



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

Order F06-10

MINISTRY OF ENVIRONMENT

Celia Francis, Adjudicator
May 24, 2006

Quicklaw Cite: [2006] B.C.I.P.C.D. No. 15
Document URL: <http://www.oipc.bc.ca/orders/OrderF06-10.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: Applicant requested records related to changes in park user fees. Ministry withheld some information under s. 12(1). Severed information formed the basis of Cabinet deliberations and its disclosure would reveal the substance of deliberations of Cabinet. Section 12(1) applies and s. 12(2)(c) does not apply.

Key Words: substance of deliberations—background explanations and analysis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1) & 12(2)(c)(i) & (ii).

Authorities Considered: **B.C.:** Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

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] This order arises out of a decision by the Ministry of Environment¹ (“Ministry”) in response to a request by the applicant, the Western Canada Wilderness Committee (“WCWC”), for records related to projected revenues from parking meters, actual revenue from parking meters, projected attendance, actual attendance and public compliance with parking regulations at 41 provincial

¹ At that time, the Ministry of Water, Land and Air Protection.

parks, for the period May 2001 to September 2004. It also requested records regarding the total attendance at all British Columbia parks and protected areas from May 2001 to September 2004.

[2] Upon hearing that there was likely to be a delay in releasing records that the Ministry had identified as potentially falling under s.12(1) (Cabinet confidences), WCWC divided its request into two and asked that the potential s. 12(1) records be treated separately from the other records. The request for the potential s. 12(1) records is the request in issue in this inquiry.

[3] The Ministry responded to this request by disclosing some records and withholding some information under s. 12(1). WCWC requested a review of the decision, arguing that s. 12(2)(c) applied. Mediation led to the disclosure of some more information but, because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act. The Ministry then told the applicant that it was also applying s. 13(1) to the records in addition to s. 12(1).

2.0 ISSUE

[4] The issues before me in this case are:

1. Is the Ministry authorized by s. 13(1) to withhold information?
2. Is the Ministry required by s. 12(1) to withhold information?

[5] Under s. 57(1) of the Act, the Ministry has the burden of proof regarding ss. 12(1) and 13(1).

3.0 DISCUSSION

[6] **3.1 Preliminary Matter**—WCWC contended in its initial submission that it was suspicious that the Ministry only had records related to revenue projections in documents prepared for Cabinet.² The Ministry responded that its search for responsive records was not an issue in this inquiry.³

[7] Some weeks after the close of this inquiry, WCWC wrote to ask that this inquiry include the issue of whether the Ministry had complied with its s. 6(1) duty to assist the applicant in conducting an adequate search for responsive records. It provided what it considered to be new information on the issue.⁴

² Paras. 3-6, initial submission.

³ Para. 1, reply submission.

⁴ WCWC's letter of November 17, 2005 and further submission of November 21, 2005.

[8] The Ministry objected on the grounds that the inquiry was closed and its search was not an issue in the inquiry. It also pointed out that WCWC had divided its request into two parts and that the search issue WCWC had raised had nothing to do with the records in issue in this inquiry. It said that the issue that WCWC sought to raise presumably related to records that were subject to other requests on this topic, previously resolved in mediation with this office.⁵

[9] I wrote to the parties on this matter, first noting that WCWC's search issue appeared to relate to records that were the subject of other requests and not the one in issue here. I said I had decided not to grant the applicant's request to be allowed to make a further submission, for the following reasons.

[10] First, as the Ministry rightly pointed out, this inquiry was closed and s. 6(1) was not listed as an issue in dispute in this inquiry. I said that, in order to promote participants' confidence in the integrity, timeliness and finality of the inquiry process, it is not desirable to re-open closed inquiries to deal with new issues that were not listed in the request for review and in the inquiry documentation.

[11] I also noted that this office's policy, as a first step in resolution of a complaint under s. 6(1), is to refer the complainant to the public body. While WCWC alleged that it had new information regarding the Ministry's search for records, there was no indication in the material before me that it had first attempted to resolve this issue directly with the Ministry.

[12] I saw no reason in this case to depart from this office's usual practice regarding search complaints. Regardless of which request the search issue related to, I said WCWC should first take the matter up directly with the public body. If WCWC was not satisfied with the Ministry's response, I observed that it was free to make a new complaint to this office.⁶

[13] **3.2 Cabinet Confidences**—The relevant parts of s. 12 read 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 ...

⁵ Ministry's letters of November 21, 2005 and November 29, 2005.

⁶ My letter of November 30, 2005.

- (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, ...

[14] I have applied here, without repeating them, the principles for interpreting ss. 12(1) and (2) in Order 01-02⁷ Order 02-38⁸ and other orders involving s. 12(1), and in *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*.⁹

[15] **3.3 Substance of Deliberations**—The Ministry discussed the interpretation of s. 12(1) and pointed out that it is a mandatory exception to the right of access. It went on to say that the information in the records at issue is either part of an OIC package that was prepared for the purpose of the Minister speaking to the issue at the Cabinet table (speaking notes and an information briefing note dated April 6, 2004, with attachments) or is found in a record that was attached to the OIC package and describes some of the contents of the records that were part of the OIC Package (an April 6, 2004 memorandum to the Minister). The Ministry argues that disclosure of any of the information would reveal the substance of deliberations because it would permit the drawing of accurate inferences with respect to those deliberations.¹⁰

[16] The Ministry described the records in issue as follows:

- a memorandum of April 6, 2004 to the Minister of Water, Land and Air Protection, which attached the Order in Council package;
- an information briefing note of April 6, 2004 with attachments (part of the Order in Council package); and
- speaking notes, prepared for the Minister of Water, Land and Air Protection (also part of the Order in Council package).¹¹

[17] The Ministry also said that the information in those records is “probative of the facts in issue in the inquiry”. It drew my attention to the introductory sentence of the memorandum of April 6, 2004 to the Minister which reads as follows:

Would you please review the enclosed Order in Council (OIC) package.

⁷ [2001], B.C.I.P.C.D. No. 2.

⁸ [2002] B.C.I.P.C.D. No. 38.

⁹ (1998) 8 Admin. L.R. (3d) 236 (B.C.C.A.).

¹⁰ Paras. 4.01-4.08. initial submission.

¹¹ Para. 4.09, initial submission.

[18] The Ministry said that it is clear on the face of the records that the severed information in issue would allow someone to draw accurate inferences about Cabinet deliberations. It said that the information briefing note of April 6, 2004 was prepared for the Minister and Cabinet in support of requested park user fee changes and was part of the OIC package that the Minister brought to Cabinet. The Ministry said that the severed information in that record provides details concerning the very issues that were the subject of Cabinet deliberations. It said that the speaking notes were prepared for the Minister in order to assist him in speaking to the issue of park fees at Cabinet. The Ministry described the records further on an *in camera* basis.¹²

[19] The Ministry provided affidavit evidence (some of it on an *in camera* basis) in support of its position from Joy Illington, Deputy Cabinet Secretary at the relevant time. She deposed in an open part of her affidavit that the issue of OIC approval of fees for parking in provincial parks went to a full meeting of Cabinet for its consideration and decision on April 21, 2004 and that she was in attendance at that meeting to take minutes of Cabinet. She went on to say that, except for the memorandum of April 6, 2004, all the records in dispute were part of the OIC package, that is, the package of records prepared for the purpose of the Minister seeking Cabinet approval of a proposed Order in Council. She continued as follows:

10. The typical practice during my time as Deputy Cabinet Secretary in the case of OIC packages is that a Minister's office would send the OIC package to Cabinet Operations. Cabinet Operations would then produce a summary of the OIC request and the summary would then be placed in the Cabinet binders which were available to all Cabinet members. The whole OIC package is then brought to the Cabinet meeting by the Deputy Cabinet Secretary in a file folder so that if any Minister wants further details the entire package of information can be referred to.

[20] In the Ministry's view, s. 12(2)(c) does not apply here and it is required to refuse access to all the severed information.¹³

[21] WCWC acknowledged the rationale behind protecting Cabinet confidences but suggested that information on the introduction of parking meters will not compromise Cabinet solidarity. In any case, WCWC argued, s. 12(2)(c) applies here, as the decision has been both announced and implemented.

[22] First, WCWC suggested, the records postdate the Cabinet decision in question which, it said, was made in October 2003. Thus, it argued, any Cabinet deliberations had concluded by the time the records in dispute came into existence. It also argued that the release of revenue projections would not reveal

¹² Paras. 4.10-4.14, initial submission.

¹³ Paras. 4.15-4.17, initial submission.

anything that is not already obvious. It said that information that is already available to the public indicates the following: the British Columbia government considered the park system to have funding shortfalls; the Recreation and Stewardship Panel was asked to provide recommendations for dealing with these issues and it recommended the imposition of parking or day use fees; and Cabinet approved the imposition of fees based on an explicit rationale to provide stable funding for the parks system. Thus, WCWC argued, disclosing revenue projections would not reveal the substance of any Cabinet deliberations as the nature of those deliberations is already known. The only impact of disclosure will be to confirm whether accurate economic forecasts and analysis were provided to Cabinet for use in its deliberations, it said.¹⁴

[23] WCWC then said that, since the records were created after the Cabinet decision to charge fees, “the entirety of the documents arguably constitutes background explanations and analysis”. It suggested that the records explain “regulatory instruments that simply carry out a previous decision of Cabinet, which is essentially housekeeping in nature”. Parking fees have been implemented, resulting in the generation of revenues, it continued. Thus, it concluded, the revenue projections clearly relate to a decision that has been announced—in the form of media releases, among other things—and implemented.¹⁵

[24] The Ministry countered WCWC’s argument on the dating of the records in dispute as opposed to the Cabinet decision in question, pointing to Joy Illington’s *in camera* evidence on this issue. The Ministry also rejected WCWC’s argument that any Cabinet deliberations were concluded at the time the records in dispute were created, pointing to the OIC package of April 6, 2004, which it said was prepared for the purpose of the Minister seeking Cabinet approval of the proposed OIC, and the covering memorandum of April 6, 2004 to the Minister which describes some of the contents of the OIC Package. If there had been nothing for Cabinet to deliberate further on, the Ministry argued, there would have been no need to send the issue to Cabinet for a decision on April 21, 2004. It was at that meeting that Cabinet approved an OIC to amend sections of the *Park and Recreation Area Regulation*, it said.¹⁶

[25] I have carefully reviewed the severed information in the three records in dispute. There is considerable overlap in the contents of the records, particularly the information briefing note and the speaking notes. The severed information comprises recommendations to Cabinet for making certain park fee changes and the reasons and policy considerations for recommending those changes. I am

¹⁴ Paras. 2 & 11-21, initial submission.

¹⁵ Paras. 22-27, initial submission.

¹⁶ Paras. 1 & 5, reply submission.

satisfied that the severed information formed the basis for Cabinet deliberations and that its disclosure would reveal the substance of deliberations of Cabinet.

[26] I do not accept WCWC's arguments surrounding the dating of the records versus the date of the Cabinet decision. It is clear from the material before me that the records in question were prepared for Cabinet's use in making a decision on changes to park fees and that it used that information in making that decision. I find that s. 12(1) applies to the severed information.

[27] I note WCWC's argument that the decision in question has been announced and implemented. I am however unable to identify any "background explanations or analysis" in the severed information. The Ministry has not, in my view, withheld any such factual information nor any analysis of such information. Sections 12(2)(c)(i) and (ii) do not therefore apply here.

[28] Given my finding on s. 12(1), I do not need to consider whether s. 13(1) applies to the same information.

4.0 CONCLUSION

[29] For the reasons given above, under s. 58 of the Act, I require the Ministry to refuse the applicant access to the information it withheld under s. 12(1).

May 24, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator