



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

Order 04-34

BC TRANSPORTATION FINANCING AUTHORITY

Celia Francis, Adjudicator
November 10, 2004

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Summary: Applicant requested a “term sheet” related to a contract for a highway interchange in Langley. Term sheet was attached to a Treasury Board submission and found to have formed basis of deliberations of Cabinet and Treasury Board. BCTFA found to have correctly refused access to disputed information under s. 12(1). Section 12(2) does not apply.

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

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1) & (2); *Committees of the Executive Council Regulation*, BC Reg. 290/2002.

Authorities Considered: B.C.: Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order 01-14, [2001] B.C.I.P.C.D. No. 15; 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 matter began life as a request for review of a decision by the BC Transportation Financing Authority (“BCTFA”) to deny the applicant access to most of a record (“term sheet”) under s. 17(1) of the *Freedom of Information and Protection of Privacy Act* (“Act”). In writing to the BCTFA to request the term sheet, the applicant referred to an earlier request for a contract between the BCTFA, the Ministry of

Transportation and the Township of Langley (“Langley”) for the Highway 1/200th Street Interchange in Langley (“Interchange”). The applicant pointed out that the term sheet was defined in Schedule 1 to that contract as “the term sheet made between BCTFA, The Ministry of Transportation and Highways and Langley, dated February 24, 1998”.

[2] The Ministry responded by providing the applicant with a severed copy of the term sheet, stating that it was withholding the severed information under s. 17(1) of the Act. The applicant requested a review of that decision by this Office. Mediation was unsuccessful and the matter was set down for inquiry. The Office sent the notice of inquiry to the applicant, the public body and Langley.

[3] Soon after, the BCTFA informed the applicant that it had recently learned that the term sheet had been attached to a Treasury Board Submission and that disclosure of the term sheet would reveal the substance of Treasury Board deliberations in approving the cost-sharing proposal for the Interchange. The BCTFA said that it was required to withhold the substance of Executive Council deliberations and that it therefore anticipated applying s. 12(1) to the term sheet, in addition to s. 17(1).

[4] The BCTFA later confirmed its decision to apply s. 12(1) to most of the term sheet. It added that it was also applying s. 12(1) to information it had earlier disclosed but now realized it should have withheld. The inquiry was re-scheduled to allow the parties to make submissions on the application of s. 12(1). In its initial submission to this inquiry, the BCTFA confirmed that it was no longer claiming s. 17(1) and that s. 12(1) was the only exception to be decided (para. 3.01, initial submission). The BCTFA and the applicant made submissions to this inquiry but Langley did not.

[5] I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[6] The issue before me in this case is whether the BCTFA is required by s. 12(1) to refuse access to the severed portions of the term sheet. Under s. 57(1) of the Act, the BCTFA has the burden of proof regarding s. 12(1).

3.0 DISCUSSION

[7] **3.1 The BCTFA** – The BCTFA said that it is a British Columbia Crown corporation that is wholly owned by the Province of British Columbia. It said its purpose, as set out in the *Build BC Act*, is to

Plan, acquire, construct, hold, improve or cause to be constructed or improved transportation infrastructure throughout British Columbia and to do such other things as the Lieutenant Governor in Council may authorize.

[8] The BCTFA said that, under the *Highway Act*, it acquired the government's highways in the province and has its own accounting, authorization and approval processes which are separate from the Ministry of Transportation and Highways. It is accountable to its Board of Directors for the development of major transportation infrastructure projects. It elaborated on its functions as follows:

- 4.08 BCTFA is involved in atypical and innovative transportation infrastructure projects and is charged with finding creative and novel approaches to funding capital projects, while as much as possible, without drawing on the general revenue of the government. BCTFA's mandate and administrative processes require its board of directors and the Treasury Board of the province (where provincial funding is involved) to consider and approve the nature, scope, timing and funding mechanism for such major, innovative projects.

[9] The BCTFA went on to say that one of its roles is to engage different levels of government, crown corporations, private sector organizations and other bodies in discussions around transportation infrastructure projects. Some projects may involve the sale of lands to help the BCTFA and its funding partners to offset costs (paras. 4.01-4.10, initial submission; paras. 2-14, Fraser affidavit).

[10] The BCTFA explained the purpose of "term sheets" as follows:

- 4.11 Term sheets normally set out in detail the basis upon which a transportation infrastructure project will be implemented and paid for including such matters as the scope of the project, funding arrangements, cost sharing, ownership of the project, consolidation of necessary adjacent properties, project delivery and the inclusion of land as an asset to off set project costs.
- 4.12 A term sheet, as was the case here, is typically the first document negotiated and forms the basis for subsequent legal agreements between funding partners for the project as well as those agreements negotiated with other parties that may become involved directly or tangentially in the development of the project including contractors, adjacent landowners and developers. Those agreements include project agreements with funding partners, design-build or construction contracts for the delivery of the transportation infrastructure and purchase and sale agreements for project lands and third party arrangements for additional properties required for rights of way and other project-related components such as park and ride facilities.

(paras. 15-16, Fraser affidavit)

[11] **3.2 Application of Sections 12(1) and 12(2)** – The BCTFA argued that s. 12(1) applies to the severed portions of the term sheet and that s. 12(2) does not apply.

[12] These sections 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
- (a) information in a record that has been in existence for 15 or more years,
 - (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
 - (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
 - (i) the decision has been made public,
 - (ii) the decision has been implemented, or
 - (iii) 5 or more years have passed since the decision was made or considered.

[13] I have applied here, without repeating them, the principles for interpreting ss. 12(1) and (2) in Orders 01-02, [2001], B.C.I.P.C.D. No. 2, 02-38, [2002] B.C.I.P.C.D. No. 38, and in *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.).

Treasury Board as Cabinet Committee

[14] In Order 02-38, the Commissioner considered what a committee of Executive Council is, noting at para. 91 that Treasury Board's status as a Cabinet committee has a legislative foundation in the *Financial Administration Act*. Section 12 of the Act was amended in November 2002 to allow for the designation by regulation of committees of the Executive Council for the purposes of s. 12. The *Committees of the Executive Council Regulation*, B.C. Reg. 290/2002, designates Treasury Board as such a committee.

[15] **3.3 Does Section 12(1) Apply to the Term Sheet?** – The applicant's initial submission on this point was brief, first pointing out that the BCTFA has the burden of proof respecting the application of s. 12(1). It then said that the term sheet was an integral part of the contract, or "Project Agreement", dated March 4, 1999, between Langley and the BCTFA for the Interchange. It said it has received a copy of the Project Agreement and requests access to the term sheet in order to make a proper assessment of the Project Agreement (paras. 1-2, initial submission).

[16] The BCTFA argued that it is required by s. 12(1) to withhold the severed parts of the term sheet, including those which it had earlier disclosed, as the term sheet was attached to Treasury Board submission 04/99, dated June 4, 1998, which dealt with proposed improvements to the Interchange. The BCTFA said that the term sheet was submitted to Treasury Board, a committee of Executive Council, in order to allow the Treasury Board to fully consider the nature, scope, timing and funding of what the BCTFA called “an innovative transportation infrastructure project”. The term sheet was thus part, the BCTFA argued, of the information that Treasury Board considered in making its decision as to whether or not to approve the project in accordance with the terms set out in the term sheet.

[17] The BCTFA said that the introductory words of the term sheet, which the applicant has received, state that it is subject to review and approval by Treasury Board and Cabinet, indicating that Treasury Board would have to review and approve the term sheet’s contents before it took effect. The BCTFA argued that disclosure of the information would allow a reader to draw accurate inferences as to the object of Treasury Board deliberations. It provided open and *in camera* argument evidence on these points, including affidavit evidence by the Director Partnership Development, Ministry of Transportation, the Ministry responsible for the BCTFA (paras. 4.22, 4.25-4.28, initial submission; paras. 16-20, Fraser affidavit).

[18] The BCTFA also provided open and *in camera* affidavit evidence from Linda Brandie, Manager, Quality Assurance, Information Management Branch, Ministry of Finance. Ms. Brandie deposed on an *in camera* basis as to the contents of Treasury Board Submission 04/99 of June 3, 1998 (a copy of which was attached as an *in camera* exhibit to her affidavit) and the contents and purpose of the term sheet. Also attached as an *in camera* exhibit to the Brandie affidavit was a letter of July 16, 1998 from the Honourable Joy K. MacPhail, then Chair of Treasury Board, to the Honourable Harry Lali, then Minister Responsible for the BCTFA. Ms. Brandie deposed in the open part of her affidavit that the letter “indicates that Treasury Board made a decision in response to the Treasury Board Submission” in question.

[19] The applicant disputed the BCTFA’s position on the term sheet, saying it was negotiated first. The applicant also argued that the term sheet would reveal the decision of the Treasury Board, not its deliberations (para. 2, reply submission).

[20] I have reviewed the term sheet and Treasury Board Submission 04/99. The term sheet is undoubtedly an attachment to the Treasury Board Submission. Despite the applicant’s argument that the term sheet predated the Treasury Board submission, the opening remarks of the term sheet of February 24, 1998, state that it was “subject to review and approval by the Treasury Board of British Columbia and the Cabinet of British Columbia”. In addition, internal evidence in the term sheet and the Treasury Board submission itself supports the BCTFA’s argument that the term sheet was provided to the Treasury Board for its consideration in deciding whether or not to approve the Interchange project in accordance with the term sheet.

[21] From my review of the material before me, including the term sheet and the Treasury Board submission, I am satisfied that the severed information in the term sheet formed the basis for deliberations of Cabinet and of Treasury Board, one of its Committees, as the Information and Privacy Commissioner has interpreted this term. I therefore find that s. 12(1) applies to this information.

[22] **3.5 Does Section 12(2) Apply?** – The BCTFA acknowledged that more than five years have passed since Treasury Board considered the decision in question and that it is therefore necessary to consider whether s. 12(2) applies to the severed information in the term sheet. It said that the purpose of the term sheet was not to provide background explanations to Treasury Board, because it contained the terms of an agreement that the BCTFA was asking the Treasury Board to approve. The information in the term sheet was part of the recommendation that the BCTFA was making to the Treasury Board, the BCTFA said, and thus cannot be construed as background explanations or analysis for the purposes of s. 12(2) of the Act.

[23] The BCTFA continued that the Treasury Board submission asked for Treasury Board’s decision regarding proposed improvements to the Interchange and specifically for approval to proceed with the project in accordance with the term sheet. As such the severed information was not incidental but integral to the submission, the BCTFA said – provided to Treasury Board to allow it to consider the project fully. Disclosure of the severed information would reveal details of a specific option recommended to Treasury Board, it concluded. Again, some of the argument and evidence the BCTFA provided on this point was *in camera* (paras. 4.29, 4.33-4.38, 4.40, initial submission; para. 20, Fraser affidavit; para. 10, Brandie affidavit).

[24] The applicant argued that Treasury Board’s decision in the form of the term sheet was implemented and that five years have passed since that decision. Sections 12(2)(c)(ii) and (iii) therefore apply, it suggested (paras. 6-7, reply).

[25] After carefully scrutinizing the contents of the term sheet, I am unable to identify any information that constitutes “background information or analysis” for the consideration of Cabinet or one of its Committees for the purposes of s. 12(2), as the Information and Privacy Commissioner has interpreted this term. I agree with the BCTFA that the severed information forms part of the recommendations that the BCTFA was making to the Treasury Board and that its disclosure would reveal an option presented to the Treasury Board for its consideration and decision. I find that s. 12(2) does not apply to the severed information in the term sheet.

Previous disclosure of information

[25] The BCTFA argued that s. 12(1) applied to the information that has been withheld, even to some information it had disclosed earlier and now says it should not have. The applicant did not touch on this point. I agree with the BCTFA’s views and note that the Information and Privacy Commissioner said in Order 01-14, [2001] B.C.I.P.C.D. No. 15, that the applicant’s possession of a record to which he had found that s. 12(1) applied did not change his finding.

4.0 CONCLUSION

[26] For the reasons explained above, I require the BCTFA to refuse access under s. 12(1) to the disputed information in the term sheet.

November 10, 2004

ORIGINAL SIGNED BY

Celia Francis
Adjudicator