

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 309-1999
May 13, 1999**

INQUIRY RE: A request for briefing notes about the Nisga'a Final Agreement in the custody of the Ministry of Aboriginal Affairs

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 7, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the B.C. Liberal Caucus (the applicant) of a decision by the Ministry of Aboriginal Affairs (the Ministry) to withhold certain portions of Ministry briefing notes about the Nisga'a Final Agreement.

2. Documentation of the inquiry process

On September 11, 1998 Brian Menzies, on behalf of the B.C. Liberal Caucus, submitted a request to the Ministry of Aboriginal Affairs for "[a]ll briefing notes on the Nisga'a since January 1, 1998." On November 30, 1998, the Ministry of Aboriginal Affairs denied access under sections 12 and 13(1) of the Act to certain portions of the records.

On December 11, 1998 and January 6, 1999, the applicant requested that my office review the Ministry's decision. The ninety-day period ended on April 7, 1999. The Notice of Inquiry was sent to the parties on March 16, 1999 setting the inquiry for April 7, 1999. During the inquiry period, the Ministry released additional information.

3. Issue under review and the burden of proof

The issue under review in this inquiry is the Ministry's application of sections 12 and 13(1) of the Act to information in the records in dispute.

The relevant parts of sections 12 and 13 are as follows:

Cabinet and local public body 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.

Policy advice or recommendations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
- (a) any factual material,
 - (b) a public opinion poll,
 - (c) a statistical survey,

- (d) an appraisal,
 - (e) an economic forecast,
 - (f) an environmental impact statement or similar information,
 - (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
 - (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
 - (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
 - (j) a report on the results of field research undertaken before a policy proposal is formulated,
 - (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
 - (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 12 and 13, it is up to the public body to prove that the applicant has no right of access to the record or part of the record.

4. The records in dispute

The records in dispute are the following:

- a) a Cabinet Submission, dated April 20, 1998, signed by the Minister of Aboriginal Affairs on April 21, 1998, entitled “Nisga’a Treaty Negotiations” (7 pages);
- b) a submission to the Priorities and Planning Committee of Cabinet from the Ministry of Aboriginal Affairs, signed by the Minister of Aboriginal Affairs on May 1, 1998, entitled “Nisga’a Treaty Negotiations” (6 pages); and
- c) a Treasury Board Submission, dated May 26, 1998, signed by the Minister of Aboriginal Affairs and date-stamped June 9, 1998 (6 pages).

5. The BC Liberal Caucus’s case

The applicant seeks access to a full, unsevered copy of the records in dispute. It disputes whether disclosure of the information in dispute would reveal the substance of Cabinet deliberations or reveal advice or recommendations to the public body.

6. The Ministry of Aboriginal Affairs’ case

The Ministry has relied on sections 12 and 13 of the Act to refuse access to information in the records in dispute. In the first instance, it argues that disclosure would reveal the substance of deliberations of Cabinet or of its committees, or that form the basis for Cabinet, Cabinet committee, and Treasury Board deliberations. With respect to the application of section 12(2), the Ministry’s submission is as follows:

The Public Body submits that it has disclosed to the Applicant all information from the records the purpose of which was to provide background explanation or analysis. The Public Body submits that none of the severed information was put into the records for the purpose of providing background explanations or analysis.

The Ministry relies on section 13 of the Act to refuse to disclose advice or recommendations developed by or for a public body or a minister. The Ministry adds that neither section 13(2) or (3) has any application in this inquiry.

In support of its application of sections 12 and 13, the Ministry generally submits that the severed and withheld information consists of specific decisions requested of Cabinet, of Treasury Board, or of the Priorities and Planning Committee; specific details about what would be needed and what was already in place to implement those decisions; objectives and goals to be met by implementing those decisions; options and recommendations; an assessment of a proposed course of action; and some information that if disclosed would reveal the substance of previous Cabinet decisions or deliberations.

I should note my agreement with the last point about the legitimacy of protecting information that forms the basis for previous Cabinet deliberations, as set out by Mr. Justice Donald writing for the Court of Appeal in Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia, (1998), 111. B.C.A.C. 95, at pages 109-110, Paragraph 48.

7. Discussion

Review of the Records in Dispute

The Ministry has provided the applicant and me with a two-page grid reviewing the specific severances in each of the three records in dispute and the rationale for them.

The Cabinet submission of April 20, 1998, which I have reviewed in its entirety, deals with an aspect of the Nisga'a Treaty Negotiations. The Ministry has withheld all of the text under the following headings: decision requested; objective; provincial goals; and recommendation. It has also withheld a sentence and about twelve lines dealing with the topic of challenges. I find that the Ministry has appropriately applied sections 12 and 13 of the Act to the records in dispute, on the basis of the language of those sections.

I have also reviewed in its entirety the submission to the Priorities and Planning Committee of Cabinet of May 1, 1998. The Ministry has withheld the entire text, except for one-half of a sentence, and the subject headings throughout. In each instance, it has relied on sections 12 and 13 of the Act for that purpose. The language of these sections does authorize the Ministry to withhold such information.

I have also reviewed the Treasury Board submission of May 26, 1998, which the Ministry has entirely withheld except for a few headings and one-half of a sentence on the basis of sections 12 and 13 of the Act. The language of these sections does authorize the Ministry to withhold such information.

8. Order

I find that the Ministry of Aboriginal Affairs was required to withhold information in the records in dispute under section 12(1) of the Act. Under section 58(2)(c), I therefore require the Ministry of Aboriginal Affairs to refuse to disclose the information withheld under section 12(1) of the Act.

I also find that the Ministry of Aboriginal Affairs was authorized to withhold information in the records in dispute under section 13 of the Act. Under section 58(2)(b), I therefore confirm the decision of the Ministry of Aboriginal Affairs to refuse to disclose the information withheld under section 13 of the Act.

David H. Flaherty
Commissioner

May 13, 1999