

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 9-1994
May 26, 1994**

**INQUIRY RE: A Request for Access to Records of the Ministry
of Finance and Corporate Relations**

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696**

1. Description of the Review

As Information and Privacy Commissioner, I conducted an oral inquiry at the office of the Information and Privacy Commissioner in Victoria, British Columbia on Tuesday, May 17, 1994 between the hours of 3:30 and 5:15 p.m. under section 56 of the Freedom of Information and Protection of Privacy Act (the Act) concerning a request for records received by the Ministry of Finance and Corporate Relations (the Ministry). The request was made by Mr. Owen C. Trist (the applicant).

On December 15, 1993 the applicant requested from the Ministry "information representing background explanation or analysis provided to Treasury Board" relating to a decision as to "whether to allow a salary increase for excluded managers." This request (No. 940016) was made under the Act. A memorandum, dated November 12, 1993, to all excluded employees, from Jo Surich, the Acting Commissioner of the Public Service Employee Relations Commission (PSERC), referred to a Treasury Board review of whether to allow a cost-of-living (COLA) increase for excluded (non-union) managers.

On February 4, 1994 the Ministry forwarded to the applicant a severed copy of the Treasury Board Submission relating to that decision. A substantial portion of the information, under the heading "Background," had been severed by the Ministry on the basis that certain information was excepted from disclosure under section 12 of the Act dealing with Cabinet confidences.

The applicant disputed the Ministry's interpretation of the Act and on February 18, 1994 (within the thirty-day limit for filing) submitted a Request for Review to the Office of the Information and Privacy Commissioner.

Following negotiations with this Office, the Ministry, and the Office of the Premier, the applicant received more information from the Office of the Premier. For the most part this consisted of the headings on the document and some background information.

2. Documentation of the Review Process

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a two-page statement of facts (the fact report), which was amended and then accepted by all parties as accurate for purposes of conducting the inquiry.

Under subsection 56(3) of the Act the Commissioner gave notice of the inquiry to the B.C. Freedom of Information and Privacy Association (FIPA), the B.C. Civil Liberties Association (BCCLA), and the Vancouver Sun. The BCCLA submission, prepared by John Westwood, its Executive Director, was provided to all of the parties. The other two intervenors provided all parties with copies of their written submissions on the day of the inquiry itself. Robert L. Seeman was legal counsel for FIPA. The Vancouver Sun's submission was prepared by Carolyn L. Berardino.

The applicant appeared for himself and was sworn to give evidence at the inquiry. The Ministry's case was presented by Shauna Van Dongen, a barrister and solicitor with the Legal Services Branch, Ministry of Attorney General. With her was Catherine L. Hunt, a barrister and solicitor with the same branch, and David Young, the Manager of Information Access and Records Services of the Financial Services and Administration branch of the Ministry. Aimee Botje, Acting Manager of Information and Privacy in the Cabinet office, also testified about how the Treasury Board prepares its submissions to Cabinet in its multiple capacities as a committee of Cabinet, a statutory body, and as part of the Ministry of Finance. At the end of the inquiry, the Ministry provided the Commissioner with a twenty-page "Outline of Argument."

On the eve of the inquiry, the Ministry provided me with severed and unsevered copies of the requested record as well as a one-page detailed rationale, with specific page and paragraph references, for the severing that occurred with the release of the document. The complete list of the "severing rationale" included the following categories: "Policy advice," "Recommendation," "Policy Consideration," "implicitly reveal the substance of deliberations," and "reveals options."

The exhibits introduced at the inquiry included the statement of facts (Exhibit 1) and printed guidelines, dated December 1993, on preparing Cabinet Submissions (Exhibits 2 and 3). Exhibit 4 was an affidavit signed by Michael Costello, Deputy Minister of Finance, as to how he acted as the decision-maker in this case.

3. Issues under Review at the Inquiry

The focus of the inquiry was the applicant's request to review the parts of the record that were withheld by the Ministry. Subsection 12(1) of the Act reads:

The head of a public body must 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.

The applicant asked the Commissioner to determine the meaning of "the substance of deliberations."

A second issue raised by the applicant concerns the relationship between subsections 12(1) and 12(2) of the Act. In particular, does subsection 12(2) operate independently of subsection 12(1)? And is subsection 12(2) an exception to subsection 12(1)?

The relevant portions of subsection 12(2)(c) read:

(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

...

The applicant has asked what is the scope of information that may be released as "background explanation or analysis" as set out in subsection 12(2)(c)? And does the interpretation of "the purpose of which" in subsection 12(2)(c) refer to the entire record or a component of a record which provides background explanations or analysis?

Finally, the applicant seeks, in light of the answers to the above questions, additional information from the Treasury Board Submission.

The position of the Ministry is that it acted correctly in denying the applicant's request to obtain these records on the basis of section 12 of the Act. The Ministry's legal argument addressed the proper statutory interpretation of section 12 and what information in the record may be withheld under this section.

4. The Record in Dispute

The Treasury Board Submission in dispute in this inquiry is comprised of four pages of text and two pages of appendices. The main section of text that the applicant did not receive consisted of ten paragraphs covering almost two full pages and labelled "discussion." The applicant received one full paragraph and an additional six lines from

another paragraph. In another section titled "options," the applicant did not receive the text of the three options that were laid out in separate sentences. In the section titled "cost implications," the applicant did not receive the contents of three entries in a table dealing with numbers of employees and financial data. Finally, in a section labelled "recommendation," the applicant did not learn the recommendation that was made to Treasury Board by the public servant responsible for the submission.

The applicant received the text of two single-paged appendices, except for the last line of the notes to the second.

5. The Government's Case

Simply put, the government submits that "Subsection 12(1) is clearly directed at protecting all information that would reveal the substance of Cabinet deliberations.... To reveal the content of a Cabinet submission is to reveal the substance of Cabinet deliberations." (Written Submission, "Argument for the Ministry of Finance and Corporate Relations," p. 13)

Based on a section of the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) (the Manual), which was prepared for the government by its own Information and Privacy Branch in the Ministry of Government Services, the government argues, in the present case, that "information must be withheld that would either explicitly or implicitly reveal the substance of deliberations of Cabinet or a Cabinet committee." (p. 14) Thus, as in the present case, "factual information and the emphasis given to that information could implicitly reveal the advice or policy considerations provided in the record, thereby revealing the substance of deliberations." (p. 14)

The government further argued that subsection 12(2) of the Act does not apply to the record under review, even though it admits that Cabinet had made a decision in the present case. To do otherwise, in its view, would be to defeat the clear purpose of subsection 12(1). (p. 17-18)

The government acknowledges that the Treasury Board Submission under consideration in the present inquiry was prepared at a time before the Act came into force: "[A]s a result, background information is interspersed with policy considerations, advice, and recommendations." This system of presentation has now changed to facilitate the severing of information that must be withheld under section 12. (p. 18)

In the government's view, the withheld information in the present case is not "'background explanations or analysis.' It is factual information that could be combined with other information such as policy considerations and advice the disclosure of which could implicitly reveal the substance of deliberations." (p. 18)

6. The Applicant's Case

The applicant argued that the meaning of the term "substance of deliberations" in subsection 12(1) is narrower than deliberations as a whole. Subsection 12(2) has a clear and unambiguous meaning that subsection 12(1) does not apply in certain circumstances. He seeks a narrow construction of subsection 12(1) and a broad interpretation of 12(2) in order to avoid "secrecy for secrecy's sake." He advocated that the purposes of the Act set forth in section 2 should be interpreted as remedial and liberal in compliance with section 8 of the Interpretation Act.

Essentially, the applicant wants the factual and analytical information that has not been given to him from the record in dispute.

7. Discussion

The PSERC announcement on November 12, 1993 that there would be no COLA increases for all excluded employees indicated that Treasury Board had reviewed this question, and "this decision was not made lightly." According to one source, there are approximately 3,600 persons in this category of non-unionized employees. It is a reasonable application of the Act that such senior personnel should receive as much information as possible about a government decision having such a direct impact on them.

I have discussed my views on the meaning of section 12 of the Act in Order No. 8, which was also issued today. Those discussions apply equally to this case. After a careful review of the Treasury Board Submission, I have concluded that its contents do not necessarily reveal the "substance of deliberations," as I defined them in Order No. 8. It indicates the thinking of the Assistant Deputy Minister, Government Personnel Services Division, the signator of the record, at least as of the date of September 2, 1993. This record does not indicate what a Cabinet committee or the Cabinet itself actually discussed or said about the matter at issue, which I take to be central to the concept of Cabinet deliberations. To assume that actual Cabinet deliberations are reflected in the contents of this record is simply that, an assumption, absent evidence to the contrary. Disclosure of the record would reveal the substance of deliberations if it permits the drawing of accurate inferences with respect to the substance of those deliberations (see Order No. 8, p. 10).

However, the Act deals with information that is recorded and, as such, I must look to the written record in this case. Subsection 12(1) of the Act mandates that advice, recommendations, and policy considerations, "submitted or prepared for submission to the Executive Council or any of its committees", to the extent that they reveal the substance of deliberations of Cabinet, must not be disclosed.

Therefore, I disagree with the government's argument that subsection 12(1) automatically prohibits disclosure of all documents submitted to Cabinet. Public bodies must review

each of these records on their own merits to determine if disclosure, or partial disclosure, would reveal the substance of deliberations. I also disagree with the government's argument that subsection 12(2) does not apply in this case. On these matters I specifically adopt my reasoning in Order No. 8 at pages 11-13.

8. Conclusion

In accordance with my interpretation of section 12 in Order No. 8, I have reviewed the 14 separate severances carried out by the Ministry on the record and identified as such in tabular form in its submission to me. For sake of convenience I have numbered these from 1 to 14 in the table. My conclusions on each severance appear in order below:

1. One part of a sentence labelled as "policy advice", which I accept as "policy consideration."
2. I accept this paragraph as correctly labelled as a "recommendation."
3. A paragraph labelled "policy advice/recommendation," comprised of three sentences. The first and third sentences are "background explanation" and should be released; the second sentence is "advice."
4. A one-sentence paragraph correctly labelled as "policy consideration/recommendation."
5. A full paragraph labelled "policy consideration." I am of the opinion that this is "background explanations or analysis" and therefore releasable.
6. A full paragraph labelled "policy consideration." I am of the opinion that this is "background explanations or analysis" and therefore releasable.
7. One sentence labelled as "policy consideration," which I accept as "advice" or a "recommendation."
8. A paragraph labelled as "policy consideration," which I accept as such.
9. A two-sentence paragraph labelled "policy consideration/recommendation." I accept this categorization for the second sentence but view the first as "background explanation" and therefore releasable.
10. A full paragraph of three sentences that is labelled as "policy consideration/recommendation." I accept this categorization for the last sentence but view the first two as "background explanation" and therefore releasable. It is immaterial to my decision that the severance rationale incorrectly identifies this as paragraph 2, rather than paragraph 3.

11. The substance of three listed options are labelled as implicitly revealing the substance of deliberations. I accept these as "advice" and "recommendations" to Cabinet.

12. Factual information relating to the cost implications of the three options are labelled as "reveals options." I accept that disclosure of this information might make possible the implicit identification of "advice" and "recommendations" to Cabinet.

13. The specific recommendation is correctly labelled as such.

14. The last line of the second appendix is correctly labelled as a "policy consideration."

On the basis of this review I advance the following working definitions of the words in subsection 12(1):

"Advice" is a suggested course of action.

A "recommendation" is a favoured or preferred course of action.

"Policy considerations" are the issues that are to be considered before a decision can be reached.

These can all be distinguished from information which is used to provide background explanations or analysis for any of the above.

9. Order

Under subsection 58(2)(a) of the Act, I order the Ministry of Finance to release certain portions of the record identified above, on the basis that it is not required to refuse access under subsection 12(1).

David H. Flaherty
Commissioner

May 26, 1994