Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 14-1994
June 24, 1994

INQUIRY RE: A Request to Review a Decision of the Ministry of Aboriginal Affairs

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1. Description and Nature of the Review

As the Information and Privacy Commissioner, I conducted an oral inquiry under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) on Tuesday, June 21, 1994 between the hours of 9:30 a.m. and 1:00 p.m. This inquiry concerned a request to review the decision of the Ministry of Aboriginal Affairs (the Ministry) to sever information from a record in the custody of the Ministry requested by the applicant, Mr. Jack Weisgerber, Member of the Legislative Assembly for Peace River South.

The applicant wrote the Ministry on January 11, 1994 requesting access to copies of records prepared by or for the Ministry in the course of the preparation of Peat Marwick Stevenson & Kellogg's March 1992 report to the provincial government entitled "British Columbia Financial Review." The Ministry released to the applicant a completed questionnaire which had been requested. On March 22, 1994 the Ministry also forwarded to the applicant a severed copy of the "entity" report (the document) prepared by Peat Marwick. The document was one of forty-seven prepared by Peat Marwick reviewing the operations and programs of government ministries, Crown corporations, and select agencies. The Ministry severed government estimates of the costs involved in the negotiation and settlement of native land claims from the document pursuant to various exceptions under the Act. On March 31, 1994 the applicant requested a review of the Ministry's decision to sever the information.

At the beginning of the inquiry on June 21, 1994 some of the severed information from the document at issue was released to the applicant by counsel for the Ministry. However, the Ministry withheld the remainder of the severed information, which is the information in dispute in this inquiry.

The Ministry excepted the severed information under sections 16(1)(a)(i), harm to relations with the federal government; 16(1)(a)(iii), harm to relations with aboriginal

governments; 16(1)(c), harm to negotiations with aboriginal governments; and 17(1)(e), harm to financial interests of the province through disclosure of information about negotiations.

2. Documentation of the Inquiry Process

The Office of the Information and Privacy Commissioner (the Office) provided the applicant and the Ministry with a two-page statement of facts (the fact report). After some amendments, the parties did not object to the accuracy of the report.

Under section 56 of the Act, the Office gave notice of the oral hearing to the parties. Mr. Gordon Wilson, Member of the Legislative Assembly for Powell River-Sunshine Coast, sought and received permission to make an oral submission to the inquiry as an intervenor.

The applicant appeared for himself and was sworn to give evidence at the inquiry. He was accompanied by Mr. Martyn Brown, caucus research director of the Reform Party of B.C. The Ministry's case was presented by Ms. Catherine L. Hunt, a barrister and solicitor with the Legal Services Branch, Ministry of Attorney General. Ms. Hunt was accompanied by Ms. Elizabeth Argall, also with Legal Services; Mr. Lyle Viereck, Senior Negotiator, Treaty Negotiations Division of the Ministry; Ms. Gail Leatherdale, Assistant Director of Information and Privacy in the Ministry; and Ms. Carol McNichol, Acting Negotiator, Treaty Negotiations Division. All witnesses who gave evidence were sworn.

As noted above, at the outset of the inquiry counsel for the Ministry released some of the previously severed information to the applicant. This was entered as Exhibit 1.

The applicant introduced a press release issued by him as Social Credit Aboriginal Affairs spokesperson in December 1991, which was entered as Exhibit 2, and a copy of the Memorandum of Understanding between Canada and British Columbia respecting the sharing of negotiation costs and settlement costs, dated June 21, 1993, which was entered as Exhibit 3.

The Ministry introduced a summary which grouped the information at issue into three categories. It was entered as Exhibit 4. A two-page affidavit from Lesley Ewing, the Acting Assistant Deputy Minister, Management Services in the Ministry of Aboriginal Affairs, dated June 21, 1994, was entered as Exhibit 5.

The Ministry also introduced a package providing background information on the treaty negotiation and settlement process in British Columbia, which was entered as Exhibit 6, as well as copies of the Official Report of Debates of the Legislative Assembly (Hansard) from various days in March and April, 1994, which were entered as Exhibit 7.

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the

applicant has no right of access to the record or parts thereof. Thus the Ministry of Aboriginal Affairs bears the burden of proof in this case.

During the oral hearing, the applicant objected to a point of view apparently put forward during the investigation and settlement process by the portfolio officer who handled this case for my Office. I responded that this was the first I had heard about the portfolio officer's view of the matter (expressed in a letter to the applicant), except for a newspaper columnist's account of the applicant's request for review. In processing the request for review, the Office followed our current practice of assigning it to a portfolio officer and thereby insulating the Commissioner from any involvement in the investigation, negotiation, or mediation phases. Although the government had no objection to my viewing the above letter, I did not find it necessary or appropriate to rely upon it in the preparation of this order.

The government objected to my taking notice of certain hearsay evidence presented by the applicant at the inquiry. While I am not bound by the strict rules of evidence and may therefore, within the requirements of fairness, accept evidence that is hearsay, nothing in this review turned upon the hearsay evidence in question, and it was not central to determining the issues before me.

During the oral inquiry, with the agreement of the applicant, I held a brief in camera session, with lawyers and witnesses representing the Ministry. I did so because I was troubled by the generality of the government's presentation at that point and wanted a more specific discussion about the severed information. I reviewed each of the excepted items during this session. No other matters were discussed. (See my Order No. 12 of June 22, 1994 for a discussion of the basis for in camera proceedings and documentation under the Act.)

3. The Information in Dispute

The Ministry had excepted from disclosure approximately thirty lines out of a total of nineteen pages in the record at issue. It disclosed about half of the thirty lines at the start of the oral hearing (see Exhibit 1). The Ministry's decisionmaker explained in her affidavit that "[t]his release was possible because of the signing of the Contribution Funding Agreement between the Province and Canada which will provide funding to First Nations by the B.C. Treaty Commissioners."

The Ministry categorized the specific information in dispute into three types: 1) cost sharing estimates; 2) costs of land claims; and 3) royalties. Mr. Viereck testified that the severed information had originally been provided to the consultants by the Ministry of Finance.

4. The Applicant's Case

The applicant indicated his "firsthand experience" with the general issues in this inquiry, given his service as the first Minister of Native Affairs in British Columbia from 1988 to 1991 and his role in initiating the B.C. Treaty negotiation process in 1990. He feels "strongly that the severed information should be made public and would in no way compromise the government's position on land claims negotiations -- or the negotiation process itself.... [I]nformation relating to land claims must be made public as an essential ingredient for successful negotiations." (See Exhibit 2)

Given his background, the applicant argued "that the reasons cited for refusing to disclose the severed information in question are spurious and inadequate." Moreover, he noted that the taxpayers have already paid a consulting firm for information now being withheld from them, and the data are two years old and thus obsolete.

The applicant argued that sections 16 and 17 of the Act should not apply, since the disclosure of the information in question would not compromise the treaty negotiation process, harm the government's conduct and relations with First Nations, or be harmful to the economic or financial interests of the province. Moreover, most of these figures are global in character and hence would not harm individual negotiations.

5. The Intervenor's Case

Mr. Wilson made a series of points about the severed records and the application of the exceptions under the Act. In his view, other persons could prepare estimates similar to the severed information if they did some research. Certain financial data of a similar type are available during consideration of the estimates for the Ministry in the legislature. Moreover, he argued that there is enormous public interest in this matter of land claims settlements.

6. The Ministry's Case

The Ministry presented an affidavit from the decision-maker in the Ministry (Exhibit 5) setting forth the factors that she considered in making her decisions:

- that treaty negotiations in the Province of British Columbia are at a critical stage;
- that any information about the projected costs of land claims would reveal negotiating positions and could harm the conduct of negotiations;
- that relations between the Province of B.C. and the federal government are extremely sensitive and could reasonably be expected to be harmed by the release of information concerning estimated provincial contributions in the cost-sharing agreements; and
- that release of the information concerning projected settlements could be reasonably expected to cause significant harm to the economic interests of the

Province in future negotiations for treaties by increasing the amounts expected in settlements by the aboriginal groups.

Mr. Viereck, a senior treaty negotiator, testified in support of the Ministry's contentions that disclosure of the severed information would harm the interests of the province in its relations with aboriginal governments and the federal government (Exhibits 3, 4, 6). Such negotiations are ongoing and protracted. He said that the government prepares various scenarios and possible outcomes during the negotiation process. It is continuing to negotiate with the federal government on various details, and he testified that release of global figures would prejudice the cost of land claims and mislead the public with respect to its expectations.

The Ministry asked me to uphold its decision to withhold information from the requested record under sections 16 and 17 of the Act.

7. Application of the Act

Harm to Relations with Canada

Section 16(1)(a)(i) of the Act states:

> 16. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
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> (i) the government of Canada or a province of Canada;

I accept the Ministry's submission, based in part on decisions of the Information Commissioner of Canada and the Ontario Information and Privacy Commissioner, that "disclosing the references to the cost sharing estimates would harm relations between the Province and the federal government and also result in harm to our ongoing negotiations with the federal government on issues relating to the cost-sharing agreement. These cost sharing estimates reflect where the province expected to end up with the cost-sharing formula. Disclosure of this information would hamper the ability of the Province to negotiate freely in the context of a confidential strategy." (Outline of Argument, nos. 22, 23)

Harm to Relations with an Aboriginal Government

> 16. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
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> ...
>
> (iii) an aboriginal government;

"Aboriginal government" is defined in Schedule 1 of the Act to mean "an aboriginal organization exercising governmental functions." The Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) (the Manual) gives Indian bands and tribal councils as examples of aboriginal governments. Mr. Wilson argued that the meaning of aboriginal government was limited to bands that had concluded agreements for self-government. I do not accept this restrictive definition which would render section 16(1)(a)(iii) of the Act meaningless in most respects. Thus I accept the Ministry's submission that "disclosure of the costs of land claims and the royalties information would harm relations between the Province and aboriginal governments." (Outline of Argument, nos. 26, 27)

Harm to the Conduct of Treaty Negotiations

Section 16(1)(c) of the Act states:

> 16. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> ...
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> (c) harm the conduct of negotiations relating to aboriginal self government or treaties.

I accept the Ministry's submission that disclosure of the severed information, including royalties information, would harm the conduct of negotiations with aboriginal governments. If the minimum and maximum costs of land claims and royalties were released, it would affect the negotiation mandate and the expected outcomes. (Outline of Argument, nos. 30-34, 36-38)

Harm to Financial Interests of Government

Section 17(1)(e) of the Act states:

> 17. (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> ...

> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

I accept the Ministry's submission that releasing the cost sharing estimates, costs of land claims, and the royalties information at issue in this review could reasonably be expected to result in financial harm to the government of British Columbia, "since disclosure would have a detrimental effect on the government's financial position" with respect to negotiations. If during the negotiations, the potential final settlement amount were known, it would harm the government's financial or economic interests. (Outline of Argument, no. 44)

8. Discussion

Initially, it is the decision of the head of a public body not to disclose certain information on the grounds that it falls within one or more of the exceptions to the Act. My role is to ensure that the information is appropriately categorized and that a specific exception is applied properly in order to avoid various harms specified in the exceptions to the Act. I am persuaded that the Ministry has acted properly in severing the information in the present case.

The evidence for exceptions must be detailed and convincing and establish that releasing the severed information could reasonably be expected to harm government relations, the conduct of negotiations, and the financial or economic interests of government. The evidence presented by the treaty negotiator clearly met this standard.

I have carefully reviewed each of the severed items on the basis of the evidence submitted to me and am persuaded that the Ministry has a legal right to withhold disclosure of the severed information under sections 16 and 17 of the Act. Almost all of the severed information concerns dollar and percentage amounts on matters that remain under negotiations in land claim discussions with the federal government and aboriginal governments. Even though the data are dated January 1992, the evidence before me indicates that they are still meaningful. I found persuasive the Ministry's evidence that the severed information is not "old, invalid" data, to use the words of my own question to Mr. Viereck, but information on royalties and cost sharing projects that are still timely, significant, and directly relevant to ongoing specific negotiations with the federal government and aboriginal governments.

The Ministry is also engaged in an ongoing effort not to discuss specific numbers or proposed settlements in public. I note that in proceedings in the legislature, including question period and estimates, the Premier and the Minister are quite guarded in their discussions of these matters (see Exhibit 7).

Although the applicant and intervenor in this case made eloquent arguments for disclosure of all of the record at issue, much of what they had to say was in justification of disclosures that had in fact already been made to them.

The applicant noted that the government's witnesses enjoyed considerable advantages in knowing the contents of the severed record. The Act recognizes this by placing the burden of proof on the public body. Moreover, under the structure of the Act, it is the responsibility of the Commissioner to review these severed records and to make a determination on their release, based on all the evidence and submissions before him and his interpretation of the appropriate sections of the Act. That is what I have done in the present case. I am also satisfied that the severed information is not simply data that are embarrassing to the government as the applicant had suggested.

Thus I am of the view that the Ministry has met the standards for establishing the potential for harm that I set forth in my first order. It has also established a link between the disclosure of specific information and the harm which is expected from the release. (Order 1 of January 11, 1994 at p. 9)

9. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Aboriginal Affairs not to release the severed information in the records to the applicant.

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David H. Flaherty
Commissioner

June 24, 1994