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

Order F05-28

OFFICE OF THE PREMIER

David Loukidelis, Acting Information and Privacy Commissioner

August 30, 2005

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Summary: The applicant sought records relating to development of a rapid transit line connecting Richmond, Vancouver International Airport and downtown Vancouver. Sections 12(1) and 22(1) require the Premier's Office to refuse disclosure and ss. 14, 16(1) and 17(1)(e) authorize it to refuse disclosure.

Key Words: disclosure harmful to intergovernmental relations or negotiations—legal advice—solicitor-client privilege—public interest disclosure—Cabinet confidences—substance of deliberations—background explanations or analysis—personal privacy—unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 14, 16(1)(a) & (b), 17(1), 21(1), 22.

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2001] B.C.I.P.C.D. No. 1; Order 01-13, [2001] B.C.I.P.C.D. No. 14; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 00-42, [2000] B.C.I.P.C.D. No. 46; Order No. 16-1994, [1994] B.C.I.P.C.D. No. 19; Order 01-48, [2001] B.C.I.P.C.D. No. 50; Order F05-08, [2005] B.C.I.P.C.D. No. 9.

Cases Considered: *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* (1998), 58 B.C.L.R. (3d) 61, [1998] B.C.J. No. 1927 (C.A.).

1.0 INTRODUCTION

[1] This decision springs from a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Office of the Premier ("Premier's Office") by the Cambie Boulevard Heritage Society ("CBHS") for records related to the Richmond-

Airport-Vancouver rapid transit line ("RAV"). The request included records relating to financing, engineering issues and route choices, agreements with equipment manufacturers, reports, details of revenue and cost sharing, correspondence between British Columbia agencies and the federal government and other related records. The request at first covered the period from 1998 to the date of the request but, in discussions between CBHS and the Premier's Office, was narrowed to cover the period from June 2001 to the date of the request (para. 1.04, Premier's Office's initial submission). The Premier's Office responded to the request in December 2003 by disclosing some records and severing and withholding other records under ss. 12, 13, 14, 16, 17 and 22 of the Act.

[2] CBHS requested a review of the decision by this Office and mediation led to the disclosure of the information originally withheld under s. 13 and of some information withheld earlier under s. 16. Mediation was otherwise unsuccessful and CBHS requested that the matter proceed to inquiry.

[3] A number of extensions to the inquiry timelines ensued in order to, among other things, provide the Premier's Office with time to reconsider its decision to withhold information and also to offer a third party and federal agencies an opportunity to participate in this inquiry. The Premier's Office disclosed more records and information in November 2004, telling CBHS that it was applying ss. 12, 14, 16, 17 and 22 to some information and adding s. 21 to other information. (As a result of the disclosures, the majority of the requested information has been released to CBHS.) The inquiry resumed in December 2004. This office invited CBHS, the Premier's Office, the Vancouver International Airport Authority ("YVR"), Infrastructure Canada and Transport Canada to participate in the inquiry and received submissions from the first three organizations.

2.0 ISSUES

[4] These are the issues in this inquiry:

1. Is the Premier's Office authorized under ss. 14, 16 and 17 to refuse access to information?

2. Is the Premier's Office required by ss. 12, 21 and 22 to refuse access to information?

[5] Under s. 57(1) of the Act, the Premier's Office has the burden of proof regarding ss. 12, 14, 16, 17 and 21. Under s. 57(2), CBHS has the burden respecting third-party personal information.

[6] The notice for this inquiry stated that s. 13 is in issue. The Premier's Office's initial submission confirmed, however, that it had disclosed the information it had earlier withheld under s. 13 and that this exception is not in issue here (para. 3.02, initial submission).

[7] There was no suggestion by the applicant that s. 25 of the Act requires disclosure of this information and, on the basis of the material before me and my decision in Order 02-38,[1] it would in any case be hard to see how s. 25 might apply to the disputed information.

3.0 DISCUSSION

[8] **3.1 Background on the RAV Project**—The Premier's Office describes the RAV project as a rail-based rapid transit line that will link central Richmond, Vancouver International Airport and Vancouver along the Cambie corridor to central Broadway, the downtown business distinct and Waterfront Station. It will be 19.5 km long and will, the Premier's Office says, improve existing transit service. The Premier's Office says that the federal and provincial governments, the Greater Vancouver Transportation Authority and YVR are each investing hundreds of millions of dollars in the project which also has the endorsement of the Cities of Vancouver and Richmond. The Premier's Office says the Government of British Columbia ("Province") wishes to have the RAV line built in time for the 2010 Winter Olympics and that RAV Management Ltd. ("RAVCO") has been created to oversee the procurement, design, construction and implementation of the RAV project. The RAV line will be designed, built, maintained and operated by a private sector partner "currently being identified through a competitive selection and negotiation process" (paras. 4.04-4.10, initial submission).

[9] **3.2 Cabinet Confidences**—The first exception to be addressed is that under s. 12(1) of the Act, 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,

[1] [2002] B.C.I.P.C.D. No. 38.

(ii) the decision has been implemented, or

(iii) 5 or more years have passed since the decision was made or considered.

[10] Section 12(1) is a mandatory exception and it is not necessary to show that harm might reasonably be expected to flow from disclosure of information to which s. 12(1) applies. This is because of the importance of maintaining Cabinet confidentiality. I discussed this exception at some length in Order 02-38, where I noted that the Supreme Court of Canada had recently affirmed the public interest in maintaining Cabinet confidentiality. I will apply here, without repeating them, the principles for interpreting s. 12(1) found in Order 02-38 and other decisions dealing with that provision.

[11] The Premier's Office says that, if the information it has severed under s. 12(1) were disclosed, it would reveal information that formed the basis for Treasury Board deliberations. It says this information is found in documents submitted to Treasury Board (a Cabinet committee), documents originating from the Chair of Treasury Board and documents referring to such information. One document is identified as an attachment to a submission to Treasury Board, the Premier's Office says, and it is obvious from the face of the records that disclosure would reveal the substance of Cabinet deliberations. Section 12(2) does not, it argues, apply (paras. 4.11-4.19, initial submission).

[12] My review of these records discloses that they consist mainly of communications with Treasury Board about Treasury Board decisions and communications asking for a Treasury Board decision or approval. They also include some records that relate to Treasury Board decisions.

[13] Previous decisions have held that Treasury Board is a committee of Cabinet.[2] Having reviewed the records, I am readily satisfied that they fall under s. 12(1) as interpreted in Order 02-38 and *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*[3] and must be withheld on that basis.

[14] **3.3 Solicitor-Client Privilege**—The Premier's Office withheld two records under s. 14 of the Act, *i.e.*, pp. 15-26 and 39-45 of the records that it provided for this inquiry. Noting that s. 14 incorporates both branches of the common law of solicitor-client privilege—legal professional privilege and litigation privilege—it says the records in question are protected by the first branch of privilege. It says these records consist of confidential communications between a lawyer and client—the Province—that are related to the giving, seeking and formulating of legal advice (paras. 4.20-4.31, initial submission; para. 89, Curtis affidavit).

[2] For example, Order 02-38.
[3] (1998), 58 B.C.L.R. (3d) 61, [1998] B.C.J. No. 1927 (C.A.).

[15] Numerous orders have dealt with s. 14 and the principles for its application are well established.[4] I will apply without repeating them the principles set out in those orders. Section 14 reads as follows:

> **Legal advice**
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[16] The records consist of two memorandums from a lawyer retained by the Province to a government official. They include comments on a draft agreement outline that the official had drafted and comments on a memorandum of understanding that the lawyer had also drafted or worked on.

[17] These records contain confidential communications between the lawyer and his client that are directly related to the seeking and giving of legal advice. They are protected by solicitor-client privilege and s. 14 authorizes the Premier's Office to withhold them.

[18] **3.4 Harm to Intergovernmental Relations**—The Premier's Office withheld the majority of the information in dispute under s. 16 of the Act, relying specifically on ss. 16(1)(a)(i) and (ii) and 16(1)(b).[5] The relevant parts of s. 16(1) read as follows:

> **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:
>
> (i) the government of Canada or a province of Canada;
>
> (ii) the council of a municipality or the board of a regional district;
>
> …
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies….

[19] Regarding s. 16(1)(a), the Premier's Office acknowledges the need to establish a reasonable expectation of harm and that evidence of speculative harm will not be enough. At paras. 4.32-4.36 of its initial submission, the Premier's Office contends that there is a reasonable expectation of harm to intergovernmental relations as contemplated by s. 16(1)(a). It also argues that, as provided in s. 16(1)(b), there is a reasonable expectation that disclosure would reveal information received in confidence from another government.

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[4] See, for example, Order 02-01, [2001] B.C.I.P.C.D. No. 1.

[5] I will note here that roughly 30 of the withheld pages consist of three copies of the same 10-page document.

[20] I have considered ss. 16(1)(a) and (b) before. See, for example, Order 01-13,[6] Order 02-19[7] and Order 02-50.[8] I will apply the approaches I took in those orders without repeating the analysis in them.

Harm to intergovernmental relations

[21] The Premier's Office argues that the s. 16(1)(a) test is met if disclosure of information would lead another government to refuse to participate in a particular program. It says that disclosure of the information in this case could reasonably be expected to have a negative impact on the Province's ability to "engage in co-operative resolution of RAV-related issues with the Government of Canada and other contributing agencies, in addition to other issues that will likely be the subject of future federal/provincial negotiations" (paras. 4.37-4.43, initial submission).

[22] The Premier's Office provided extensive open and *in camera* affidavit evidence in support of its position from Garry Curtis, Senior Advisor, Strategic Services, Intergovernmental Relations Secretariat, Office of the Premier. In the open parts of his affidavit, Garry Curtis deposes that the severed information relates to "efforts by the Province to finalize a promised financial contribution from the Government of Canada for the RAV Project…[*in camera* portion omitted]". He also says that effective intergovernmental relations rely on the ability of governments to engage in confidential discussions and that officials will be willing to engage in open and frank discussions only under assurances of confidentiality. He believes discussions and negotiations between the federal and provincial governments would be seriously impaired if the parties did not have assurances of confidentiality, which would reduce frankness and diminish the likelihood of reaching an agreement. He elaborates on these points in the *in camera* portions of his affidavit (paras. 14-85, Curtis affidavit).

[23] CBHS's brief submission on s. 16(1)(a) suggests that the Premier's Office is applying this provision "to deny information that might be politically embarrassing to individuals in government". It goes on to suggest that s. 16 "can be the ultimate mask for corruption".

[24] As the disclosed information and evidence in this inquiry indicate, the Province was, at the time it responded to CBHS's request and after that, negotiating with the federal government respecting possible federal contributions to the cost of the RAV project (paras. 24, 77 & 80, Curtis affidavit). These ongoing negotiations involved a lot of back and forth between both levels of government and there were also discussions between the Province and various local governments in the Greater Vancouver area. The financial and political issues involved in the conception and financial arrangements for the RAV project were, overall, of a sensitive and delicate nature.

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[6] [2001] B.C.I.P.C.D. No. 14.
[7] [2002] B.C.I.P.C.D. No. 19.
[8] [2002] B.C.I.P.C.D. No. 51.

[25] Garry Curtis's evidence and the content of the withheld information lead me to conclude that it is reasonable to expect that the Province's ability to continue its discussions and negotiations with the federal and local governments would be harmed by disclosure of the information to which s. 16(1) has been applied. The impact, in my view, is of such a character that there is a reasonable expectation of harm to the Province's conduct of relations with the government of Canada and with the municipalities and regional districts in question. I find that s. 16(1)(a) authorizes the Premier's Office to refuse to disclose the information to which it has applied that provision.

Reveal information received in confidence

[26] Regarding s. 16(1)(b), the Premier's Office relies again on the affidavit evidence of Garry Curtis. He deposes that the then Deputy Minister to the Premier told him that his discussions with federal ministers and officials were conducted in confidence and that disclosure would reveal information received in confidence from the federal government. The Premier's Office also says there was a mutual understanding that the information would be maintained in confidence (paras. 4.44-4.45, initial submission; paras. 86-87, Curtis affidavit).

[27] I am persuaded that disclosure of the information to which s. 16(1) has been applied would, as contemplated by s. 16(1)(b), disclose information received in confidence from the federal government or its agencies. This finding flows from the affidavit evidence and the contents of the records in dispute.

[28] **3.5 Harm to Financial Interests**—The Premier's Office argues that disclosure of the information that it withheld under s. 17 could reasonably be expected to harm the financial interests of the Province and of RAVCO, a public body named in Schedule 2 to the Act as RAV Project Management Ltd.

[29] I have dealt with the application of s. 17(1) on a number of occasions. See, for example, Order 02-50. I will apply here without repeating them the principles from those orders, notably Order 02-50. The relevant parts of s. 17(1) read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information: …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[30] The Premier's Office says that previous s. 17 decisions show that it is not necessary to prove that significant harm will result from disclosure, only that there is

a reasonable expectation of harm from disclosure. It also acknowledges, however, that evidence of speculative harm will not be enough.

[31] The Premier's Office provided *in camera* argument and open and *in camera* evidence to support its position that s. 17 authorizes it to withhold this information (paras. 4.46-4.59, initial submission; paras. 12-13, Bird affidavit; para. 88, Curtis affidavit). The Premier's Office's arguments centre on s. 17(1)(e). It says that the information to which it applied s. 17(1)(e) includes information about negotiations carried on by RAVCO or the Province concerning the RAV project. In addition, it says that disclosure of some information would harm RAVCO's ability to negotiate effectively with the proponent ultimately selected for the RAV project.

[32] As I said above in relation to s. 16(1)(a), the information disclosed to CBHS and the evidence at hand confirm that the Province was, at the time it responded to CBHS's request (and after that), negotiating with the federal government regarding federal contributions to the cost of the RAV project. These negotiations involved considerable back and forth between both governments and there were negotiations between the Province and local governments in the Greater Vancouver area.

[33] My review of the withheld information, taken together with the open and *in camera* evidence and argument of the Premier's Office, leads me to conclude that the necessary reasonable expectation of harm within the meaning of s. 17(1) of the Act has been established. The information to which s. 17(1)(e) has been applied is "information about negotiations carried on by or for a public body or the government of British Columbia". That information would, among other things, disclose negotiating positions of the Province and financial information relating to those negotiations and disclosure would interfere in a material way with the Province's ability to reach some or all of its objectives.

[34] I make the same finding with respect to information in the records about negotiations carried on by RAVCO, as a public body. In this respect, I note that the introductory words of s. 17(1) authorize the head of a public body to refuse disclosure where there is a reasonable expectation of harm to "a public body". The reference to "a public body", not "the public body" whose head refuses disclosure, is intended to authorize one public body to protect the financial or economic interests of another public body where information the first public body has custody or control of is information of the other public body. This view is further confirmed, in this case, by the s. 17(1)(e) reference to information about negotiations carried on by or for "a public body".

[35] I find that s. 17(1)(e) authorizes the Premier's Office to refuse to disclose the information to which it has applied that section.

[36] **3.6 Third-Party Business Interests**—The Premier's Office applied s. 21(1) to most of a March 27, 2003 letter from the President and Chief Executive Officer of YVR to the Deputy Minister to the Premier. The Premier's Office adopted YVR's submissions respecting s. 21(1).

[37] The Premier's Office applied s. 16(1) to this letter and I have already found that s. 16(1)(a) authorizes the Premier's Office to refuse disclosure of information to which it applied s. 16(1). I therefore need not consider YVR's s. 21(1) arguments and make no finding respecting s. 21(1).

[38] To be clear, this does not imply that I consider—and neither YVR nor the Premier's Office contended—that YVR is part of the federal government or is an agency of that government. My finding flows from the circumstances as they relate to the Province's overall relations with the federal government and certain local governments and the harm to those relations that could reasonably be expected to flow from disclosure of this letter's contents.

[39] **3.7 Third-Party Privacy**—The Premier's Office applied s. 22 to a government official's home email address and to information about a third party's "personal affairs" (para. 4.70, initial submission). It says that the relevant parts of s. 22 are the following:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny, …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …
>
> (d) the personal information relates to employment, occupational or educational history, … .

[40] The Premier's Office refers me to an order by Commissioner Flaherty in which he confirmed the severing of a government employee's personal cell phone number.[9] Similarly, in the Premier's Office's view, if an official of a public body chooses to use his or her personal email address for specific and limited activities related to official duties, as opposed to general use, that person is entitled to protection of that information.

[41] The Premier's Office does not believe disclosure of this information would be desirable for subjecting the activities of the government or the public body to public

[9] Order No. 16-1994, [1994] B.C.I.P.C.D. No. 19.

scrutiny. The Premier's Office points out that the applicant has the burden of proof regarding this information (paras. 4.66-4.73, initial submission). The applicant made no comments on this severed information.

[42] The information in question is, as the Premier's Office says, the home email address of a government official (repeated a number of times throughout the records) and a few lines of information about the personal affairs of an individual to whom that same government official sent a letter.

[43] A number of previous orders have found that personal contact information such as home email addresses and personal telephone numbers fall under s. 22(1) or, in some circumstances, s. 22(3). In Order 00-42[10], for example, I found at p. 31 that a third party's home address had to be withheld under s. 22(1). At para. 57 of Order 01-48,[11] I found that a third party's telephone number and email address fell under s. 22(1) (a case where the applicant also failed to address the contact information issue).

[44] Similarly, I am persuaded here that s. 22(1) applies to this individual's home or private email address. I also find that s. 22(1) applies to the information that relates to another third party's personal affairs. See para. 18, Order F05-08,[12] for a similar finding. No relevant circumstances apply favouring disclosure in either case. The applicant has not discharged its burden and s. 22(1) requires the Premier's Office to withhold this information.

4.0 CONCLUSION

[45] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. I require the Premier's Office to withhold the information it withheld under ss. 12(1) and 22(1).

2. I find that ss. 14, 16(1)(a) and (b) and 17(1)(e) authorize the Premier's Office to withhold the information it withheld under those sections.

August 30, 2005

ORIGINAL SIGNED BY

David Loukidelis
Acting Information and Privacy Commissioner
for British Columbia

OIPC File No. 18971

[10] [2000] B.C.I.P.C.D. No. 46.
[11] [2001] B.C.I.P.C.D. No. 50.
[12] [2005] B.C.I.P.C.D. No. 9.