Order 01-02

OFFICE OF THE PREMIER AND EXECUTIVE COUNCIL OPERATIONS

David Loukidelis, Information and Privacy Commissioner
January 25, 2001

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Summary: Applicant requested records related to Melville Creek and Cayoosh Creek ski development. Public body severed two letters under s. 12(1). Public body found to have applied s. 12(1) properly.

Key Words: substance of deliberations of Cabinet – background explanations or analysis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 12(1).

Authorities Considered: B.C.: Order 48-1995.

Cases Considered: *Aquasource Ltd.* v. *The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

1.0 INTRODUCTION

[1] In November 1999, the applicant in this inquiry sent a request to the Office of the Premier and Executive Council Operations ("OPECO") for records related to a ski development proposal at Cayoosh Creek, to the candidacy of Melville Creek for protection under the Province's Protected Areas Strategy and subsequent removal of Melville Creek from protected status. OPECO responded in two stages. In early February 2000, it provided some unsevered records. Later that month it provided copies of three other records, with portions severed under s. 12(1) of the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] In March 2000, the applicant asked for a review, under s. 52 of the Act, of the severing of two of the three severed records. He also took issue with the amount of time OPECO had taken to respond to his request and questioned the adequacy of OPECO's search for the records he had requested. During mediation, OPECO disclosed some information it had previously withheld. The applicant asked that I deal with the decision to withhold, under s. 12(1), information in two records and, under s. 56 of the Act, I held a written inquiry on that issue.

2.0 ISSUE

[3] The only issue in this inquiry is whether OPECO was required to withhold information under s. 12(1) from two records. These are a letter of August 15, 1994 ("letter") and a memorandum of May 4, 1995 ("memo"). OPECO has the burden of proof in this case by virtue of s. 57(1) of the Act.

3.0 DISCUSSION

[4] **3.1 Procedural Matters** – Although the applicant raised concerns about delay and the adequacy of OPECO's search in his request for review, the Notice of Written Inquiry refers only to the s. 12(1) issue. In its initial submission, OPECO contended that delay and search issues were resolved in mediation and were not at issue in the inquiry. The applicant did not raise these issues in his initial submission but, in his reply submission, responded to OPECO's position that the search and delay issues were not before me in this inquiry.

[5] Both the Notice of Written Inquiry and the Fact Report that this Office issued to the parties clearly state that the s. 12(1) severing was the only issue to be dealt with in this inquiry. The applicant's concerns about delay and search are not properly before me and I do not deal with them in this order.

[6] The applicant attached to his reply submission a statement he referred to as the "Applicant's Fact Report". After the close of the inquiry, OPECO submitted a further response to what it viewed as new facts and issues in the applicant's reply submission. To the extent that the applicant's reply submissions and the "Applicant's Fact Report" raised new issues, they were not germane to the issue in dispute before me and I did not consider them. I therefore did not find it necessary to consider OPECO's further response.

[7] **3.2 Cabinet Confidences** – This is the first time I have had to deal with s. 12(1) of the Act. It would be useful, I think, for me to summarize the interpretation my predecessor and the Courts have given to this section, which reads 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.

[8] In Order No. 48-1995, my predecessor articulated his views on the meaning of "substance of deliberations" and "background explanations or analysis" in ss. 12(1) and 12(2)(c). That order was the subject of judicial review proceedings. Neither the Supreme Court nor the Court of Appeal took issue with his interpretation of ss. 12(1) and 12(2)(c). Commissioner Flaherty's interpretation of these sections stands and I adopt them.

Meaning of "substance of deliberations"

[9] Section 12(1) requires public bodies to withhold information that would reveal the "substance of deliberations" of Cabinet or of a Cabinet committee. My predecessor interpreted the term "substance of deliberations" as follows, at p. 9 of Order No. 48-1995:

> … recorded information that reveals the oral arguments, pro and con, for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.

[10] He went on to say the following, at p. 10:

> I do not automatically assume that Cabinet submissions in all cases reflect the "substance of Cabinet deliberations" without some at least inferential evidence. I agree that disclosure of a record would "reveal" the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of those deliberations.

[11] The Court of Appeal decision in *Aquasource Ltd.* v. *British Columbia (Information & Privacy Commissioner)* (1998), 8 Admin. L.R. (3d) 236, also provides

useful guidance on the meaning of "substance of deliberations". At para. 39, Donald J.A. said the following:

> Standing alone, "substance of deliberations" is capable of a range of meanings. However the phrase becomes clear when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted …." That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. An exception to this is found in s. 12(2)(c) relating to background explanations or analysis which I will discuss later.

[12] At para. 41, Donald J.A. also said the following:

> It is my view that the class of things set out after "including" in s. 12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. I arrive at this conclusion with the assistance of several authorities.

[13] In the next several paragraphs Donald J.A. discussed how, in his view, the word "including", in s. 12(1), enlarges the scope of the words preceding it. The test that emerges from *Aquasource* is whether information in dispute under s. 12(1) formed the basis for Cabinet deliberations.

Meaning of "background explanations or analysis"

[14] Although s. 12(2) is not in issue in this case, I will comment on it briefly for future reference. That section contains what the previous Commissioner rightly viewed as notable qualifications on the mandatory exception created by s. 12(1). One of them is information described in s. 12(2)(c), *i.e.*, information in a record the purpose of which is to present "background explanations or analysis" for consideration by Cabinet or a Cabinet committee in making a decision. This exception applies only in three cases: where the decision in question has been made public, where the decision has been implemented or where more than five years have passed since the decision was made or considered.

[15] The previous Commissioner acknowledged, as I do, that it can be difficult to distinguish between information that forms the "substance of deliberations" and that which forms "background explanations or analysis". He acknowledged that in some cases these categories may be interchangeable. In Order No. 48-1995, he nonetheless expressed the view (at p. 13) that "background explanations"

> … include everything factual that Cabinet used to make a decision. "Analysis" includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations.

[16] *Aquasource* confirmed my predecessor's interpretation of the inter-relationship between ss. 12(1) and 12(2)(c).

[17] **3.3 Does Section 12(1) Apply?** – The applicant says he has a full copy of a briefing note – a record not in dispute here – that probably contains the same information as that withheld from the letter. He argues, therefore, that he should have a complete copy of the letter and, by extension, of the memo.

[18] OPECO points out that s. 12(1) is a mandatory exception designed to protect Cabinet confidentiality and that it is irrelevant if the applicant has a copy of another record which he believes contains the same information. It acknowledges that the two records in this case are not Cabinet submissions, but argues they would reveal advice and other information that formed the basis for deliberations by Cabinet, or one of its committees, on alpine ski policy. OPECO contends, therefore, that disclosure of the severed information would reveal the substance of deliberations of Cabinet or of its committees.

[19] In the case of the letter, OPECO argues that the information would reveal what the alpine ski policy does and what the goals of that policy are. It says that both of these items of information were included in submissions which were prepared for and submitted to Treasury Board, a committee of Cabinet, for its consideration of whether to adopt the policy. It argues that disclosing these two things in the letter would reveal information which formed the basis for Treasury Board's deliberations.

[20] OPECO submitted an affidavit sworn by Linda Brandie, OPECO's manager of information and privacy, who deposed as follows:

> 3. … I have viewed submissions which were prepared for Treasury Board, and which went to Treasury Board for consideration in deciding whether to approve the alpine ski policy (the "Treasury Board Submissions").
>
> 4. The contents of the second paragraph of the Letter are the same as some of the contents of the Treasury Board submissions.
>
> 5. I do not know when the Treasury Board Submissions were prepared, but from my review of them and of the Letter (the first paragraph of which states that the policy had been submitted to Treasury Board for approval, and the second paragraph of which encapsulates the contents of the policy), and based on my knowledge that it is very common in government for Treasury Board submissions to be prepared for submission to Treasury Board, and submitted to Treasury Board Staff, well ahead of the time when they are eventually considered by Treasury Board, it appears to me that the Treasury Board Submissions were very likely prepared before the Letter was, and that the wording of the Letter was based on the Treasury Board Submissions.

[21] In the case of the memo, OPECO argues that the severed information must be withheld, as its disclosure would reveal what the deputy ministers' committee

recommended and Cabinet accepted. Disclosure of the information would, it argues, reveal advice submitted to Cabinet.

[22] I will now consider whether s. 12(1) applies to the two disputed records.

August 15, 1994 Letter

[23] This record is a letter from the Honourable Moe Sihota, then Minister of Environment, Lands and Parks, to the Honourable Glen Clark, at that time the Minister of Employment and Investment. OPECO withheld only the second paragraph of this 1½-page letter. The rest of the letter is an update for Glen Clark on the next steps in dealing with the topic under discussion.

[24] Linda Brandie's affidavit establishes that the information in this paragraph was also in a submission which went to Treasury Board for consideration. Although OPECO did not provide me with a copy of that Treasury Board submission, I accept (in this case) that the withheld information is from, or is the same as, a related Treasury Board submission. I am mindful of my predecessor's comments that information in a Cabinet submission does not necessarily reveal the substance of deliberations. However, I conclude that the severed information would, in this case, reveal "what the alpine ski policy does and what the goals of that policy were" and that the information qualifies for protection under s. 12(1).

[25] Although OPECO's affidavit evidence has sufficed in this case, in light of the disputed records themselves, in similar cases I would expect to see, in addition, the actual Cabinet or Cabinet committee record.

[26] It is not necessary to consider ss. 12(2)(a), (b) and (c) in relation to the letter.

May 4, 1995 Memo

[27] This one-paragraph memorandum from the then Assistant Deputy Minister of the Land Use Coordination Office to the Chair of the Thompson-Okanagan Inter-Agency Management Committee ("IAMC") begins with the following words (which were disclosed to the applicant):

> Upon review of the issues, including consideration of the options presented by IAMC, the Deputy Ministers Committee recommended, and Cabinet accepted, … .

[28] OPECO severed the remainder of this sentence under s. 12(1), on the basis its disclosure would reveal recommendations to Cabinet. I agree that disclosure of the remainder of this sentence would disclose a recommendation to Cabinet, and therefore the substance of deliberations of Cabinet, such that s. 12(1) applies to the severed information. I need not consider ss. 12(2)(a), (b) and (c) with respect to the memo.

4.0 CONCLUSION

[29] For the reasons given above, under s. 58(2)(c), I require OPECO to refuse access to the disputed information in the letter and in the memo.

January 25, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia