



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

Order F10-15

OFFICE OF THE PREMIER

Celia Francis, Senior Adjudicator

May 12, 2010

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Summary: FIPA requested records leading to and underlying Cabinet decisions regarding the restructuring of BC Ferries. The Premier's Office disclosed a number of records, severing information under ss. 12(1) and 13(1). The Premier's Office is found to have applied these exceptions properly.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c), 13(1) and 13(2)(a).

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; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order F08-17, [2008] B.C.I.P.C.D. No. 30; Order F06-16, [2006] B.C.I.P.C.D. No. 23.

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665.

1.0 INTRODUCTION

[1] Four years after the government announced that BC Ferries would be re-organized, the Freedom of Information and Privacy Association ("applicant") requested access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to "all background papers and analysis that led to and underlaid [*sic*] this 2003 cabinet decision" from the Office of the Premier ("Premier's Office"). Approximately eight months later, the Premier's Office responded by disclosing some records, from which it severed information under

ss. 12(1) and 13(1) of FIPPA.¹ FIPA requested a review of this decision by this Office (“OIPC”). Mediation was not successful and the matter proceeded to an inquiry under Part 5 of FIPPA.

2.0 ISSUES

[2] The issues before me are these:

1. Whether the public body was required by s. 12(1) to withhold information.
2. Whether the public body was authorized by s. 13(1) to withhold information.

[3] Section 57 of FIPPA sets out the burden of proof in an inquiry. Under s. 57(1), the Premier’s Office has the burden respecting both exceptions.

3.0 DISCUSSION

[4] **3.1 Records in Dispute**—The Premier’s Office retrieved 382 pages of responsive records. They comprise 15 individual items, which the Premier’s Office described as presentations to Cabinet, Cabinet submissions, Cabinet documents and presentations or reports to the Core Review and Deregulation Task Force. The Premier’s Office disclosed cover pages and some portions of the records but withheld the bulk of the 382 pages.

[5] **3.2 Cabinet confidences**—The Premier’s Office applied s. 12(1), a mandatory exception, to the vast majority of the responsive records. The relevant provisions 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

¹ According to the portfolio officer’s fact report that accompanied the notice for this inquiry, the Premier’s Office first issued a fee estimate about which FIPA complained to the OIPC. FIPA also asked that the OIPC review the Premier’s Office failure to respond to its request within legislated time lines. These two matters were the subject of separate files and are not in issue here.

- (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.

[6] In Order 01-02,² Commissioner Loukidelis reviewed past orders and case law on s. 12(1) and concluded as follows:

[13] ... The test that emerges from *Aquasource* is whether information in dispute under s. 12(1) formed the basis for Cabinet deliberations.

[7] The Commissioner then discussed the meaning of s. 12(2)(c):

[15] The previous Commissioner acknowledged, as I do, that it can be difficult to distinguish between information that forms the “substance of deliberations” and that which forms “background explanations or analysis”. He acknowledged that in some cases these categories may be interchangeable. In Order No. 48-1995, he nonetheless expressed the view (at p. 13) that “background explanations”

... include everything factual that Cabinet used to make a decision. “Analysis” includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations.

[8] A number of other orders have also dealt with the interpretation of s. 12(1). I take the same approach here.³

Parties' submissions

[9] FIPA acknowledged that the mandatory nature of s. 12(1) is “indicative of the deference given to protecting the legitimate decision making process of the Executive Council”. In its view, however, the Premier’s Office has applied s. 12(1) too broadly. It argued that s. 12(2) reflects the balance between the interest in maintaining Cabinet confidentiality and the interest in disclosure. It suggested that the Premier’s Office had not properly considered s. 12(2) and that background records ought to be released.⁴

² [2001] B.C.I.P.C.D. No. 02. The Commissioner discussed s. 12 at some length at paras. 7-16.

³ See Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 69-75, and Order 02-50, [2002] B.C.I.P.C.D. No. 51, at paras. 94-109.

⁴ Paras. 3.10-3.21, FIPA’s initial submission; p. 3, FIPA’s reply submission.

[10] The Premier's Office said its evidence shows that each document was "tabled, reviewed and/or discussed at a ... Cabinet meeting".⁵ It argued that the severed information, which it described as advice, recommendations and implications of options, was part of the body of information that Cabinet considered. As such, disclosure of these portions would in its view reveal the substance of deliberations of Cabinet under s. 12(1) or would allow the drawing of accurate inferences of such information. The Premier's Office also said that it disclosed portions of the records which in its view do not reveal the substance of deliberations, as well as information that it says falls under s. 12(2), such as historical financial and background information.⁶

Analysis

[11] Each of Records 2, 3, 4 and 9 is explicitly entitled a Cabinet submission, a presentation to Cabinet or a Cabinet document. In addition, Kevin Jardine, Deputy Cabinet Secretary, deposed that Records 1-6, 9 and 11-14 were provided to Cabinet for its consideration and reviewed and discussed at Cabinet meetings.⁷ The relevant Cabinet minutes and Records of Cabinet Decision attached to the Jardine affidavit support his evidence.⁸ I therefore accept that the Records 1-6, 9 and 11-14 were submitted or prepared for submission to Cabinet. I am satisfied that the severed portions of Records 1-6, 9 and 11-14 formed the basis of deliberations of Cabinet and that their disclosure would reveal the substance of deliberations of Cabinet and I find that s. 12(1) applies to them.

[12] Kevin Jardine also deposed that the relevant Record of Cabinet Decision confirms that Records 7 and 8, respectively a presentation and a background report to the Task Force on the BC Ferry Service Implementation Plan, were "subsequently discussed at Cabinet on July 24, 2002".⁹ I do not consider the evidence for Records 7 and 8 to be as clear as it is for the documents I discuss just above. Taken together, however, the material before me, including the Jardine evidence on these two records and the relevant Record of Cabinet Decision, supports the conclusion that these two items were before Cabinet for its consideration.¹⁰ I am thus satisfied that disclosure of the severed portions of

⁵ Para. 11, Jardine affidavit #1.

⁶ Paras. 14-34, Premier's Office's initial submission; Jardine affidavit #1.

⁷ See paras. 12-17, 21 and 24-28, Jardine affidavit #1.

⁸ An extract from the Cabinet minutes of February 18, 2003 (Exhibit "B" to the Jardine affidavit) refers to Cabinet considering Record 1; the Jardine evidence (at para. 13) says that the Cabinet Operations file for the Cabinet meeting of November 27, 2002 contains a copy of Record 2; the Record of Decision of December 4, 2002 regarding the Cabinet meeting of November 27, 2002 (Exhibit "C") shows that Cabinet considered Records 3, 4, 5 and 6; Exhibit "D" indicates that Cabinet approved Task Force recommendations on Record 9; Exhibit "F" indicates that Cabinet considered Task Force recommendations on Records 11 and 12; the Record of Decision of February 5, 2002 for the Cabinet meeting of January 30, 2002 (last page of Exhibit "G") shows that Cabinet considered Records 13 and 14.

⁹ Paras. 19-20, Jardine affidavit #1.

¹⁰ Para. 23, Jardine affidavit #1, Exhibit "D", Jardine affidavit #1.

Records 7 and 8 would reveal the substance of deliberations of Cabinet and I find that s. 12(1) applies to them.

[13] This leaves Record 10, a paper of May 13, 2002 entitled “Implementation Process for Major Crown Restructuring Report to Core Services Review Task Force”, and Record 15, a “Subsidy Policy Paper” which is undated but apparently dates from no earlier than 2002.

[14] The evidence regarding Record 10 is that minutes of a meeting of the Task Force “confirm that this document was tabled, reviewed and discussed” at a Task Force meeting of May 13, 2002 and “indicate that materials were to be prepared for the ‘June Cabinet Planning Session’.”¹¹ Most of this record is outside the scope of the request as it relates to bodies other than BC Ferries. However, the Task Force minutes indicate that the Task Force made certain recommendations to Cabinet on Record 10. I am therefore satisfied that the severed information in Record 10 would reveal recommendations to Cabinet and thus the substance of deliberations of Cabinet. I find that s. 12(1) applies to the severed portions of Record 10.

[15] Given my finding that disclosure of the severed portions of Records 1-14 would reveal the substance of deliberations of Cabinet, I do not need to consider whether the Task Force was a Cabinet committee and whether disclosure of the severed portions would also reveal the substance of deliberations of a Cabinet committee. I have therefore not set out or considered here the parties’ arguments on this issue.

[16] As for s. 12(2)(c), I have carefully considered the parties’ submissions on this section and have also reviewed Records 1-14 in depth. I am unable to identify any information in the severed portions of these records that falls under s. 12(2)(c). I agree with the Premier’s Office that it has disclosed any information in Records 1-14 that falls under that section.

[17] I have decided I do not need to consider whether s. 12(1) applies to the severed information in Record 15, as I find below that s. 13(1) applies to the same information.

[18] **3.3 Advice or Recommendations**—Section 13(1) reads as follows:

Policy advice, recommendations or draft regulations

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.

¹¹ Exhibit “E”, Jardine affidavit #1.

[19] 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. Previous orders have characterized the purpose of s. 13(1) as being to allow full and frank discussion of advice or recommendations on a proposed course of action within a public body, preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. These orders have also found that a public body is authorized to refuse access to information, such as implications of options, that would allow an individual to draw accurate inferences about advice or recommendations.¹² I take the same approach here.

Parties' submissions

[20] The Premier's Office said it severed information from five pages of the Subsidy Policy Paper.¹³ It said that the information consists of key policy options and questions followed by the rationale "for those key considerations". In its view, this information falls within the "expansive definition of advice or recommendations" in the BC Court of Appeal decision *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*.¹⁴ With reference to s. 13(2),¹⁵ the Premier's Office admitted that there is some factual information in Record 15 (on p. 380) but argued this information is "interwoven with the advice or recommendations such that it cannot reasonably be considered separate or distinct". It also argued that disclosure of this factual information would allow the applicant to draw accurate inferences as to the policy options the subsidy paper weighs.¹⁶

[21] The Premier's Office said that it had considered a number of factors in exercising discretion under s. 13(1) and provided evidence from the analyst who had made the severing recommendations to the head of the public body. The Premier's Office said that the head of the public body at that time has since left the public service and it was therefore unable to provide affidavit evidence from her. It said she had however agreed with the analyst's recommendations in making her decision.¹⁷

[22] FIPA noted that *College of Physicians* dealt with expert opinions but said that the information in this case was unlikely to be of that type. It also suggested

¹² See Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 102-127, and Order F06-16, [2006] B.C.I.P.C.D. No. 23, at para. 48, for example.

¹³ The Premier's Office also applied s. 13(1) to a portion of page 242 but I do not find it necessary to consider this issue as I found above that s. 12(1) applies to the same information.

¹⁴ 2002 BCCA 665.

¹⁵ This section states that public bodies may not apply s. 13(1) to certain kinds of information, including factual information (s. 13(2)(a)).

¹⁶ Paras. 35-51, initial submission of the Premier's Office. The Premier's Office also argued that there is no information that falls under the rest of s. 13(2) and that s. 13(3) does not apply. I agree.

¹⁷ Paras. 2-3, reply submission of Premier's Office; Ghag affidavit.

that, in exercising its discretion to apply s. 13(1), the Premier's Office had not considered FIPPA's purpose of making public bodies more accountable.¹⁸

Analysis

[23] The information that the Premier's Office withheld under s. 13(1) in Record 15 consists of policy questions, possible options for changes to the policy and considerations for these various options, including a discussion of implications and possible impacts of the options. I consider that all of this information is advice or recommendations as past orders have interpreted these terms and I find that s. 13(1) applies to it. I agree with the Premier's Office that the small amount of factual information on p. 380 cannot reasonably be separated from the surrounding information that falls within s. 13(1). I am also satisfied that the Premier's Office exercised its discretion in deciding to withhold the information.

4.0 CONCLUSION

[24] For reasons given above, under s. 58 of FIPPA, I confirm that head of the Premier's Office is required by s. 12(1) to withhold the information it severed on pp. 1-373 and is authorized by s. 13(1) to withhold the information it severed on pp. 374-382.

May 12, 2010

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F08-35089

¹⁸ Pages 9-11, FIPA's initial submission.