

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 313-1999
June 30, 1999**

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

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

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 a representative of the B.C. Liberal Caucus (the applicant) of a decision by the Ministry of Municipal Affairs (the Ministry) to withhold certain portions of Ministry briefing notes concerning the Nisga'a Final Agreement.

2. Documentation of the inquiry process

On September 11, 1998 the applicant submitted a request to the Ministry of Municipal Affairs for “[a]ll briefing notes on Nisga'a since January 1, 1998.” On November 13, 1998 the Ministry denied access under sections 13 and 16 of the Act to certain portions of the records.

On December 11, 1998 and January 4, 1999 the applicant requested this Office to review the Ministry's decision. The ninety-day review period ended on April 7, 1999. During the inquiry period, the Ministry released additional information. The Notice of Inquiry was sent to the parties on March 16, 1999 setting the inquiry for April 7, 1999.

3. Issue under review and the burden of proof

The issue under review in this inquiry is the Ministry's application of sections 13(1), 16(1)(a)(ii), 16(1)(a)(iii), and 16(1)(c) of the Act to information in the records in dispute.

The relevant parts of sections 13 and 16 are as follows:

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,
 - ...
 - (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
 - ...

Disclosure harmful to intergovernmental relations or negotiations

- 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:
 - ...
 - (ii) the council of a municipality or the board of a regional district;
 - (iii) an aboriginal government;
 - ...
 - (c) harm the conduct of negotiations relating to aboriginal self government or treaties.

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 13 and 16, it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the record or part of the record.

4. The records in dispute

The thirteen records partially in dispute are a series of “Issue Notes on the Nisga’a Final Agreement,” which are described in greater detail below.

5. The applicant’s case

The applicant seeks access to full, unsevered copies of the records in dispute. He contends that the information in dispute would not reveal the substance of Cabinet deliberations or reveal advice or recommendations to the public body. The applicant puts the public body to the strict burden of proving that sections 13 and 16 apply.

I have presented below the applicant’s specific submissions on the application of sections 13 and 16 of the Act to the records in dispute.

6. The Ministry of Municipal Affairs’ case

The Ministry has in part withheld the records in dispute on the basis of section 13 of the Act.

The Ministry provided considerable background concerning the initiatives currently underway to reform the *Municipal Act*, which is the most comprehensive piece of local government legislation in the province. The *Municipal Act* confers authority on local governments to deal with a myriad of local issues such as elections, taxation, public works, utilities, planning and business regulation.

The *Municipal Act* recognizes that the province must provide notice and consultation with respect to provincial government actions which directly affect local government interests. The Union of British Columbia Municipalities (UBCM) was formed to represent local governments for the purposes of provincial consultation. The Province and the UBCM have signed a “Protocol of Recognition” which sets out the principles governing the basis of the relationship between the provincial and local orders of government. In 1997, the Province and the UBCM also signed a “Protocol of Recognition Sub-Agreement on a New Legislative Foundation for Local Governments” which provides that the legislative basis for local governments should be reviewed and updated regularly.

The ongoing consultation between the UBCM and the provincial government provides an important context for reviewing the records. The records in dispute comprise “issue notes” which are a form of internal briefing note prepared for the Minister. The issue notes in question were prepared for the purposes of:

- a) providing advice to the Minister in preparation for her appearance at the UBCM conference in September 1998; and
- b) providing advice to the Minister in preparation for the debate in the Legislative Assembly with respect to the Nisga’a Final Agreement.

The advice contained in the issue notes deals with a broad range of issues including local governance issues, anticipated advice from local governments and the UBCM with respect to issues involved in the treaty process, the negotiation of future aboriginal agreements, the relationship between aboriginal governments and neighbouring local governments, the relationship between aboriginal agreements and the ongoing reforms to the *Municipal Act*, among other things. The issue notes were submitted by an *ad hoc* committee to the Ministry's Executive Director, Planning and Governance, for the purposes of providing advice to the Minister.

The Ministry submits that disclosure of the information which it has severed under section 13(1) of the Act would implicitly or explicitly reveal advice or recommendations developed by or for the public body or a minister. It further submits that most of the information severed reflects advice concerning local government issues, including the ongoing reform of the *Municipal Act*, in the context of treaty negotiations. The Ministry also submits that none of the information falls within the scope of section 13(2); nor does section 13(3) apply as the oldest record is dated August 17, 1998.

The Ministry also relies on sections 16(1)(a)(ii) and (iii), and 16(1)(c) of the Act to withhold some of the information. It points out that section 16(1) does not require actual harm to be proven and there is no requirement that the potential harm be "substantial" or "significant." Section 16(1) only requires evidence of a reasonable expectation of harm to the conduct of relations or the conduct of negotiations.

The Ministry contends that disclosure of much of the information could reasonably be expected to harm the conduct of relations between the Province and municipal councils and boards of regional districts through the UBCM under section 16(1)(a)(ii). Specifically, the Ministry submits that disclosure would harm the co-operation and consultations between the Province and local governments with respect to ongoing reform of the *Municipal Act* and consultations with respect to local governance issues in the context of treaty negotiations.

The Ministry also relies on sections 16(1)(a)(iii) and 16(1)(c) on the basis that disclosure of information regarding the Province's policies, position, tactics, and strategies for treaty negotiations, including information concerning the internal development and assessment of the said policies, positions, tactics, and strategies, could reasonably be expected to harm the conduct of relations and treaty negotiations between the Province and aboriginal governments.

I have reviewed the Ministry's detailed submissions below. They were accompanied by affidavit evidence, some of which was submitted on an *in camera* basis.

7. Discussion

Section 13: Policy Advice and Recommendations

The applicant submits that the records in dispute do not reveal advice or recommendations to the public body, since they fall within the categories covered by section 13(2) of the Act. Their disclosure would not hinder the ability of the Ministry to engage in full and frank discussion or protect advice or recommendations as set out in my Order No. 215-1998, February 23, 1998.

The Ministry submits that the issue notes were prepared to assist the Minister during her appearance at the UBCM meeting in September 1998 and for debate in the Assembly on the Nisga'a Final Agreement. The Ministry has provided the applicant and me with a detailed description of the contents of the issue notes (which the Ministry has largely disclosed to the applicant in any event). It submits that:

Most of the information severed under section 13(1) from the records in dispute reflects the Public Body's advice concerning local governance issues, including the on-going reform of the *Municipal Act*, in the context of treaty negotiations. Other advice relates to the treaty process directly. A role of the Public Body is to provide advice to the Ministry of Aboriginal Affairs.... It is essential that the free flow of advice and recommendations be protected in the deliberative process of government decision making and policy development. (Submission of the Ministry, paragraph 5.16)

I have reviewed the information severed from each of the records in dispute having regard to the evidence submitted by the Ministry which provides background context for the issue notes. As the Ministry correctly points out, there is no requirement of proof of harm under section 13. The issue is simply whether the information would reveal advice or recommendations developed by or for a public body or a minister. Information which falls within the scope of section 13(2) may not be withheld under section 13(1).

I agree that most, but not all, the information severed from the records in dispute constitutes "the type of decision and policy making information that section 13(1) is intended to protect from disclosure." The Ministry submits that none of the information falls under the section 13(2) list (Submission of the Ministry, paragraph 5.17 and 5.18), but a few sentences contain factual material within the meaning of section 13(2)(a) and ought to be released. I find that the remainder of the information was properly withheld under section 13(1). As none of the records has been in existence for ten years or more, section 13(3) does not apply.

My detailed findings with regard to the application of section 13 to the severances in each record are reflected below in the review of the records in dispute.

Section 16: Disclosure harmful to intergovernmental relations or negotiations

The applicant submits that the Ministry must prove that it has “a reasonable expectation of harm if the records are released.” He submits that no such level of harm exists.

The Ministry submits that disclosure of the records in dispute could reasonably be expected to harm the conduct of its relations with the council of a municipality or the board of a regional district or with an aboriginal government, and harm the conduct of negotiations relating to aboriginal self-government or treaties. The potential harm of such disclosure extends as well to the municipal councils and directors or chairs of regional districts, who are, or are not, represented on the UBCM. (Submission of the Ministry, paragraphs 5.25 and 5.26) The risk of such harm concerns both treaty negotiations and the ongoing efforts to revise and update the *Municipal Act*. (Submission of the Ministry, paragraphs 5.01 to 5.09, and 5.24 to 5.27)

With respect to treaty negotiations, the Ministry makes the following overall statement:

The Public Body submits that the disclosure of information regarding the Province’s policies, positions, tactics and strategies for treaty negotiations, including information regarding the internal development and assessment of the said policies, positions, tactics and strategies, can reasonably be expected to harm the conduct of relations and the conduct of treaty negotiations between the Province and aboriginal governments.
(Submission of the Ministry, paragraph 5.28; see also Order 14-1994, June 24, 1994)

On the basis of my review of the severed information and the evidence filed by the Ministry, I accept that most, but not all, of the information was properly severed under section 16 of the Act. For those few exceptions that do not fall within the scope of section 16, I find that the Ministry has failed to discharge its burden of establishing that disclosure of the information could reasonably be expected to harm the conduct of relations or negotiations with local governments or aboriginal governments.

My findings in relation to the application of section 16 to the severances in each record are reflected below in the review of records in dispute.

Review of the Records in dispute

In what follows, I have adopted the Ministry’s numbering system for each of the thirteen records in dispute. I am also following the detailed three-page grid of these records provided by the Ministry to the applicant and myself in its initial submission (Submission of the Ministry, pp. 7-9). The Ministry has, overall, severed very little information from the forty pages in dispute. My rough estimate is that the Ministry has withheld approximately three pages in total.

Subject to some exceptions, the Ministry has correctly applied sections 13 and 16 to the records in dispute. I find that it has severed some information that falls under neither section, and that some of the information that has been severed is simply statements that may be contrary to the Ministry's public positions rather than "advice" as such.

A general point is that the Nisga'a agreement is now a fact of life in this province and, in the interest of accountable government, more information should be released.

1. Issue Note: Similarities and differences between the structure of the local government and the structure of Nisga'a Governments, September 1, 1998. I find that the Ministry has appropriately severed 2 sentences from this 7 page record on the basis of sections 13 and 16 of the Act.

2. Issue Note: Representation and other rights of non-aboriginals resident on Nisga'a Lands, August 31, 1998. The Ministry has severed about one-half page from a two-page document on the basis of sections 13 and 16 of the Act.

The Ministry has severed a paragraph on the first page under sections 13 and 16. The first sentence of this paragraph is not "advice" nor does it implicitly reveal any advice. One cannot glean from this statement what the policy position is with respect to non-aboriginal representation, which is the topic of the note. It appears to be a statement of fact and, in reality, local governments on their own initiative and through the UBCM have publicly stated their desire for such representation. It is also inappropriate to apply section 16 to this information. I find that this severed information should be disclosed. The remainder of this information was properly severed under sections under sections 13 and/or 16.

3. Issue Note: Relationship between Nisga'a and the Regional District of Kitimat Stikine, August 31, 1998. The Ministry has severed 7 sentences from a two-page document on the basis of sections 13 and 16 of the Act.

The Ministry has severed a one-sentence reference to a member of the Nisga'a council. Although the sentence has been severed under sections 13 and 16, I do not accept that this is "advice" nor that disclosure would somehow interfere with or jeopardize intergovernmental relationships under section 16.

The Ministry has severed a second sentence, which is a factual statement, not policy advice. The Ministry has also applied section 16. I find that neither section 13 nor section 16 applies to this sentence.

The remainder of the information was properly severed under sections 13 and/or 16.

4. Issue Note: Similarities and differences in financial powers and revenue sources granted to the local government and to Nisga'a Lisims Government, August 18, 1998.

The Ministry has severed 4 paragraphs from a two-page record on the basis of sections 13 and/or 16 of the Act. It has severed a sentence that is a statement of fact, not policy advice or recommendations. I find that it must be disclosed. The remainder of the information was properly severed under sections 13 and/or 16.

5. Issue Note: Powers: Comparison of powers provided to the Nisga'a Governments in the Nisga'a Final Agreement with the powers of local government under the *Municipal Act*, September 3, 1998. The Ministry has severed 2 sentences of information from a four-page record on the basis of sections 13 and 16 of the Act. It has severed a sentence that appears to be a statement of fact not policy advice or recommendations. I find that it must be disclosed. The remainder of the information was properly severed under sections 13 and/or 16.

6. Issue Note: Nisga'a Governments may make laws for the use, management, planning, zoning and development of Nisga'a Lands and these laws may prevail over inconsistent provincial Laws, September 10, 1998. I find that the Ministry has appropriately severed about 20 lines from a five-page record on the basis of sections 13 and 16 of the Act.

8. Issue Note: Community control of land, September 3, 1998. The Ministry has severed fewer than 4 lines from a one-page record on the basis of sections 13 and 16 of the Act.

One sentence was severed under sections 13 and 16. I do not agree that section 16 applies, nor do I find any advice or recommendations revealed in this sentence. This statement is an observation, not advice, and must be disclosed. The remaining sentence was properly severed under section 13.

9. Issue Note: Comparative review of self government models in the Nisga'a Final Agreement, the Sechelt Indian Government District and the proposed federal Westbank Self Government Agreement, September 3, 1998. The Ministry has severed 9 sentences from a three-page record on the basis of sections 13 and 16 of the Act. It has severed a sentence that is a statement of fact not policy advice or recommendations. I find that it must be disclosed. The remainder of the information was properly severed under sections 13 and/or 16.

10. Issue Note: *Indian Act*, *Municipal Act* and Nisga'a Final Agreement: a comparison of the Nisga'a Nation under the Final Agreement with BC's local governments created under the *Municipal Act* and with First Nations governments operating under the auspices of the *Indian Act*, September 3, 1998. The Ministry has severed four words from a two-page record on the basis of sections 13 and 16 of the Act. The words severed are not advice or recommendations but an observation. I also find that the Ministry is wrong to hold that release of this phrase is going to harm its intergovernmental relations.

11. Issue Note: The relationship between the *Municipal Act* Reform and the Nisga'a Final Agreement, August 17, 1998. I find that the Ministry has appropriately severed two sentences and a portion of another on the basis of sections 13 and 16 of the Act.

12. Issue Note: The relationship between the Nisga'a Final Agreement and the proposed Community Charter, August 17, 1998. I find that the Ministry has appropriately severed approximately ten lines from 1.5 page record on the basis of sections 13 and 16 of the Act.

14. Issue Note: Evaluation of Nisga'a Final Agreement with respect to the UBCM's Position on Treaty Settlements, September 1, 1998: The Ministry has severed three sentences from a 1.5 page record on the basis of sections 13 and/or 16 of the Act. One sentence should not be withheld in its entirety. Specifically, the opening phrase of the first sentence should be released, since this information is contained directly in the agreement. The remainder of the sentence should be withheld under section 13. The remaining sentences were properly severed under sections 13 and/or 16.

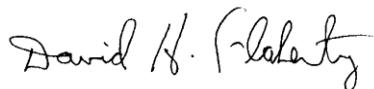
15. Issue Note: Provincial safety services to Nisga'a, September 11, 1998. I find that the Ministry has appropriately severed 1 sentence from a 1.5 page record on the basis of sections 13 and 16 of the Act.

I find that the Ministry has met its burden of proof with respect to the application of sections 13 and 16 of the Act to certain, but not all, records in dispute.

8. Order

I find that the head of the Ministry of Municipal Affairs was authorized to withhold some of the information in the records in dispute under sections 13 and 16 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the head of the Ministry of Municipal Affairs to withhold the specific information which I have identified to the Ministry of Municipal Affairs.

I find that the head of the Ministry of Municipal Affairs was not authorized under sections 13 and 16 to refuse access to some of the information in the records in dispute. Under section 58(2)(a) of the Act, I require the head of the Ministry of Municipal Affairs to give access to some of the information withheld on the basis of sections 13 and 16, as identified by the list that I am providing to the Ministry of Municipal Affairs.



David H. Flaherty
Commissioner

June 30, 1999