



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

Order F07-13

MINISTRY OF ATTORNEY GENERAL

Celia Francis, Senior Adjudicator

July 10, 2007

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Summary: Campbell River Indian Band requested records related to its proposed destination casino project. Ministry disclosed some records and withheld information and records under ss. 12(1), 13(1), 14, 16(1), 17(1) and 22(1). Ministry found to have properly withheld information under ss. 12(1) and 13(1) and, with some exceptions, s. 14. Ministry ordered to disclose some information it withheld under s. 16(1) and s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13(1), 14 and 16(1).

Authorities Considered: **B.C.:** Order F07-11, [2007] B.C.I.P.C.D. No. 16; Order F07-12, [2007] B.C.I.P.C.D. No. 17; Order F07-14, [2007] B.C.I.P.C.D. No. 19; Order 04-30, [2004] B.C.I.P.C.D. No. 31; Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order No. 16-1994; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

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.); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665

1.0 INTRODUCTION

[1] This order is a companion to three others—Orders F07-11,¹ F07-12² and F07-14³—involving the Campbell River Indian Band (“CRIB”), and three other public

¹ [2007] B.C.I.P.C.D. No. 16.

² [2007] B.C.I.P.C.D. No. 17.

bodies, which I am issuing concurrently with this order. CRIB submitted the same request, for records related to its proposed destination casino project, to all four public bodies. CRIB's full request appears in Order F07-11. That order also sets out relevant background information on CRIB's casino project.

[2] The Ministry of Attorney General ("AG") responded to CRIB's request ten months after receiving it, at the beginning of October 2004, with a partial release of records, telling CRIB that it was withholding some information and records under ss. 13, 14 and 22 of FIPPA. CRIB then requested a review by this Office of the decision to deny access.⁴

[3] AG's failure to respond to the rest of the request became the subject of an inquiry and, in Order 04-30,⁵ the Information and Privacy Commissioner ordered AG to provide a complete response by mid-November 2004. AG did so, telling CRIB that it was withholding information and records under ss. 12, 13, 14, 16, 17 and 22 of FIPPA. CRIB requested a review of this denial as well. Because the matter did not settle in mediation,⁶ a written inquiry took place under Part 5 of FIPPA.

2.0 ISSUE

[4] The notice of inquiry listed the following as the issues in this case:

1. Whether AG was required by ss. 12 and 22 of FIPPA to refuse the applicant access to information.
2. Whether AG was authorized by ss. 13, 14, 16 and 17 of FIPPA to refuse access to information.

[5] The material before me indicates that AG originally applied s. 22⁷ only to p. 193 but that CRIB later received a complete copy of this record.⁸ I do not therefore need to deal with s. 22 in this decision. I also do not need to consider s. 17 here, as AG applied it to information which I find below falls under one or more of ss. 12, 13 and 14.

[6] Under s. 57(1) of FIPPA, AG has the burden of proof regarding ss. 12, 13, 14 and 16.

³ [2007] B.C.I.P.C.D. No. 19.

⁴ The information in this paragraph and the next comes from the Portfolio Officer's fact report which accompanied the notice for this inquiry.

⁵ [2004] B.C.I.P.C.D. No. 31.

⁶ CRIB states at para. 17 of its initial submission that, after this Office issued the notice of inquiry for this case, it received a shipment of records on June 1, 2005 that AG had previously withheld in full. At para. 2 of its reply, CRIB said it had received a further package of records in the week of July 18, 2005 and asked why it had not received them in the first place.

⁷ This section requires a public body to withhold personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy.

⁸ This page was enclosed with AG's decision letter of July 15, 2005 which CRIB attached to its reply submission.

3.0 DISCUSSION

[7] **3.1 Background**—This case has considerable overlap with those in Orders F07-11, F07-12 and F07-14, involving the Ministries of Finance, Public Safety and Solicitor General (“PSSG”) and Agriculture and Lands, the last of which now has responsibility for the records that CRIB originally requested of Land and Water British Columbia Inc. (“LWBC”). The applicant and request are the same in all four cases, as are most of the exceptions and related issues, and much of the disputed information. In addition, the same legal counsel represented all four public bodies. The four inquiries proceeded together on this basis.

[8] AG made a joint submission with PSSG. Many of their arguments and evidence overlap with those of the Ministries of Finance and Agriculture and Lands. To avoid repetition in this order, I have, as appropriate, applied my reasoning in those decisions to the evidence before me in this case. I have also considered the evidence and submissions before me in this inquiry in making my findings and orders here.

[9] **3.2 Some Information Outside Scope of Request**—AG said that it had removed some information in the records as it was outside the scope of the request.⁹ CRIB did not comment on this issue.

[10] The portions or pages¹⁰ in question are clearly marked on the individual pages as “o/s” or “not responsive”. I agree with AG that this information is outside the scope of the request, as it relates to other topics. I do not need to consider whether CRIB is entitled to have access to the out of scope records and information. For the same reasons, I do not need to consider records 40, 47, 156 and 205.

[11] **3.3 Search for Records**—CRIB complained in its initial submission that AG had failed to provide all responsive records, saying it had received from other public bodies copies of records which it should also have received from AG. It also provided samples of these records.¹¹ AG objected to CRIB raising the search issue at this point, as it was not listed in the notice for this inquiry.¹²

[12] I agree with AG on this point and also observe that CRIB did not raise the adequacy of AG’s search in its request for review. I do not therefore address the search issue in this decision.

[13] **3.4 Inconsistencies in Application of Exceptions**—In reviewing the records in dispute in the four inquiries, I noted a number of inconsistencies in the four public bodies’ severing of information and in their annotation of the records with applicable exceptions, both within their own records and in comparison with the other public

⁹ Para. 4.15, initial submission.

¹⁰ AG classified records 15 and 49 and pp. 3-5 of record 50 as entirely out of scope.

¹¹ Paras. 26-27 & Tab 29, initial submission.

¹² Reply submission.

bodies' records. There were also cases where the exceptions noted on the records did not match those on the accompanying severance tables.

[14] CRIB did not raise any objections to these inconsistencies. As it was not clear what positions the four public bodies were taking, however, I offered them the opportunity to reconsider their positions collectively, with a view to reconciling the inconsistencies. As a result, the four public bodies disclosed some more information and records and cleared up some, though not all, of the inconsistencies.

[15] **3.5 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 ...

- (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, ...

[16] I have applied here, without repeating them, the principles for interpreting ss. 12(1) and (2) in Order 01-02,¹³ Order 02-38¹⁴ 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*.¹⁵

[17] AG provided the same information on Treasury Board as a Cabinet Committee and made the same arguments on s. 12(1) and its interpretation as LWBC did in the related inquiry.¹⁶ AG described the records to which it applied s. 12(1), as follows:

- information in a Cabinet Decision Document of June 18, 2003, received by Treasury Board the following day; the severed information relates to the issue going forward to Treasury Board for resolution, the recommendation of the Minister Responsible for LWBC, options, fiscal management considerations, significant implications and the recommendation to Treasury Board

¹³ [2001] B.C.I.P.C.D. No. 2.

¹⁴ [2002] B.C.I.P.C.D. No. 38.

¹⁵ (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

¹⁶ Paras. 4.16-4.35, initial submission.

- information relating to the drafting of a submission to Cabinet called “Cabinet Decision Document” that went to Treasury Board, for a decision
- communications of April 29, 2003 and June 16, 2003 from a Treasury Board analyst, discussing decisions made by Treasury Board
- information in Treasury Board decision documents of June 16, 2003 and June 19, 2003
- information that if disclosed would reveal information in a Treasury Board decision document or information which formed the substance of Treasury Board deliberations, including options for consideration, implications of the various options, financial considerations and recommendations¹⁷

[18] CRIB questioned AG’s application of s. 12(1), complaining that AG did not provide many specifics about the records it withheld under that exception. CRIB pointed out that s. 12(1) is intended to protect information that would reveal the substance of deliberations and suggested that s. 12(2) may apply. In CRIB’s view, AG’s interpretation of s. 12(1) extends its application beyond what is reasonably necessary to prevent harm to government arising from disclosure of Cabinet deliberations.¹⁸

[19] The information to which AG applied s. 12(1) is in emails discussing the development of the contents of Treasury Board decisions, a Treasury Board record of decision, Treasury Board decision letters and Cabinet decision documents. There is some duplication of information within the records.

[20] I need not consider AG’s application of s. 12 to records 41 and 43.¹⁹ Record 43 is a briefing note to the Minister of Finance that appears to relate to a proposed decision by him as Minister, not as Chair of Treasury Board, a Cabinet Committee. Record 41 is an email from a Ministry of Finance employee on the same subject. AG did not explain why it thought s. 12 applied to records 41 and 43 but not to the same information in record 42, another version of the briefing note in record 43, with much the same information. I do not, however, need to resolve this apparent discrepancy, because I find below that s. 13 applies to the withheld information in all three records.

[21] I also need not consider whether s. 12(1) applies to para. 3 of record 99, to which AG applied ss. 12 and 13. The Ministry of Finance’s records indicate that it disclosed this information in October 2005.²⁰

¹⁷ Pages 12-13, initial submission; paras. 4-10, Paul affidavit; para. 9, Proverbs affidavit; para. 14, Sturko affidavit.

¹⁸ Paras. 29-31, initial submission; paras. 5-7, reply submission.

¹⁹ AG confirmed in a letter of September 8, 2006 that it had applied ss. 13 and 17 to record 42 and ss. 12, 13 and 17 to records 41 and 43.

²⁰ See p. 103 of that Ministry’s records.

[22] The remaining severed information consists of recommendations, options and policy considerations related to various issues connected with the Campbell River destination casino project that were submitted or prepared for submission to Treasury Board, a committee of Cabinet,²¹ as well as records revealing Treasury Board decisions. I accept that this information formed the basis for Treasury Board deliberations and I am satisfied that its disclosure would reveal the substance of deliberations of Cabinet within the meaning of s. 12(1). I find that s. 12(1) applies to all of the information which AG withheld under that section. Section 12(2) does not apply.

[23] **3.6 Advice or Recommendations**—The relevant portions of s. 13(1) read 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) ...
- (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[24] Numerous orders have considered the interpretation of s. 13(1). See, for example, Order 02-38. I will apply here, without repeating them, the principles for interpreting s. 13(1) set out in those orders.

[25] CRIB suggested, without elaborating, that s. 13(2)(n) applies to the information which AG withheld under s. 13(1).²² It generally rejected AG's arguments on that exception, suggesting that they "would allow the withholding of most documents considered at the ministerial level".²³

[26] AG provided the same discussion and interpretation of s. 13(1) in past orders and case law as LWBC did in the related inquiry. AG also rejected CRIB's argument about s. 13(2)(n), saying that none of the information in question constitutes the type of information covered by that section. Nor, it said, has CRIB stated what legal rights of CRIB could be at issue in this case.²⁴

²¹ See B.C. Reg. 290/2002.

²² Para. 33, initial submission. AG denied this in its reply.

²³ Paras. 32 & 34, initial submission; paras. 8-10, reply submission.

²⁴ Paras. 4.36-4.61, initial submission; p. 1, reply submission.

[27] The purpose of s. 13(1) is to protect a public body's internal decision-making and deliberative processes, in particular while those processes are still underway. I have not considered the application of s. 13 in instances where AG withheld information under this exception but it or other public bodies disclosed the same information.²⁵ I find that the remaining information in question all falls under s. 13(1), as previous orders have interpreted this exception. The Ministry may therefore withhold this information. I am also satisfied that s. 13(2), including s. 13(2)(n), and s. 13(3) do not apply.

[28] **3.7 Solicitor-Client Privilege**—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.

[29] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Orders 02-01,²⁶ 03-02,²⁷ 03-32,²⁸ 03-22,²⁹ 00-06³⁰ and F06-16.³¹ I will not repeat those principles but apply them here.

[30] CRIB acknowledged that s. 14 incorporates the common law of solicitor-client privilege, including litigation. It pointed out that privilege does not apply to all communications between solicitor and client and argued that AG applied s. 14 incorrectly in several cases, for example, attachments and indirect communications. CRIB also expressed concern about the number of lawyers with whom AG had communicated for the purposes of legal advice.³²

[31] AG relied on legal professional privilege in this case and set out much the same discussion of s. 14 as LWBC did in the related inquiry. AG said that the information it withheld under s. 14 includes direct, confidential communications between its representatives and its legal counsel or external legal counsel: emails, often with attachments, including previous emails; draft submissions; letters; and other draft material. AG argued that the attachments are also protected by solicitor-client privilege by virtue of being attached to the confidential communication, although they may or may

²⁵ Examples include: p. 1 of record 94 (the Ministry of Finance disclosed this record in its p. 102); the portion following "I would like you to proceed as follows:" on p. 3 of record 216, p. 2 of record 220 and p. 2 of record 221 (LWBC disclosed this information on its p. 45); para. 3 of record 99 (as noted above, the Ministry of Finance disclosed this information on its p. 103); third withheld item in record 134 (AG disclosed this information in a duplicate email in record 133).

²⁶ [2002] B.C.I.P.C.D. No. 1.

²⁷ [2003] B.C.I.P.C.D. No. 2.

²⁸ [2003] B.C.I.P.C.D. No. 32.

²⁹ [2003] B.C.I.P.C.D. No. 22.

³⁰ [2000] B.C.I.P.C.D. No. 6.

³¹ [2006] B.C.I.P.C.D. No. 23.

³² Paras. 35-41, initial submission; paras. 11-18, reply submission.

not have been privileged before being attached to those emails. Other information has been severed, AG said, because its disclosure would reveal confidential communications between AG and its solicitors. In AG's view, the records themselves also provide evidence that they are protected by solicitor-client privilege.³³ AG added that some records are confidential communications between LWBC and AG, the sharing of which did not constitute a waiver of privilege, as the Province of British Columbia is the sole shareholder of LWBC.³⁴

[32] AG did not refer to specific records on this last point, although it appears from the Proverbs affidavit that AG is referring to communications between LWBC and its external legal counsel, Cook Roberts, which are among AG's records here. AG also did not provide any authority for the proposition that sharing privileged material between the Province and a separate legal entity does not constitute waiver of privilege, solely on the basis of the Province's ownership of that legal entity.

[33] I could find only three LWBC/Cook Roberts communications among AG's records, record 54, which I do not need to deal with (see below), record 80 and a letter at pp. 2-5 of record 129. AG did not argue that it had a common interest with LWBC, although LWBC did make this argument about the sharing of privileged information among the public bodies in the related LWBC inquiry.³⁵ While I am sceptical of AG's argument that privilege is not waived solely on the ownership basis, I accept that there was a common interest among the public bodies in this matter and that the sharing of privileged information in record 80 and pp. 2-5 of record 129 between AG and LWBC on this basis did not constitute a waiver of privilege. See Order 03-02 and Order F06-16 for similar findings.

[34] I do not need to consider AG's application of s. 14 to pp. 1-3 of record 54, an email and attached letter. In my letter of August 9, 2006 to legal counsel for the four public bodies, I noted that AG had disclosed these pages³⁶ while LWBC and PSSG had withheld their copies of the same email and letter. In his letter of September 8, 2006, the public bodies' legal counsel responded that AG had withheld this part of record 54 while LWBC had disclosed one page. It is clear, however, that CRIB has a copy of the email and letter and I need not therefore consider AG's argument that s. 14 applies to them. I also do not need to consider AG's application of s. 14 to the third withheld item in record 134, as AG disclosed this information in record 133.

[35] The remaining records and information to which AG applied s. 14 consist of confidential communications (emails, faxes and letters) of the type AG described, as set out above. I have carefully reviewed these records and, with some exceptions, I am satisfied that disclosure of these records and information would reveal information

³³ Paras. 4.62-4.83, initial submission; paras. 4-10, Proverbs affidavit.

³⁴ Para. 4.84, initial submission; paras. 3-12, Sturko affidavit; para. 7, Proverbs affidavit, LWBC's initial submission; paras. 7-12, Hallam affidavit, LWBC's initial submission.

³⁵ Para. 4.83, LWBC's initial submission.

³⁶ CRIB's reply submission included a copy of the email and letter with AG's decision letter of July 15, 2005.

subject to solicitor-client privilege and I find that s. 14 applies to them.³⁷ The exceptions are records 8, 19(1) and 98 and, for the reasons set out below, I find that s. 14 does not apply them:

- record 8 is a letter with handwritten changes (AG did not say whose handwriting it is); AG said that s. 14 applies to this record because it was “shared with legal counsel”³⁸ but there is no indication of this on the record itself; there is also no indication on this record of any confidential legal advice from solicitor and client which might attract solicitor-client privilege
- record 19(1) is an email copied to Mark Timmis; AG said that Mark Timmis is an AG lawyer and the records themselves support this statement; previous orders state that the fact that a communication was copied to a public body’s lawyer is not enough in and of itself to attract solicitor-client privilege;³⁹ there is certainly no indication on the face of this record that any confidential client instructions or legal advice would be revealed
- record 98 is, AG states, Trevor Proverbs’⁴⁰ handwritten note of a telephone conversation with “Mark Timmins [sic]”;⁴¹ the handwriting at the top of the record, while partly cut off, shows that the notes are actually of a conversation with Mark Hallam, an LWBC manager, not Mark Timmis; the record does not contain any references to legal advice and there is otherwise nothing on the face of this record to show that s. 14 applies⁴²

[36] **3.8 Harm to Government Relations**—AG relies on s. 16(1)(c) in this case. It said that it and PSSG briefly decided to lift ss. 16 and 17 from the records in dispute but later reversed this decision because of the potential significant impact on the treaty negotiation process flowing from disclosure of the records.⁴³

[37] AG reminded me of what past orders have said about the application of harms-based exceptions and the standard of review regarding s. 16(1)(a), which it argues also apply to s. 16(1)(c). AG then described the cost-sharing arrangement between the federal and British Columbia governments for funding First Nations treaty settlements, whereby the federal government’s share is mostly cash and British Columbia’s share is mostly land. It said that the Province does not normally disclose to the public or to First Nations the monetary values of land offered to First Nations prior to concluding treaties. It then, on an *in camera* basis, set out the harms AG believes would occur on disclosure of the information in question.⁴⁴

³⁷ I include here record 80 and pp. 2-5 of record 129 discussed above.

³⁸ See AG’s table of disputed records.

³⁹ See pp. 9-11, Order 00-06, [2000] B.C.I.P.C.D. 6.

⁴⁰ Chief Negotiator, Ministry of Aboriginal Relations and Reconciliation, Treaty Negotiation Office; see para. 1, Proverbs affidavit.

⁴¹ See AG’s table of disputed records.

⁴² I find above that s. 13 applies to this record.

⁴³ Paras. 4.95-4.102, initial submission; paras. 11-18, Paul affidavit; paras. 11-25, Proverbs affidavit.

⁴⁴ Paras. 11-18, Paul affidavit; Exhibits “B”, “C” and “D”, Paul affidavit; paras. 11-25, Proverbs affidavit.

[38] CRIB cast doubt on AG's arguments for applying s. 16, saying that AG must make a rational connection between the disclosure of the disputed information and the harm that would allegedly result. In its view, AG has not done so here.⁴⁵

[39] Section 16(1)(c) reads 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 ...

(c) harm the conduct of negotiations relating to aboriginal self government or treaties.

[40] The Information and Privacy Commissioner discussed the interpretation of and standard of proof for applying s. 16(1) at paras. 111-122 of Order 02-50,⁴⁶ noting that evidence of speculative harm will not suffice. A public body must establish a rational connection between the information disclosed and the harm that will allegedly result. In Order 02-50, the Commissioner rejected AG's claims regarding possible harm to current negotiations with the applicant, a First Nation, including, among other things, AG's argument that treaty negotiations with the First Nation could be side-tracked into other disputes as a result of disclosure of the requested information.

[41] AG applied s. 16(1)(c) to only a few items of information, for the most part to information to which I find elsewhere s. 12 or 13(1) or both apply. I therefore only need to consider s. 16 where it is the sole exception, that is, three lines on p. 2 of record 165.

[42] AG's evidence on the alleged s. 16(1)(c) harm was (properly) submitted *in camera*, which makes it difficult for me to discuss it here. I can however say that AG's arguments and *in camera* evidence relate to possible harm to potential future negotiations with First Nations in a general sense, a different topic from the information in dispute in record 165, which AG did not specifically address in its submissions.

[43] AG's arguments are speculative and similar to those it raised in Order 02-50. Such arguments would more properly relate to s. 17(1), which AG did not argue applied to this information.⁴⁷ AG raised hypothetical scenarios which may or may not arise in future negotiations with other First Nations and did not explain how the information on p. 2 of record 165 could lead to the harms it envisioned. AG has not persuaded me that disclosure of the information in question could reasonably be expected to result in the harms it alleges could occur and I find that s. 16(1)(c) does not apply to the information in question.

⁴⁵ Paras. 42-44, initial submission; paras. 19-20, reply submission.

⁴⁶ [2002] B.C.I.P.C.D. No. 51.

⁴⁷ In saying this, I do not suggest that a s. 17(1) argument would or would not have succeeded here.

4.0 CONCLUSION

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

1. I require AG to refuse CRIB access to the information it withheld under s. 12(1).
2. I confirm that AG is authorized to refuse CRIB access to the information it withheld under s. 13(1).
3. Subject to para. 4 below, I confirm that AG is authorized to refuse CRIB access to the information it withheld under s. 14.
4. I require AG to give CRIB access to the information it withheld under s. 14 in records 8, 19(1) and 98.
5. I require AG to give CRIB access to the information it withheld under s. 16 on p. 2 of record 165.

July 10, 2007

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC Files: F04-22786 and F04-23406