



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

Protecting privacy. Promoting transparency.

Order F12-07

## MINISTRY OF FINANCE

Jay Fedorak, Adjudicator

April 19, 2012

Quicklaw Cite: [2012] B.C.I.P.C.D. No. 10

CanLII Cite: 2012 BCIPC No. 10

Document URL: <http://www.oipc.bc.ca/orders/2012/OrderF12-07.pdf>

**Summary:** The BCCLA applied for a copy of an audit report on Provincial Police Services that Treasury Board had requested the Office of the Comptroller General produce for its consideration. The Ministry withheld the Report on the grounds that disclosure would reveal the substance of the deliberations of Treasury Board, which is a committee of the Executive Council for the purposes of s. 12(1) of FIPPA. The adjudicator found that s. 12(1) of FIPPA applied to the Report as it was produced with the intention that Treasury Board would consider it. The adjudicator required the Ministry to withhold the Report.

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

**Authorities Considered: B.C.:** Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14; Decision F08-02, [2008] B.C.I.P.C.D. No. 4; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order F08-17, [2008] B.C.I.P.C.D. No. 30; Order F07-23, [2007] B.C.I.P.C.D. No. 38; Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order F12-01, [2012] B.C.I.P.C.D. No. 1.

**Cases Considered:** *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927 (C.A.).

## INTRODUCTION

[1] This case involved the BC Civil Liberties Association (“BCCLA”) challenging a decision of the Ministry of Finance (“Ministry”) to withhold an audit

report entitled the “Provincial Police Services Review” (“Report”). The Ministry withheld the Report on the grounds that disclosure would reveal the substance of the deliberations of a committee of the Executive Council under s. 12(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

## ISSUES

[2] The question I must answer is whether s. 12(1) of FIPPA requires the Ministry to refuse access to the audit report.

## DISCUSSION

[3] **Background**—The BCCLA originally requested all correspondence and reports relating to the financial audit of the contract with the RCMP for policing operations in British Columbia. The Ministry responded by assessing a fee for processing the request. The BCCLA complained about the fee to the Office of the Information and Privacy Commissioner (“OIPC”). During mediation of the complaint, the BCCLA agreed to narrow the request to the Report alone.

[4] Section 12(1) of FIPPA requires public bodies to withhold information that would reveal the substance of the deliberations of the Executive Council (also known as the Cabinet) and any of its committees. In accordance with s. 1 of the regulation to FIPPA, B.C. Reg 229/2005, the Province has designated Treasury Board as a committee of the Executive Council for the purposes of s. 12(1) of FIPPA.

[5] **Preliminary Issues**—The BCCLA objects to the fact that the Ministry issued a fee estimate for records that it later refused to disclose under s. 12(1) of FIPPA. It asks me to decide whether the Ministry failed to meet its obligation under s. 6(1) of FIPPA to respond openly, accurately and completely. The BCCLA also alleges that the Ministry acted in bad faith and requests that I make a finding under s. 74.1(1) that the Ministry committed an offence.

[6] Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage, only if permitted to do so.<sup>1</sup> The BCCLA did not ask the permission of the OIPC to raise s. 6(1) of FIPPA prior to the inquiry. I note that the BCCLA submits that it did not have the information necessary to provoke a complaint, until it received the initial submission of the Ministry in this inquiry. This is an issue better suited to investigation by the OIPC as a complaint, as there is insufficient material before me to make a finding. The BCCLA has a right to request that the OIPC conduct a formal investigation.

---

<sup>1</sup> See for example Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14, and Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

[7] On the issue as to whether the Ministry might have committed an offence pursuant to the *Offence Act*, I have no authority to make such a finding or impose any penalty under this provision. Moreover, I note that the responsibility for the prosecution of offences under s. 74 of the *Offence Act* is with the Ministry of Justice.

[8] I have decided, therefore, not to permit the BCCLA to raise these issues in this inquiry.

[9] **Cabinet Confidences**—Section 12(1) of FIPPA requires a public body to withhold information that would reveal the substance of Cabinet deliberations. The relevant parts of s. 12 read as follows:

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, or

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

[10] The Supreme Court of Canada's decision in *Babcock v. Canada (Attorney General)* outlines the purposes underlying the common law principle of cabinet confidentiality.<sup>2</sup> In addition, the British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*<sup>3</sup> considered the principles for interpreting ss. 12(1) and (2) of FIPPA, and subsequent orders such as Order 01-02<sup>4</sup> and Order 02-38<sup>5</sup> discussed them further. The Court in *Aquasource* found that s. 12(1) "must be read as widely protecting the confidence of Cabinet communications." It also found that the "substance of deliberations" in s. 12(1) refers to "the body of information which Cabinet

<sup>2</sup> 2002 SCC 57 at paras. 18 to 20.

<sup>3</sup> 1998] B.C.J. No. 1927 (C.A.).

<sup>4</sup> [2001] B.C.I.P.C.D. No. 2.

<sup>5</sup> [2002] B.C.I.P.C.D. No. 38.

considered (or would consider in the case of submissions not yet presented) in making a decision, including the type of information specifically there enumerated.”

[11] If it is determined that s. 12(1) of FIPPA applies to the record, the next step is to consider whether any provisions of s. 12(2) apply. In the event that one or more of these provisions apply, then s. 12(1) does not apply to information in the records that constitutes background explanations or analysis.

[12] I take the same approach here.

[13] Treasury Board requested that the Officer of the Comptroller General prepare the Report for the purposes of providing advice and recommendations to Treasury Board with respect to the management of the Provincial Police Services Agreement. It is clear that Treasury Board intended to deliberate on the Report. The Ministry submits that the Report is marked that it is prepared for advice to Treasury Board and Cabinet.

[14] The BCCLA concedes, based on the information that the Ministry has provided in its submission, that the Report is subject, at least in part, to s. 12(1) of FIPPA. It notes that the Ministry failed to disclose, until its initial submission to this inquiry, that the Office of the Comptroller General had marked the Report as having been prepared for Treasury Board. The BCCLA suggests, however, that there is information in the Report, such as passages on the title page, that could be released without revealing the substance of the deliberations of Treasury Board or Cabinet.

[15] The evidence persuades me that Treasury Board commissioned the Report with the intention of deliberating on it at a future meeting of the committee. Treasury Board intended that the Report would constitute part of the body of information that it would consider. Therefore, the Report falls within the category of records that previous orders and court decisions have determined are subject to s. 12(1) of FIPPA. I note that the BCCLA does not dispute this conclusion.

[16] The BCCLA does dispute, however, whether the entire Report is subject to s. 12(1) of FIPPA. It contends that certain information in the Report is already in the public domain, as the result of the Ministry having disclosed publicly some of the information about the Report. The BCCLA argues that because the information is in the public domain, disclosure of that information would not reveal the substance of deliberations. I disagree. The fact that the Ministry might have disclosed information relating to a record does not negate the application of s. 12(1) of FIPPA to any parts of the record. The issue is whether the information might reveal the substance of the deliberations of the meeting; it

is not just whether it would reveal the substance of the deliberations for the first time. Section 12(1) of FIPPA does not involve a harms test with respect to the disclosure of the information at issue. Moreover, in this case, at the close of submissions to this inquiry, the deliberations had not yet occurred. The parties could not know, at that time, what precisely the deliberations would be. In order to protect the constitutional principle of Cabinet confidentiality that is inherent in s. 12(1) of FIPPA, it is necessary to withhold the entire record, in cases where the deliberations have not yet occurred by the time of the decision whether to apply the exception.

[17] The fact that the deliberations had not taken place, also means that none of the provisions of s. 12(2) of FIPPA can apply. This is because they are contingent on a decision having already been made or considered. The BCCLA has asked that I not make a decision on the application of s. 12(2) of FIPPA until after the Report has been submitted to Cabinet. I must decline this request. In order to determine whether s. 12(1) of FIPPA currently applies, I must consider the application of s. 12(2). The BCCLA retains the right to make a new request for the Report after Treasury Board or Cabinet has deliberated on it. In the event such a request results in a future inquiry, it would be necessary to consider the application of s. 12(2) again at that time. My finding in this inquiry does not preclude a different finding in a future inquiry. However, I cannot remain seized of the issue until that time.

[18] Therefore, I find that s. 12(1) of FIPPA applies to the Report and the Ministry must withhold it.

## **CONCLUSION**

[19] For the reasons given above, under s. 58 of FIPPA, I require the Ministry to withhold the Report.

April 19, 2012

## **ORIGINAL SIGNED BY**

---

Jay Fedorak  
Adjudicator

OIPC File No.: F11-46353