



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-71

MINISTRY OF FORESTS

D. Hans Hwang
Adjudicator

July 25, 2024

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Summary: An applicant asked the Ministry of Forests (Ministry) for access to records about archaeological sites. The Ministry disclosed some information but withheld the rest under s. 18(a) (conservation of heritage sites) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and s. 3(3) (provincial heritage register) of the *Heritage Conservation Act*. The adjudicator determined that the Ministry was authorized to withhold the disputed information under s. 18 of FIPPA and it was not necessary to decide if s. 3(3) of the *Heritage Conservation Act* also applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, s. 18(a) and Schedule 1 (Definitions); *Freedom of Information and Protection of Privacy Regulation*, BC Reg 155/2012, ss. 6(a) and 6(b); *Heritage Conservation Act*, RSBC 1996 c 187, s. 3(3).

INTRODUCTION

[1] An association (applicant) asked the Ministry of Forests (Ministry) for access to records about archaeological sites in the Capital Regional District under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The Ministry provided responsive records to the applicant but withheld some information from those records under s. 18(a) (conservation of heritage sites) of FIPPA¹ and s. 3(3) (provincial heritage register) of the *Heritage Conservation Act*.²

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. The OIPC's mediation process did not resolve the matter and it proceeded to inquiry.

¹ From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.

² RSBC 1996 c 187.

[4] Both parties provided written submissions. The OIPC permitted the Ministry to submit some of its submission and affidavit evidence *in camera*.

Preliminary Issue

Public interest, s. 25

[5] The applicant says that disclosure of the disputed information is in the public's interest under s. 25.³ Section 25 imposes a duty on a public body to disclose information when it is in the public interest to do so.

[6] Past OIPC orders have consistently said that parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so.⁴ The notice of inquiry (notice), which was provided to both parties at the start of this inquiry, also states that parties may not add new issues into the inquiry without the OIPC's prior consent. In this case, the applicant did not request prior permission from the OIPC to add this issue or explain what circumstances would justify adding it at this late stage. Accordingly, I will not consider, or make any decision about, s. 25.⁵

Applicant's request to make a further submission

[7] After the submission phase of this inquiry closed, the applicant requested permission to make a further submission in response to the Ministry's reply submission. The OIPC's revised schedule for submissions⁶ clearly explains the schedule for submissions and deadlines for this inquiry.⁷ This schedule, which follows the OIPC's standard inquiry submission schedule, did not include a reply submission for the applicant. I find that the applicant did not point to any exceptional circumstance that would justify permitting him to provide additional submissions. As a result, I decline the applicant's request to make a further submission.

Complaint about the Ministry's information access policy

[8] The applicant says that the Ministry's policy for accessing archaeological information (policy)⁸ does not assist a claimant in a timely manner and, as a

³ Applicant's response submission, page 4.

⁴ For example, Order F16-34, 2016 BCIPC 38 at para 9.

⁵ See for similar reasoning Order F12-07, 2012 BCIPC 10 at para 6; Order F10-37, 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).

⁶ Dated December 11, 2023, which was provided to both parties at the start of this inquiry.

⁷ Revised Schedule dated December 11, 2023.

⁸ The Ministry's Archaeological Information Access Policy, revised July 7, 2023.

result, increases the cost of developing land.⁹ The Ministry submits that the applicant's complaint about the policy goes beyond the issues in dispute.¹⁰

[9] In this inquiry, my task is to dispose of the issues listed in the OIPC investigator's fact report and the notice. Those issues are limited to whether certain FIPPA exceptions to disclosure or the *Heritage Conservation Act* apply to the information in dispute. The applicant's complaint about the policy is outside the scope of FIPPA, and I do not have the authority to decide that issue. Therefore, although I have read all of the parties' submissions, I will only comment on those matters insofar as they directly relate to an issue under FIPPA.

ISSUES

[10] The issues I must decide in this inquiry are:

1. Is the Ministry authorized to refuse to disclose the information in dispute under s. 18(a)?
2. Is the Ministry authorized to refuse to disclose the information in dispute under s. 3(3) of the *Heritage Conservation Act*?

[11] Under s. 57(1), the Ministry, which is the public body in this case,¹¹ has the burden of proving that the applicant does not have a right of access to the information withheld under s. 18.

[12] FIPPA does not say who has the burden of proof regarding s. 3(3) of the *Heritage Conservation Act*. However, there is a general rule that it is for the party claiming the benefit of a legislative provision to show that they are entitled to rely on it.¹² In my view, this general rule applies here because the Ministry is seeking to rely on the benefit of s. 3(3) of the *Heritage Conservation Act*. Additionally, s. 3(3) of the *Heritage Conservation Act* and s. 18 are similar provisions in that they both give a public body the discretion to refuse to disclose information to prevent harm to heritage sites. Given the Ministry has the burden under s. 18, it should also have the burden under s. 3(3) of the *Heritage Conservation Act*.¹³

⁹ Applicant's response submission, pages 2 and 5.

¹⁰ Ministry's reply submission at paras 3-4 and 8.

¹¹ Schedule 1 "Definition".

¹² *Québec v. (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, 1994 CanLII 58 (SCC), [1994] 3 S.C.R. 3 at p. 15. See also e.g. *Smith v. Nevins*, 1924 CanLII 70 (SCC), [1925] S.C.R. 619.

¹³ See for similar reasoning Order F20-50, 2020 BCIPC 59 (CanLII) at para 5.

DISCUSSION

Background

[13] The Ministry is responsible for the stewardship of provincial Crown land and ensures the sustainable management of forest, wildlife, water and other land-based resources.¹⁴

[14] The Archaeology Branch (Branch) of the Ministry is responsible for maintaining and distributing heritage information. The Branch is also responsible for managing records related to heritage resources.

[15] The *Heritage Conservation Act* prohibits a person from damaging, desecrating or altering a Provincial heritage site or object or a burial place that has historical or archaeological value, without permission.¹⁵ The Ministry may allow archaeological assessment or alteration to archaeological sites under the *Heritage Conservation Act*.

[16] The Ministry operates the remote access to archaeological data web portal (RAAD) that is an online geographic information application system. RAAD allows authorized users¹⁶ to access to data respecting the Province's archaeological sites for the purposes of land-use planning, development approval processes, or archaeological studies. A private business can gain access to RAAD by retaining a professional archaeologist, which is required to ensure that archaeological data is properly interpreted, utilized, and protected to foster conservation of archaeological and heritage sites.

[17] In 2022, the applicant made its access request under FIPPA for records about archaeological sites in the Capital Regional District.¹⁷ Before the FIPPA request, the applicant requested access to RAAD for the same records but was rejected by the Branch.

Record and information at issue

[18] The information at issue consists of red triangles on a one-page map (Map) of the southern part of Vancouver Island produced by the Ministry. These triangles identify the locations of 2,719 sites. The Ministry has released

¹⁴ The information in this background section is not disputed by the parties and is based on the information already disclosed in the record and the parties' submissions.

¹⁵ Section 12.1 of the *Heritage Conservation Act*.

¹⁶ Authorized users may include archaeological consultants, Indigenous groups, accredited academic researchers, and federal, provincial, or local government resource and land-use planning agencies. These authorized users are required to enter into data sharing agreements that impose conditions on further disclosure of the information. The general public is not authorized to access RAAD.

¹⁷ Applicant's access request dated June 1, 2022.

approximately a quarter of these triangles and is withholding the rest.¹⁸ The Ministry applied both s. 18(a) of FIPPA and s. 3(3) of the *Heritage Conservation Act* to all of this information.

Disclosure to the world

[19] The Ministry says that in assessing whether or not disclosure could reasonably be expected to result in harm under FIPPA, a public body is entitled to assume disclosure under FIPPA is effectively disclosure to the world at large.¹⁹

[20] I accept the Ministry's point that, under FIPPA, disclosure of information to an applicant in response to an access request is, in effect, disclosure to the world. This is a well-established principle.²⁰ It is based on the fact that there are no restrictions in FIPPA prohibiting an applicant from disclosing the information publicly. Even if an applicant does not in fact disclose the information publicly, they could do so, so the FIPPA analysis assumes that disclosure is to the world and not just to the applicant. Accordingly, when considering the harms under the relevant exception, I will do so on the basis that the records could be disclosed to the world.

Harm to the conservation of heritage site, s. 18(a)

[21] Section 18(a) allows a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of fossil sites, natural sites or sites that have an anthropological or heritage value.

[22] Section 18(a) has two parts, and the public body must prove both. First, the site at issue must be a fossil site, a natural site or a site that has an anthropological or heritage value. Second, disclosure of the information in dispute must reasonably be expected to result in damage to or interfere with the conservation of that site.²¹

[23] The Ministry says that the red triangles on the Map identify the location of the sites at issue, which have anthropological and/or heritage value.²² The Ministry says that disclosure of the disputed information could reasonably be expected to cause damage to or interfere with the conservation of those sites.²³

¹⁸ Given the scale of the Map, the marks that have been disclosed are so densely placed and overlapping that one cannot actually pinpoint where the sites are located.

¹⁹ Ministry's initial submission at paras 16

²⁰ See, for example, Order 01-52, 2001 CanLII 21606 at para 73; Order 03-35, 2003 CanLII 49214 (BC IPC) at para 31.

²¹ F22-34, 2022 BCIPC 38 (CanLII) at para 161; Order F23-100, 2023 BCIPC 116 at para 54.

²² Ministry's initial submission at para 68.

²³ Ministry's initial submission at paras 45 and 75.

[24] The applicant says that the Ministry has already disclosed some information from the records at issue; therefore, there is no reasonable expectation of probable harm coming to the sites described in the records. The applicant also says that the Ministry failed to prove the harm is considerably above a mere possibility.²⁴

[25] In response to the applicant, the Ministry says that some of the red triangles on the Map, which identify the sites with anthropological and/or heritage value, were released to the applicant because the format in which this information has been shared (overlapping red triangles) makes it difficult, if not impossible, to determine the number, details or precise locations of these sites.²⁵ The Ministry also says that disclosure of that information is not an acknowledgement of a lack of harm regarding disclosure of the sites at issue.²⁶

Anthropological or heritage value, s. 18(a)

[26] I find that the sites at issue are sites that have anthropological and/or heritage value for the reasons that follow.

[27] Section 6 of the Freedom of Information and Protection of Privacy Regulation²⁷ (Regulation) reads:

6 For the purposes of section 18 of the Act,

(a) a site has anthropological value if it contains an artifact or other physical evidence of past habitation or use that has research value, and

(b) a site has heritage value if it is the location of a traditional societal practice for a living community or it has historical, cultural, aesthetic, educational, scientific or spiritual meaning or value for the Province or for a community including an Indigenous people.

[28] Additionally, sections of the *Heritage Conservation Act* provide definitions and the Ministry's authority relating to protection and conservation of sites and objects that have heritage value or archaeological value. These sections read:

1 In this Act:

"heritage object" means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people;

²⁴ Applicant's response submission at page 4.

²⁵ Ministry's reply submission at para 18; Affidavit # 1 of Deputy Director at para 10.

²⁶ Ministry's reply submission at para 16.

²⁷ BC Reg 155/2012.

“heritage site” means, whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people;

“heritage value” means the historical, cultural, aesthetic or educational worth or usefulness of a site or object;

“Provincial heritage site” means a heritage site designated under section 9 or a Provincial heritage property designated under section 11.1.

3(1) The minister must establish and maintain one or more registers, to be known collectively as the Provincial heritage register, for the recording of the following:

- (a) Provincial heritage sites;
- (b) Provincial heritage objects;
- (c) heritage sites and heritage objects that are included in a schedule under section 4(4)(a);
- (d) other known heritage sites and heritage objects that are, in the opinion of the minister, protected under section 12.1;

12.1 (1) Except as authorized by a permit issued under section 12.2 or 12.4, a person must not move, or attempt to remove, from British Columbia a heritage object that

- (a) is protected under subsection (2), or
- (b) has been removed from a site protected under subsection (2).

(2) Except as authorized by a permit issued under section 12.2 or 12.4 or an order issued under section 12.3, a person must not do any of the following:

- (b) damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value;

[29] To support its assertion that all the sites at issue have anthropological and/or heritage value, the Ministry provides affidavit evidence from a deputy director with the Ministry’s strategic priorities, archaeology branch (Deputy Director) who says that she is a statutory decision maker under the *Heritage Conservation Act*. She explains that she has also held several previous positions with the Ministry, among them Heritage Resource Specialist and Manager of Archeological Operations. She says that she personally reviewed the record at issue and she decided the information in dispute could not be released to the applicant.²⁸

[30] On the basis of the affidavit evidence and exhibits before me, I am satisfied that the sites at issue have anthropological and/or heritage value.

[31] I accept that the Ministry’s Provincial Heritage Register (Heritage Register) is a Provincial register established under s. 3(1) of the *Heritage Conservation Act*

²⁸ Affidavit #1 of Deputy Director at paras 1-7.

for the recording of heritage sites and heritage objects.²⁹ The Deputy Director says that in order to determine whether a site will be recorded in the Heritage Register, the Branch examines if the site has archaeological and/or heritage value based on the Archaeological Impact Assessment Guidelines (the Guidelines).³⁰ The Deputy Director says that the Branch examined each of 2,719 sites identified in the Map and concluded they all contain physical evidence of historic meaning, use or occupation.³¹ As a result, the 2,719 sites were entered into the Heritage Register.³²

[32] The Deputy Director's affidavit includes parts of the Guidelines, and based on that I can see that the criteria the Branch considers when assessing the significance of a site include the following:

- If the site contains evidence which may substantively enhance understanding of a culture's history or process, and other aspects of local and regional prehistory;
- If the site contains evidence which may substantively enhance understanding of historic patterns of settlement and land use in a particular locality, regional or larger area;
- If the site contains evidence which may be used for experimentation aimed at improving archaeological methods and techniques;
- If the site contains evidence paleoenvironmental studies;
- If the site presently has traditional, social or religious importance to a particular group or community;
- If the site contributes to sense to continuity or identity;
- If the site is a good typical example of an early structure or device commonly used for a specific purpose throughout an area or period of time;
- If the site does or could contribute to a sense of continuity or identity either alone or in conjunction with similar sites in the vicinity;
- If the site is representative of a particular architectural style or pattern;
- The scientific significance of a site, which refers to the potential for relevant contributions to other academic disciplines or to industry;
- The ethnic significance of a site, which may be assessed by someone having special knowledge of a particular site, who is properly trained in

²⁹ Affidavit #1 of Deputy Director at paras 8 and 15. Section 1 of the *Heritage Conservation Act* provides following definitions: "heritage object" means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people; and "heritage site" means, whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people.

³⁰ Affidavit #1 of Deputy Director at paras 8 and 27. The Guidelines are Exhibit A to the affidavit.

³¹ Affidavit #1 of Deputy Director at para 28.

³² Affidavit #1 of Deputy Director at para 8, 15, 27-31.

obtaining and evaluating data.³³

[33] Having reviewed the Ministry's evidence, I find that the criteria set out in the Guidelines require a site contain physical evidence of past habitation or use that has value for further study. In my view, these requirements equate to the meaning of anthropological value in s. 6(a) of the Regulation (i.e., a site has anthropological value if it contains an artifact or other physical evidence of past habitation or use that has research value). While the Guidelines use the term "archaeology" instead of "anthropology", I accept the Deputy Director's evidence that archaeology is understood to be a subdiscipline of anthropology and is the study of material culture (i.e., the physical evidence of where and how people lived), while anthropology is the study of human culture.³⁴

[34] Further, I find that the definition of heritage value in s. 1 of the *Heritage Conservation Act* (i.e., the historical, cultural, aesthetic or educational worth or usefulness of a site or object) equates to the meaning of heritage value set out in s. 6 of the Regulation (i.e., a site that has historical, cultural, aesthetic, educational, scientific or spiritual meaning or value for the Province or for a community including an Indigenous people).

[35] As some of the Deputy Director's affidavit evidence was accepted into the inquiry *in camera*, I am restricted in what I can say about it. However, I can say that her evidence includes a report about some of the sites at issue and contains the following information about these sites: their geographic information, a full description of artifacts and physical evidence discovered at the sites, its cultural history and archaeological findings.³⁵ I find that the Deputy Director's *in camera* evidence satisfactorily demonstrates the sites in the report were used by Indigenous people and have historical, cultural and spiritual meaning.

[36] Having considered these circumstances, in my view, the Ministry's evidence provides sufficient grounds for concluding that the sites at issue have anthropological and/or heritage value within the meaning of s. 6(b) of the Regulation.

[37] As a result, I conclude that the sites at issue have anthropological and/or heritage value within the meaning of s. 18(a).

Harm, s. 18(a)

[38] Section 18(a) identifies two kinds of harm and either is sufficient for s. 18(a) to apply. The question is whether disclosure of the information in dispute could be reasonably expected to either:

³³ Affidavit #1 of Deputy Director at para 27; Exhibit A to the affidavit.

³⁴ Affidavit #1 of Deputy Director at para 19.

³⁵ The Report is Exhibit B of her affidavit.

- result in damage to the sites that I have found above have anthropological and/or heritage value; or
- interfere with the conservation of those sites.

[39] The standard of proof is a reasonable expectation of probable harm. The words “could reasonably be expected to” mean that the public body must establish a reasonable expectation of probable harm. This language tries to mark out a middle ground between that which is probable and that which is merely possible. To establish that there is a reasonable expectation of probable harm, the public body must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground.³⁶ There must be a direct link between the disclosure and the apprehended harm.³⁷

[40] The Ministry says that the information about the location of the sites at issue is not publicly available³⁸ and public release of this information would create a real and substantial risk that individuals would seek out and disturb these sites.³⁹

[41] The Deputy Director says that the disputed information identifies landscape features (i.e., the coastline and the map scale) that can be used to locate the sites at issue.⁴⁰ She says that this information is restricted and provided only to archaeologists, Indigenous groups, local/provincial government representatives, and other parties with appropriate training or responsibilities related to land-use decision-making.⁴¹ The Deputy Director also says that once an anthropological site has been disturbed, the valuable information that could have been captured from further study of the site would be irreparably harmed and lost. She states that disclosure of the site location may encourage unsanctioned searching, looting and treasure-hunting.⁴² The Deputy Director gives the following examples of irreparable damage that has occurred in the past at archaeological sites throughout the Province:

- Indigenous pictographs defaced by racist graffiti and paintballs;
- The original carved Indigenous images at the Sooke Hills, which are estimated to be between 200-3,000 years old, obscured by vandalism;
- Indigenous pictographs that appear to be two native hunters above Kootenay Lake damaged by paintball pellets in 2013, which requires complicated process for restoration;

³⁶ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54.

³⁷ *Merck Frosst Canada Ltd v Canada Health*, 2012 SCC 3 at para. 219. See also Order F17-15, 2007 CanLII 35476 (BCIPC) at para. 17.

³⁸ Ministry’s initial submission at para 14.

³⁹ Ministry’s initial submission at para 80.

⁴⁰ Affidavit #1 of Deputy Director at para 26.

⁴¹ Affidavit #1 of Deputy Director at para 9.

⁴² Affidavit #1 of Deputy Director at paras 33-34.

- The Osoyoos Indian Band pictograph was spray-painted with racial epithets in 2020;
- Archaeological artifacts posted for sale in 2023; and
- Archaeological artifacts illegally collected in 2024.⁴³

As noted above, the applicant says that there is no reasonable expectation of harm coming to the sites described in the records.⁴⁴

[42] In considering the type of evidence required to prove harm for the purposes of s. 18(a), former Commissioner Loukidelis stated in Order 01-11 that it is not necessary to prove that any individual has a motive to “despoil” the site, although evidence of such a motive may be useful.⁴⁵ He said that evidence of an opportunity to harm or interfere with the site is relevant, but not necessarily dispositive of the issue. He also found that, until the sites at issue were professionally excavated, their “only effective protection lies in their locations not being publicly known.”⁴⁶ I agree with this approach.

[43] I accept the Ministry’s evidence that in the past archeological/heritage sites have been vandalized. Based on this evidence, I conclude that it is reasonable to expect that there are people who would damage the sites identified in the record if they knew where these sites are located. I am satisfied that the disputed information contains information that is not publicly available and, if disclosed, can be used to locate the archaeological sites and heritage sites.

[44] Considering all of the above, I find that disclosing the disputed information could reasonably be expected to result in damage to the sites at issue.

Conclusion, s. 18(a)

[45] To summarize, I find the sites on the Map have anthropological and/or heritage value within the meaning of s. 18(a) and s. 6(a) of the Regulation. I also find that disclosure of the disputed information could reasonably be expected to result in damage to these sites. I conclude that the Ministry is authorized to withhold the disputed information under s. 18(a).

[46] Given this finding, I do not need to consider whether s. 3(3) of the *Heritage Conservation Act* also applied to the same information.

⁴³ Affidavit #1 of Deputy Director at paras 35-43; Exhibits C, D, E and F to the affidavit.

⁴⁴ Applicant’s response submission at page 4.

⁴⁵ Order 01-11, 2001 CanLII 21565 (BCIPC) at para 31.

⁴⁶ *Ibid* at para 44.

CONCLUSION

[47] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse to disclose the information it withheld under s. 18(a) FIPPA.

July 25, 2024

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

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