to that belief. For example, the ADM does not say the sender told him it was to be received in confidence and that he believes that to be true. The Office submits that the belief comes from the government-to-government relationship. I find this submission requires an inference that goes too far. The special nature of the relationship

[16] *Ibid* at para 19.
[17] Applicant's additional response relying on Order F17-28, 2017 BCIPC 30 (CanLII).
[18] Applicant's initial response.
[19] ADM's affidavit at para 9.

does not mean that all communications between those governments are confidential.

[30] The Office offered no corroborating evidence to bolster its statement of belief regarding the expectation of confidentiality. In previous OIPC orders where a public body successfully established information was received in confidence, there was some form of corroborating evidence to support the public body's assertion.[20] That is not the case here. The information in dispute here was shared via an email attachment. There was nothing in the subject line or in the body of the email to indicate it was to be received in confidence. The subject line of the email indicates "Draft" - it does not say "Confidential Draft". There was no generic email disclaimer about confidentiality in the body of the email. There was no expression of a sentiment such as "please do not share" within the body of the email. Further, the Draft contains no statement about confidentiality or any watermark proclaiming it to be confidential.

[31] For these reasons, I find there is no objective basis to conclude the information in dispute was received in confidence. Further, I do not have the evidence to conclude it was treated by the Office as confidential upon receipt. The Office provided an assertion, unsupported by evidence, that I can infer the information was not forwarded or shared. The Office says I can infer that it was not shared on the basis that no related emails were found as responsive to the access to information request. I decline to make such an inference as the access request pertained only to the Office's correspondence with Pacheedaht. I have no basis to infer that the email was not forwarded to others outside of Pacheedaht.

[32] The s. 16(1)(b) test looks at the intentions of both parties, in all the circumstances, in order to determine if the information was "received in confidence."[21] Here the parties are the Office and Pacheedaht. The affidavit evidence shows the Office consulted with Pacheedaht regarding the access request[22] but no evidence was presented from Pacheedaht regarding the confidential nature of the information in dispute. The Office submits it is unreasonable to require evidence from Pacheedaht. To be clear, I do not require evidence from Pacheedaht but rather offer it is as an example one type of corroborating evidence to support a confidentiality claim. I do not even have hearsay evidence to consider as the ADM does not say what Pacheedaht told him when the draft was shared.

[20] For example: Order 19-38, 2019 BCIPC 43 (CanLII), Order F13-01, 2013 BCIPC 1 (CanLII), and Order F17-28, 2017 BCIPC 30 (CanLII).
[21] Order F23-07, 2023 BCIPC 8 (CanLII) at para 76.
[22] ADM's affidavit at para 11.

[33] I find the record does not contain sufficient evidence that the ADM's belief that the information was received in confidence was objectively warranted[23] and therefore I give it little weight. I find the ADM's belief insufficient for the Office to meet its burden of proving the applicant has no right to access the information in dispute.

[34] I find that the Office has failed to meet its burden on the second part of the s. 16(1)(b) test and is therefore not authorized to withhold the information in dispute.

[35] In Order F23-75, I held that the Office was not authorized to withhold this same information in dispute under s. 16(1)(a)(iii) and ordered the Office to provide access to the information by November 1, 2023. In fairness, now that I have made my decision on the merits of the application of s. 16(1)(b), it makes sense to match the compliance dates for both orders and I do so below.

CONCLUSION

[36] 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)(b), 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.

[37] Pursuant to s. 59(1) of FIPPA, the Office is required to comply with this order by **November 29, 2023**.

October 17, 2023

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File No.: F21-86193

[23] Order F19-38, 2019 BCIPC 43 (CanLII) at para 121 relying on *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124 at para. 67 and Order F17-28, 2017 BCIPC 30 (CanLII) at para 35.