

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 33-1995
February 2, 1995**

**INQUIRY RE: A Request for Access to Records about the Premier's Council on
Native Affairs**

**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 a written inquiry on December 16, 1994 at the Office of the Information and Privacy Commissioner in Victoria under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review in which the applicant sought "all information and facts" concerning the Premier's Council on Native Affairs, an entity that was created and functioned during a Social Credit administration.

The applicant made his original request for information by way of letters dated April 28, 1994 to Cliff Serwa, M.L.A., and July 7, 1994, to Premier Mike Harcourt. The Office of the Premier (the Premier's office) dealt with the request insofar as it related to records held by that office and transferred the balance of the request to the Ministry of Aboriginal Affairs (the Ministry). In August, September, and October of 1994, both the Ministry and the Premier's office responded to the applicant's request by releasing packages of records.

Of the records released, several had information severed from them under section 12(1) of the Act. On October 10, 1994 the applicant submitted a request for review of these severances to the Office of the Information and Privacy Commissioner (the Office).

2. Documentation of the inquiry process

Under section 56(3) of the Act, the Office invited representations from the parties to this inquiry, being the applicant and the public bodies (I am using the term "public bodies" in this order to refer to the Premier's office and the Ministry collectively). On December 1, 1994 a Notice of Inquiry was sent to the parties.

The Office provided the parties involved with a two-page statement of facts (the “Portfolio Officer’s fact report”), which, with minor amendments, was accepted as accurate for purposes of conducting the inquiry. The parties made initial submissions on December 12, 1994. The public bodies submitted a reply by December 16, 1994; the applicant did not.

3. Issue under review at the inquiry

This inquiry examined the extent to which section 12 (Cabinet confidences) may be invoked when refusing to disclose information from the records in dispute. Section 12 reads:

Cabinet confidences

12(1) 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.

(2) Subsection (1) does not apply to

- (a) information in a record that has been in existence for 15 or more years,
- (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
- (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.

Under section 57(1) of the Act, the head of the public body has to prove that the applicant has no right of access to all or part of these records.

4. The records in dispute

The records in dispute are in seven separate sections, which I have numbered for ease of reference as follows:

1. Record 1 consists of two pages of meeting notes of the Premier's Council on Native Affairs, July 14, 1989.
2. Record 2 is five pages of minutes of a joint meeting of the Cabinet Committee on Native Affairs with the Premier's Council on Native Affairs, July 20, 1990, which includes an appendix of attendees.
3. Record 3 is a one-page summary of a Cabinet decision relating to the Premier's Council on Native Issues, dated June 21, 1989.
4. Record 4 is a seven-page (including appendices) Cabinet Submission relating to the establishment of the Premier's Council on Native Issues.
5. Record 5 is a one-page Treasury Board Chairman's report from June 22, 1989.
6. Records 6 and 7 are one-page summaries of Cabinet decisions dated June 28, 1989, and July 25, 1990.

5. The applicant's case

The applicant wants full access to the records that have been severed. He offers a number of reasons to justify his request, which pertain to a dispute as to whether a Chief appointed to the Premier's Council on Native Affairs had any formal connection with, or was appointed with, the recommendation of an Indian band (from which the Chief originated) and an Indian Tribe. Other issues concern his travel expenses and per diem compensation. The applicant states that the Premier's Council led to the creation of the B.C. Treaty Commission, which neither the particular Indian Band nor the Indian Tribe have accepted or approved.

In the applicant's view, "[a]ll documents pertaining to meetings of the Premier's Council on Native Affairs must be provided, otherwise the government of B.C. is guilty of breach of fiduciary trust and obligations."

6. The Ministry's case

The public bodies categorize the severed records as pertaining to: "Minutes from Cabinet Committee meetings, Cabinet Submissions, a Treasury Board Chairman's report and Summaries of Cabinet Decisions." (Argument for the Public Bodies, p. 3) The fundamental issue is whether these records are covered by section 12(1) of the Act.

The public bodies argue that none of these records fall within any of the parts of section 12(2) of the Act; therefore section 12(1) prohibits their disclosure as a mandatory exception. (Argument for the Public Bodies, p. 6) In their view, "[a]ny record, the

disclosure of which would reveal the substance of deliberations of Cabinet or its committees, is excepted from disclosure.” (Argument for the Public Bodies, p. 8)

The section therefore prohibits the disclosure of options which are being considered and the factors taken into account in deciding among those options as well as the essence of the arguments, the pros and cons which are advanced during consideration of the options.... If disclosure would permit the drawing of accurate inferences as to the substance of deliberations[,] the information must be withheld. (Argument for the Public Bodies, p. 9)

In addition to the points outlined below with respect to particular types of Cabinet materials, the public bodies argued, summarily, that the severed information “consists overwhelmingly of advice and recommendations regarding a course of action to be pursued in the future,” including “estimates of the advantages and disadvantages of pursuing that course of action.”

To the limited extent that the severed information describes or explains an existing situation, the context makes it clear that the information was included to draw Cabinet’s attention to a problem meriting special consideration in determining the details of a course of action to be pursued in the future. (Argument for the Public Bodies, p. 11)

The public bodies conclude that they have released “all information in these records which describes or explains the existing situation and the relevant historical information and which does not, by its context, signal the presence of a particular issue for Cabinet’s deliberation regarding a future course of action....” (Argument for the Public Bodies, p. 12)

7. Discussion

The applicant hoped to use the Act as a dispute-resolution mechanism. The Act itself only provides access to information. In my judgment, the public bodies acted appropriately in not making submissions with respect to certain statements made by the applicant. (Reply Submissions for the Public Bodies, p. 1) They made the relevant final statement that “[f]ull disclosure of the information contained in the records at issue would not provide the applicant with any more of the information he is seeking than has already been released.” (Reply Submissions for the Public Bodies, p. 2)

Section 12(2)(c)

Do the records in dispute fall into this category of disclosable information? The public bodies admit that, in connection with these severed records, a decision has been made public and implemented and five of the seven records are five years old. But they interpret the meaning of “background explanations or analysis” as follows:

...the words ‘background explanations or analysis’ refer to information upon which recommendations are based: explanatory or contributory information, information which may be used to clarify. This type of information provides a background to, or the basis upon which, Cabinet proceeds to determine a course of action for the future.

...the phrase ‘background explanations or analysis’ does not include information that would reveal the substance of deliberations of Cabinet or its committees as referred to in section 12(1).

The severed information at issue in this review consists of advice and recommendations only, and is not composed of background explanations or analysis. (Argument for the Public Bodies, pp. 7-8)

In general, I accept the public bodies’ arguments on section 12(2) in this particular case.

Cabinet Submissions and Treasury Board Chairman’s report

The public bodies offered useful descriptions of each type of record at issue in this dispute. A “Cabinet submission” and a Treasury Board Chairman’s report contain some information, now severed, that would necessarily be the object of Cabinet’s deliberation with respect to “recommendations,” “advice,” and outlining a suggested course of action. The internal evidence of the language used, the public bodies argue, supports this argument. Furthermore, they argue, “a Cabinet submission, by its nature and content, comes within the ambit of s. 12(1).”

It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would ‘reveal’ the substance of Cabinet deliberations[,] because it would permit the drawing of accurate inferences with respect to the deliberations. (Argument for the Public Bodies, pp. 9-10)

I agree with this general characterization of Cabinet submissions and apply it specifically below.

Cabinet Committee minutes

With respect to this type of record, the public bodies argued that “[t]he severed information documents the matters addressed by the Cabinet committee and summarizes the content of discussions which occurred between the individuals in attendance at the meeting.... Minutes of meetings form the very basis of the ‘substance of deliberations.’” (Argument for the Public Bodies, p. 10) I agree with this general characterization and apply it specifically below.

Summaries of Cabinet decisions

The public bodies essentially argued that this severed information would implicitly reveal the substance of Cabinet deliberations. In particular, they argued that the name of the Minister who recommended a particular course of action should be excepted from disclosure: “The identity of an individual who had initiated the subject of deliberation before Cabinet is certainly an aspect of the essence of the deliberation.” (Argument for the Public Bodies, p. 11) As indicated below, I am skeptical about the specific applicability of this last point in this case.

The specific records in dispute

Record 1: Meeting Notes of the Premier’s Council on Native Affairs, July 14, 1989

Members of the Cabinet Committee on Native Affairs were present as guests at this first meeting of the Premier’s Council. The two pages of meeting notes are largely ceremonial in nature and descriptive of the intended work of the Council. Whatever substantive matters were discussed are not reflected in the written meeting notes.

These records should be disclosed since they are not Cabinet records under section 12 of the Act. The presence of members of a Cabinet Committee at another meeting does not turn it into a Cabinet meeting.

Record 2: Joint Meeting, Cabinet Committee on Native Affairs and the Premier’s Council on Native Affairs, July 20, 1990

Twenty-seven members of Indian Bands from near Lillooet were also present for the morning part of the meeting. The minutes of the morning meeting do concern the discussion of substantive matters, including recommendations, that were explicitly intended to be brought forward to Cabinet. All of the minutes of the Premier’s Council meeting alone in the afternoon have been disclosed to the applicant, except for a specific suggestion from a member of what should be in the report and recommendations to Cabinet.

These records should not be disclosed, since they include the explicit minutes of a Cabinet Committee (the morning records), discussions of substantive matters intended for Cabinet, and a specific proposed recommendation to Cabinet.

Record 3: Summary of Decisions, Cabinet, June 21, 1989

The public bodies have already disclosed the basic summary of the Cabinet decision. They have only severed the name of the Minister who proposed the creation of the Premier’s Council on Native Issues and also the funding status of the proposal. I fail to see how the severance of the Minister’s name in this particular case reveals anything

about the “substance of deliberations” at Cabinet, at least as the public bodies have argued above for such an exclusion.

This record should be disclosed.

Record 4: Cabinet Submission, Premier’s Council on Native Issues

This is a seven-page document from 1989. The substantial severances fit the criteria outlined above by the public bodies. The materials include recommendations, advice, and policy options. Other severed material include proposals for specific members of the Council, proposed time frames, suggested locations for meetings, communications strategy, and communications expenditure.

These records do not have to be disclosed, since they clearly fall within the ambit of section 12(1) of the Act. However, since some of this information is now historical in character, I would urge the public bodies to rethink their decision not to release so much of it.

Record 5: Treasury Board Chairman’s Report, June 22, 1989

This one paragraph document from 1989 describes a Treasury Board recommendation to Cabinet.

This record should not be disclosed, since it clearly falls within the ambit of section 12(1) of the Act.

Record 6: Summary of Decisions, Cabinet, June 23, 1989

The public bodies have severed two letters and two words, which indicate which Ministry originated the proposed action by Cabinet and what was decided.

I reluctantly accept that a strict interpretation of section 12(1) of the Act allows such a severance. However, because the actual severance is so non-revealing as to run the risk of bringing the process of severing into disrepute, I would have preferred a less technical application that would be more in keeping with the spirit of the Act.

Record 7: Summary of Decisions, Cabinet, July 25, 1990

The public bodies have again severed one word which indicates which part of government brought forward the specific recommendation to Cabinet.

Once again, I reluctantly accept that a strict interpretation of section 12(1) of the Act allows such a severance, but the actual severance is so non-revealing as to run the risk of bringing the process of severing into disrepute. I would have wished for a less technical application that would be more in keeping with the spirit of the Act.

8. Order

Under section 58(2)(b) of the Act, I confirm the decision of the public bodies not to disclose records 2, 4, 5, 6, and 7.

Under section 58(2)(a) of the Act, I determine that the heads of the public body are neither authorized, nor required to refuse access to Record 1 in full and Record 3 in part. Thus I order the public bodies to disclose Record 1 in full and Record 3 in part.

David H. Flaherty
Commissioner

February 2, 1995