



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F24-43

## MINISTRY OF ENERGY, MINES AND LOW CARBON INNOVATION

Erika Syrotuck  
Adjudicator

May 24, 2024

CanLII Cite: 2024 BCIPC 51

Quicklaw Cite: [2024] B.C.I.P.C.D. No. 51

**Summary:** The applicant requested a draft report from the Ministry of Energy, Mines and Low Carbon Innovation (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry provided the draft report but withheld some information under various exceptions under Part 2 of FIPPA, including s. 14 (solicitor client privilege). In Order F24-37, the adjudicator found that s. 14 did not apply to the information in dispute and ordered the Ministry to produce that information for the purpose of deciding whether ss. 12(1) (Cabinet confidences) and 17(1) (harm to the financial or economic interests of a public body) also applied. In this order, the adjudicator finds that s. 12(1) applies to the information in dispute and that the Ministry is required to withhold it under that exception. Consequently, there was no need to address whether s. 17(1) also applied.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 12(1), 17(1).

### INTRODUCTION

[1] An applicant made an access request to the Ministry of Energy, Mines and Low Carbon Innovation (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for a copy of the “full draft final report on the Site C project review” submitted by a special advisor to the BC Ministers of Finance and of Energy, Mines and Low Carbon Innovation on October 10, 2020.

[2] In response, the Ministry withheld the report in its entirety under multiple exceptions to disclosure under Part 2 of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry’s decision.

[3] Mediation failed to resolve the issues and the matter proceeded to inquiry.

[4] At the inquiry, the Ministry revised its decision and released more information to the applicant. It continued to withhold information in the report under various exceptions to disclosure including ss. 12(1) (Cabinet confidences), 14 (solicitor client privilege) and 17(1) (harm to a public body's financial or economic interests).

[5] On May 7, 2024, I issued Order F24-37.<sup>1</sup> In that order, I found that s. 14 did not apply to the information that the Ministry withheld under that exception. I made this decision on the basis of affidavit evidence and without reviewing the information. Because the Ministry also applied ss. 12(1) and 17(1) to the information it withheld under s. 14, I ordered the Ministry to produce it in order to decide whether those other exceptions apply. The Ministry complied with my production order and provided me with an unsevered copy of the information. In this order, I will decide whether ss. 12(1) or 17(1) apply to the information that the Ministry withheld under s. 14.

## ISSUES

[6] The issues I must decide are:

1. Is the Ministry required to withhold the information in dispute under s. 12(1) of FIPPA?
2. Is the Ministry authorized to withhold the information in dispute under s. 17(1) of FIPPA?

[7] Under s. 57(1), the Ministry has the burden of proof with respect to both ss. 12(1) and 17(1).

## BACKGROUND

[8] The Site C Clean Energy Project (Site C) is a project to build a dam and hydroelectric generating station on the Peace River in northeastern BC.<sup>2</sup>

[9] Site C construction started in 2015. By 2020, the Province was concerned about several issues relating to Site C.

[10] In late July 2020, Treasury Board directed the Minister of Energy, Mines and Low Carbon Innovation (Minister) to retain a consultant to conduct an independent review. Later that month, the Minister announced that they had selected a consultant to conduct the review (Advisor).

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<sup>1</sup> 2024 BCIPC 45 (CanLII).

<sup>2</sup> In Order F24-37, I set out a more detailed background at paragraphs 19-30.

[11] On October 10, 2020, the Advisor provided the Minister and the Minister of Finance with a draft report called “Site C Project Review” (Report). Information in the Report is the subject of this inquiry.

[12] On February 24, 2021, Cabinet decided that it would continue Site C and that it would accept the recommendations in the Report. Cabinet announced these decisions on February 26, 2021.

## **INFORMATION AT ISSUE**

[13] The information at issue is portions of four pages of the Report.

## **DISCUSSION**

### ***Section 12(1) – Cabinet Confidences***

[14] Section 12(1) requires a public body to 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.

[15] The purpose of s. 12(1) is to widely protect the confidence of Cabinet communications.<sup>3</sup> To explain 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>4</sup> Further, the Supreme Court of Canada recently said the following about what decision makers must keep in mind when considering if s. 12(1) applies:

In approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy’s core purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity. They must also be attentive to the dynamic and fluid nature of executive decision making, the function of Cabinet itself and its individual members, the role of the Premier, and Cabinet’s prerogative to determine when and how to announce its decisions.<sup>5</sup>

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<sup>3</sup> *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para 41.

<sup>4</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 57 (CanLII) at para 18 citing *Singh v Canada (Attorney General)*, 2002 CanLII 17100 (FCA) at paras 21-22.

<sup>5</sup> *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)* 2024 SCC 4 (CanLII) at para 61.

*Would the information reveal the substance of deliberations?*

[16] The phrase “substance of deliberations” refers to the body of information that Cabinet or any of its committees considered (or would consider in the case of submissions not yet presented) in making a decision.<sup>6</sup> In determining whether information would reveal the substance of deliberations, the BC Court of Appeal has said that the appropriate test is: “Does the information sought to be disclosed form the basis for Cabinet deliberations?”<sup>7</sup>

[17] In Order F24-37, I found that, except for information that had already been disclosed, the information in the Report would reveal the substance of deliberations of Cabinet and Treasury Board.<sup>8</sup> Briefly, I found that the Ministry had provided ample evidence that the Report formed the basis of Cabinet and Treasury Board’s deliberations.

[18] My analysis in Order F24-37 applies equally here. I have reviewed the information in dispute, and it is not information disclosed elsewhere.

[19] I find that the information would reveal the “substance of deliberations” within the meaning of s. 12(1).

*Section 12(2)*

[20] Section 12(2) sets out types of information that a public body cannot withhold under s. 12(1). As I determined in Order F24-37, only s. 12(2)(c) is potentially relevant to this inquiry. This provision says:

(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.

[21] In relation to s. 12(2)(c) the OIPC has consistently said that “background explanations” “include, at least, everything factual that Cabinet used to make a

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<sup>6</sup> *Aquasource supra* note 3 at para 39.

<sup>7</sup> *Ibid* at para 48.

<sup>8</sup> See Order F24-37, 2024 BCIPC 45 (CanLII) at paras 61-78.

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decision” and that “analysis” “includes a discussion about the background explanations but would not include analysis of policy options presented to Cabinet.”<sup>9</sup>

[22] I find that the purpose of the information at issue is not to present background explanations or analysis. Rather, I am satisfied that the information in dispute forms part of the very advice that Cabinet considered in relation to its decision to accept the recommendations in the Report. Therefore, I find that s. 12(2)(c) does not apply.

[23] In conclusion, I find that s. 12(1) applies to the information in dispute. As a result, there is no need for me to also address whether s. 17(1) applies.

### **CONCLUSION**

[24] For the reasons above, under s. 58(2) of FIPPA, I require the Ministry to refuse to disclose the information in dispute under s. 12(1) of FIPPA.

May 24, 2024

### **ORIGINAL SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: F21-86265

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<sup>9</sup> See *Aquasource*, *supra* note 3 at para 11. See also Order F18-43, 2018 BCIPC 46 (CanLII) at para 16.