



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-14

SUPERANNUATION COMMISSION

David Loukidelis, Information and Privacy Commissioner
April 10, 2001

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Summary: Applicant not entitled to portions of agendas, minutes and reports of meetings which disclose substance of Cabinet deliberations or advice or recommendations to a public body. Public body required under s. 13(2)(a) to disclose small amounts of factual material that it had withheld under s. 13(1).

Key Words: substance of deliberations of Cabinet – advice or recommendations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1) and (2), 13(1), 13(2)(a), (i), (k) and (m).

Authorities Considered: B.C.: Order 00-17, [2000] B.C.I.P.C.D. No. 20; Order 01-02, [2001] B.C.I.P.C.D. No. 2.

1.0 INTRODUCTION

[1] In July 1999, the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* (“Act”), to the Superannuation Commission (“Commission”) for agendas, minutes and reports for all Public Service Pension Board and Committee meetings since January 1, 1998. The Commission at all relevant times was a public body designated in Schedule 2 to the Act, although its functions have, as I understand it, been assumed by the British Columbia Pension Corporation (“Corporation”). The Corporation is also a public body under Schedule 2. It also appears that the records in dispute were transferred to the Corporation when it came into existence.

[2] Because Schedule 2 designates the Minister of Finance and Corporate Relations as the Commission's head for the purposes of the Act, the Ministry of Finance and Corporate Relations ("Ministry") handled the request on behalf of, and in consultation with, the Commission. It disclosed some records, in full, in December 1999. In early February 2000, it disclosed another set of records, this time in severed form. The Ministry's February 2000 decision letter told the applicant that it had applied ss. 12, 13 and 17 to some information in that second set of records. The Ministry also refunded the applicant's fee deposit of \$197, saying it had waived all fees associated with the request due to its delay in responding.

[3] In early March 2000, the applicant requested a review, under s. 53 of the Act, of the decision to withhold information, for the following reasons:

The pre-retirement survivor benefit provisions under the Public Service Pension Plan were amended by Bill 89 in July 1999. The changes reduced my survivor benefit by over \$100,000. Thousands of other members of BC public sector plans have been similarly impacted. My wife and I have been attempting to obtain information to ascertain if the changes were proper and consistent with intent. That is why I initially requested information from the Superannuation Commission.

The Minister of Finance and Corporate Relations stated in the House that the changes were the result of collective bargaining and a resulting Accord between the BCGEU and provincial government. However:

- the pension plan has a significant number of members who are non-BCGEU
- other BC public sector pension plans that have few, if any, BCGEU members were also amended
- [the BCGEU representative] on the Public Service Pension Advisory Board, stated that the change was not what was intended in both the Provincial union newsletter and in a union meeting
- representatives from the police and firefighters have stated that the changes were not what they had understood would be introduced
- a member of the BCGEU negotiating team has stated he did not know the change was so significant

I therefore have grave concerns as to whether the amendment is what was intended and recommended by the Public Service Pension Advisory Board.

[4] As mediation was not successful in resolving the issues under review, this Office issued a Notice of Inquiry. It stated that ss. 12, 13 and 17 all remained in issue. The Corporation, by then handling the Commission's affairs under the Act, reconsidered the earlier position on these exceptions and, after this Office adjourned the inquiry, disclosed further records. The s. 56 inquiry then resumed with, it appeared, only s. 12(1) remaining at issue. It later became clear, after the parties had filed their submissions on s. 12(1), that the Commission continued to claim that s. 13(1) applied to some information. The Commission filed a submission on s. 13.

2.0 ISSUES

[5] The issues in this case are whether the Commission is required under s. 12(1) to withhold information from four records and whether it is authorized under s. 13(1) to withhold information from four other records. The Commission has, under s. 57(1) of the Act, the burden of proof on both issues.

3.0 DISCUSSION

[6] **3.1 Preliminary Issue** – The applicant objected to the Commission filing a further submission on s. 13 and asked that I proceed with only the original submissions, regarding on s. 12(1). It appears that, initially, there was some confusion on the Commission’s part, and miscommunication with its legal counsel, as to what records and exceptions were in dispute. When the Commission’s legal counsel realized s. 13(1) had always been in issue, the Commission made submissions on it some time after the close of the inquiry. It is clear the Commission applied s. 13(1) to some of the disputed information from the outset. I note, among other things, that the applicant’s initial and reply submissions show that he received records to which the Commission had applied s. 13(1). The applicant dealt with both ss. 12 and 13 in his initial submission. In the circumstances, I decided that the preferred course was to accept the Commission’s late submission and to give the applicant an opportunity to respond to those submissions, which I did.

[7] **3.2 Records in Dispute** – The disputed records can be divided into two classes, according to whether s. 12(1) or s. 13(1) is said to apply. In the first category, there are four pages of minutes from meetings of the Public Service Pension Advisory Board (“Board”) or its committees, from which information has been withheld under s. 12(1). The second category consists of records from which information has been withheld under s. 13(1), *i.e.*, seven pages of meeting minutes and a one page “Issue Paper”.

[8] **3.3 Cabinet Confidences** – Section 12(1) requires a public body to withhold information

... that would reveal the substance of deliberations of the Executive Council [*i.e.*, Cabinet] 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.

[9] Section 12(1) does not apply to certain categories of information, including, for the purposes of this order,

- 12(2) (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.

[10] My views on the interpretation of s. 12 are set out in paras. 7 to 16 of Order 01-02, [2001] B.C.I.P.C.D. No. 2, and need not be repeated here. I apply the principles outlined in Order 01-02 to this case.

[11] The Commission argued that disclosure of any records or information listed in s. 12(1) would reveal the substance of deliberations of Cabinet or one of its committees. By extension, it says, disclosure of records or information prepared in order to form the basis for Cabinet deliberations would also reveal the substance of deliberations of Cabinet or one of its committees (para. 6.05, initial submission). Paragraphs 6.06 and 6.07 of the Commission's initial submission expand on this argument:

6.06 ... the Public Body also submits that where a record was not itself prepared for the purpose of forming the basis of Cabinet deliberations, but contains information that was prepared for the purpose of forming Cabinet deliberations, disclosure of that information would reveal the substance of Cabinet deliberations – at least where it can be gleaned from the rest of the record or from other information disclosed to or known by an applicant that that information was prepared for the purpose of forming the basis of Cabinet deliberations.

6.07 The Public Body also submits that where a record was not itself prepared for the purpose of forming the basis of Cabinet deliberations, but contains information that reveals the thinking and/or resolutions of Cabinet, disclosure of that information would reveal the substance of deliberations.

[12] It is obvious that the Commission considers s. 12(1) to have a generous scope. It argues that disclosure of the information severed under s. 12(1) would reveal the substance of deliberations of Cabinet or one of its committees because the information constitutes “recommendations that were developed in order to form the basis for Cabinet deliberations (Records 1 through 3)” and “information that reveals the thinking and/or resolutions of Cabinet (Record 4)”.

[13] It says that the information severed from Records 1-3 sets out recommendations of the Board's Benefits Committee, which were developed in order to be considered, and then conveyed, by the Board to Cabinet or Treasury Board (or both). In the case of Record 3, the Commission says the severed information sets out comments made by the Cabinet Committee on Legislation. It argued that the severed information in Records 1-3 was developed in order to form the basis of Cabinet deliberations and that the severed information in Record 4 reveals the thinking or resolutions of Cabinet, or both (paras. 6.08-6.09, initial submission).

[14] The Commission argues that it is possible to deduce from other information in the records that the severed information in Records 1-3 was prepared for the purpose of forming the basis of Cabinet deliberations. It says that the introductory wording of item 4 of Record 4 shows that the severed information reveals the thinking or resolutions of Cabinet, or both. At para. 6.10 of its initial submission, it says the following:

In any event, the Public Body also says that the very fact that the Public Body applied section 12 to the information, and cited that section in its response to the applicant, as the Act requires it to do, revealed to the Applicant that the severed and withheld information is information that would reveal the substance of deliberations.

[15] I do not find the argument just quoted to be particularly compelling.

[16] In support of its case, the Commission submitted an affidavit sworn by Gary Beatty, who was the Secretary to the Board and its Benefits Committee from May 1996 to June 2000. He deposed that he was the author of Records 1-4 and that the information severed from Records 1-3 under s. 12(1) “reveals recommendations that were developed by the Benefits Committee for Board consideration and submission to Cabinet and/or to Treasury Board.” He also deposed that the information severed under s. 12(1) in Record 4 “reveals comments made at Cabinet Committee for Legislation”.

[17] The applicant objected to the Commission’s application of s. 12(1) to Records 1-4 on the grounds that the Board is not a committee of Cabinet and that the information was in fact prepared for the Board, not Cabinet. He argued that, even if the Board were found to be a committee of Cabinet, s. 12(2) of the Act would require disclosure of background information and analysis, as the decision had been made public and implemented in Bill 89 in 1999. He said that he seeks background information on the survivor benefit changes that were implemented and made public with Bill 89 in 1999. He argues, essentially, that s. 12(2)(c) applies to the withheld information and that he should therefore receive it.

[18] The Commission acknowledges that the withheld information was developed for the Board, but reiterates that it was also developed for consideration by Cabinet and Treasury Board. It admits that this information would appear in a separate record in being submitted to Cabinet or Treasury Board – and that it might well have different wording – but says it would be the same information.

[19] Records 1 and 2 are the first two pages of minutes of the “Public Service Advisory Board Benefits Committee minutes, February 4, 1997” (which should read 1998, according to the Commission’s submission). The Commission severed one sentence near the middle of Record 1, three bullets of information at the end of the same page and one bullet at the top of Record 2. The severed information in Record 3 (a single undated page from minutes of a meeting of the Board) is the same as the four bullets severed at the bottom of Record 1 and top of Record 2.

[20] The severed information in Records 1-3 undoubtedly consists of recommendations. I also note that the severed information flanks two sentences (which were disclosed), the second of which says

It was observed that for amendments to the plan involving cost, the protocol is for the board to make a recommendation to Treasury Board. The committee agreed to recommend the change in the pre-retirement survivor benefit to the board on the following basis: ...

[21] That text is then followed by four severed recommendations. This supports the Commission's argument that information already disclosed would allow the applicant and others to determine that the severed information would, if disclosed, reveal recommendations to Cabinet or one of its committees and therefore would reveal the substance of deliberations of Cabinet or one of its committees. Moreover, Gary Beatty's affidavit establishes that the Benefits Committee developed these recommendations for consideration by and submission to Cabinet or Treasury Board, or both. I conclude that the severed information qualifies for protection under s. 12(1).

[22] Record 4 is a page from the minutes of a meeting – the date of which is not known – of the Board's Governance Committee. The Commission severed three items from this record. The paragraph preceding the severed portion was disclosed. That paragraph says:

The status of the legislation was discussed. The committee was advised that the request for legislation concerning the re-write and joint trusteeship had cleared both the Deputy Minister's Committee and Cabinet Committee for legislation. The legislation is to be available for review on May 3, 1999. In the review of the legislation the committee was advised that three issues were raised:

[23] Three severed items follow. Gary Beatty's affidavit establishes that the information severed from Record 4 consists of "comments made at Cabinet Committee for Legislation". This fact is also apparent from the paragraph just quoted. I therefore conclude that this information is also protected under s. 12(1).

[24] It should be noted that the applicant says he received a complete copy of Record 4 at some point. The Commission expressed doubt that he could have received the full document, except in error. The applicant attached a complete copy of Record 4 to his additional submission. This does not change my finding on this point. Disclosure under the Act would disclose s. 12(1) material.

[25] For future reference, it would be preferable in a case such as this for the public body to provide me, if at all practicable, with the relevant corresponding Cabinet or Cabinet committee records. In this case, at least, the affidavit evidence and internal evidence in the records was satisfactory for the purposes of s. 12(1), but that will not always necessarily be so.

[26] It is not necessary for me to consider the applicant's s. 12(2) argument, other than to observe that the severed information does not qualify as "background explanations or analysis" within the meaning of s. 12(2)(c).

[27] **3.4 Advice or Recommendations** – Section 13(1) permits a public body to refuse to disclose information that "would reveal advice or recommendations developed by or for a public body or a minister". The Commission initially applied s. 13(1) to portions of eight pages, which it called Records 5-12. Just before it made its further submission on s. 13(1), the Commission withdrew its application of that section from the withheld parts of Records 7, 8, 10, 12 and from one of the three withheld items in Record 11. (A name withheld under s. 22 of the Act in Record 11 is not at issue here.) It continues to rely on s. 13(1) in relation to portions of Records 5, 6 and 9 and for two items that remain withheld from Record 12.

[28] Records 5 and 6 are pages one and two of the Governance Committee Meeting Minutes of June 17, 1998. In its further submission, the Commission describes the severed information, and the Committee's role, as follows:

8.07 The information severed from records 5 and 6 consists of motions (in preliminary wording) that were developed by what is being referred to in the Public Body's submissions as the Governance Committee. (It's [*sic*] full name is Interplan Governance Committee.)

8.08 The Governance Committee was a committee made up of representatives from each of four public sector pension plans. It was tasked with reaching consensus on various issues concerning what changes should be made and how they should be made in the area of public sector pension management, and taking agreed-upon recommendations back to the boards of the four public sector pension plans for ratification. This conveyance of recommendations from the Governance Committee to the four public sector pension plan boards was done at a meeting, called a "joint board meeting", of all four boards together. The intent was that, once ratified by each board, each recommendation would be communicated by each board to the Minister of Finance and Corporate Relations as a recommendation for consideration by that Minister.

8.09 In short, the "motions" that were severed from records 5 and 6, and withheld under section 13, are recommendations that were developed by the Governance Committee for consideration and ratification by each board, and ultimately, for conveyance by each board to the Ministry of Finance and Corporate Relations as a recommendation for consideration by that Minister.

[29] The Commission says that the information withheld from Records 5 and 6 consists of motions that the Governance Committee proposed to put before the various public sector pension boards for consideration and conveyance to the Minister of Finance, as recommendations for the Minister's consideration. The disclosed text in Record 5, immediately preceding the five bullets of withheld information, supports this contention: "The committee when fully convened proposed the following motions for the

joint board meeting ...”. Section 13(1) applies to the information severed from Records 5 and 6, subject to the exceptions discussed below.

[30] Record 9 is page one from the Board’s Benefits Committee minutes of a meeting held on February 10, 1999. The Commission severed a four-line paragraph at the bottom of the page. It says, at para. 8.11 of its further submission, that this information

... consists of a recommendation that was developed by the Benefits Committee to be conveyed to and considered by the Public Service Pension Advisory Board. It was intended that the Public Service Pension Advisory Board would convey this recommendation to the Ministry of Finance and Corporate Relations for consideration by that Minister.

[31] Record 11 is the second page from the minutes of the June 16, 1998 meeting of the Board. The two withheld items are, the Commission says, “recommendations developed by the Public Service Pension Advisory Board to the Minister of Finance and Corporate Relations for consideration by that Minister” (para. 8.13, further submission). In support of these submissions, the Commission relies on a second affidavit sworn by Gary Beatty. Paragraphs 5-7 of that affidavit – which support the Commission’s arguments – need not be quoted here.

[32] The applicant argues in his initial submission that the severed information falls under ss. 13(2)(k), (i) and (m) of the Act, such that s. 13(1) does not apply. Section 13(2) provides that s. 13(1) does not apply to the kinds of information specified in s. 13(2). The relevant portions of s. 13(2) read as follows:

- 13(2) The head of a public body must not refuse to disclose under subsection (1)
- (a) any factual material,
 - ...
 - (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
 - ...
 - (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,
 - ...
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 -

[33] According to the Commission’s further submission, after the applicant’s submissions were made, it disclosed the record to which the applicant argues s. 13(2)(i) applies. The Commission says that, in any case, the disputed records are neither technical nor feasibility studies and are not covered by s. 13(2)(i). I agree.

[34] Next, the Commission says that s. 13(2)(k) applies to a report and not to the kinds of records in this case. I agree, but emphasize that, in my view, the committee here was not a “task force, committee, council or similar body” that was “established to consider any matter”. The committee happened to consider a matter within the scope of its mandate, but it was not established for that purpose in the sense contemplated by s. 13(2)(k). See, also, Order 00-17, [2000] B.C.I.P.C.D. No. 20.

[35] The Commission also says there is no basis for believing that the head of the Commission or the Minister has cited any of the withheld information publicly as a basis for a decision to make changes to the public sector pension scheme. It therefore argues that s. 13(2)(m) does not apply. In his reply submission, the applicant asserts – apparently in support of his argument that s. 12(2)(c) applies, rather than s. 13(2)(m) – that the Minister said in the Legislature in July 1999 that the pension legislation changes would enable the government to meet its pension commitments with various public sector accords. He has not produced any other evidence to support his contention that s. 13(2)(m) applies. In my view, the Minister’s supposed statement is not a public citation of the severed information within the meaning of s. 13(2)(m). I find that s. 13(2)(m) does not apply to these records.

[36] I conclude, however, that s. 13(2)(a) applies to a few phrases of the severed information. Under s. 13(2)(a), a public body is prevented from withholding any “factual material”. Some of the withheld information is all but identical to factual information in the records that was disclosed by the Commission. Other information withheld under s. 13(1), but not otherwise disclosed by the Commission, is also factual and not advice or recommendations. I have marked the portions of Records 5, 6, 9 and 11 that must be disclosed on the Commission’s copy of this order.

[37] The Commission says that, when it processed the applicant’s request, it considered disclosing recommendations found in Records 5-12 if they were public knowledge or had been acted upon, but that it decided to apply s. 13(1) to portions of Records 5-12. The Commission later turned its mind to s. 13(1) and decided to disclose previously withheld portions of some of the records and to continue to rely on s. 13(1) for other portions, as I noted above. It says these were proper exercises of its discretion under s. 13(1).

[38] The Commission supplied two affidavits in support of this argument that it had exercised its discretion in applying s. 13(1) to the records in dispute. This affidavit evidence is of limited value, since the deponents were not the decision-maker and therefore did not exercise any discretion. In addition, as the applicant points out in his additional submission in response to the public body’s s. 13(1) arguments, one was sworn by an employee whose employment with the public body post-dates both the creation of the records and the response to the request. I would normally expect to see direct evidence from the decision-maker in this type of case, together with details on the factors he or she considered in exercising the discretion under s. 13(1). However, it is evident from other material before me that the Commission re-considered its decision and

decided to disclose more information. I therefore accept that the Commission exercised its discretion in deciding whether or not to apply s. 13(1).

[39] Subject to the s. 13(2)(a) exception noted above, I find that the severed information was correctly withheld under s. 13(1), as it consists of advice, or recommendations, developed by or for the Minister.

4.0 CONCLUSION

[40] For the reasons given above, I make the following orders:

1. Under s. 58(2)(c) of the Act, I require the public body to refuse to disclose the severed information in Records 1-4 under s. 12(1),
2. Subject to the order in paragraph 3, below, under s. 58(2)(b) of the Act, I confirm the decision of the public body to withhold the severed information in Records 5, 6, 9 and 11 under s. 13(1), and
3. Under s. 58(2)(a) of the Act, I require the public body to give the applicant access to the factual material that it withheld under s. 13(1) and that is identified on the copies of Records 5, 6, 9 and 11 that I have delivered to the public body with its copy of this order.

April 10, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia