



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

Order F08-17

OFFICE OF THE PREMIER

Celia Francis, Senior Adjudicator

November 5, 2008

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Summary: Applicant requested access to agendas of government caucus committees from 2006. Premier's Office disclosed the agendas in severed form, withholding information under s. 12(1). Withheld information found not to fall under s. 12(1) as it consists of subjects or topics of discussion, disclosure of which would not reveal the "substance of deliberations" of Cabinet.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2), 12(5); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: **B.C.:** Order F08-18, [2008] 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 00-14, [2000] B.C.I.P.C.D. No. 17; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39. **Nfld.:** Report 2007-018, 2007 CanLII 28203 (NL I.P.C.). **Ont.:** Order M-355, [1994] O.I.P.C. No. 237. **Alta.:** Order 97-010, [1997] A.I.P.C.D. No. 14.

Cases Considered: *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

1.0 INTRODUCTION

[1] The applicant, a reporter, made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Office of the Premier ("Premier's Office") for agendas and a list of reports presented to Cabinet, Cabinet committees and government caucus committees on health for the period January 1 to July 17, 2006. The Premier's Office responded by disclosing records from which it severed some information under s. 12 of FIPPA. The applicant requested a review of this decision by this Office. He complained that the Premier's Office had sent him agendas with "all agenda headings

blanked out” and argued that “mere topic headings” are not “subjects of deliberations”.¹

[2] Mediation did not resolve the s. 12 issue and the matter proceeded to an inquiry under Part 5 of FIPPA. The inquiry was held in tandem with another inquiry on the application of s. 12 to other records involving the same applicant and the Premier’s Office, Order F08-18,² which I am issuing concurrently with this one.

2.0 ISSUE

[3] The issue before me in this case is whether the Premier’s Office is required to refuse access to information under s. 12(1) of FIPPA. Under s. 57(1) of FIPPA, the Premier’s Office has the burden of proof.

3.0 DISCUSSION

[4] **3.1 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, ...

(5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.

[5] In Order 01-02,³ Commissioner Loukidelis discussed the principles for interpreting ss. 12(1) and (2) and I have applied the approach taken there and in

¹ In his request for records and request for review, the applicant also argued that s. 25 applied to the records in dispute. He dropped this issue during mediation and therefore I need not address it here.

² [2008] B.C.I.P.C.D. No. 31.

³ [2001] B.C.I.P.C.D. No. 2.

later orders involving s. 12(1) and s. 12(2), such as Order 02-38.⁴ I have also followed *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*.⁵ I have also found useful, though of course not determinative, discussions of the meaning of “substance of deliberations” in decisions under the access to information laws in other provinces, including Newfoundland and Labrador Report 2007-018,⁶ Ontario Order M-355⁷ and Alberta Order 97-010.⁸

[6] **3.2 Records in Dispute**—Although the applicant requested agendas and a list of reports presented to Cabinet, Cabinet committees and government caucus committees on health for the period January 1 to July 17, 2006, the records in dispute that the Premier’s Office provided to me for this inquiry were agendas for the Government Caucus Committee on Social Development, for January to September 2006, and the Government Caucus Committee on Natural Resources and Economy, for January to October 2006.

[7] The Premier’s Office did not explain why the records in dispute are different from those the applicant requested, although this appears to be due in part to the fact that, according to the *Committees of the Executive Council Regulation*⁹ in effect at the time of the request, there was no Government Caucus Committee on Health. It may be that the Premier’s Office provided these records because it believed they best responded to the substance of the applicant’s request. In any case, the applicant did not object to this response or otherwise comment on this issue. I have therefore considered the records that the Premier’s Office provided to me as the records in dispute in this case.

[8] The records in dispute consist of a series of one-page committee agendas setting out the names of the committees, the dates on which they met, the name of the minister or official responsible for an item and standard headings, such as “items for discussion”, “items for decision”, “items for information/discussion”, “items for information”, “items for recommendation”, “legislation review” or “items to be reported out on”. The Premier’s Office disclosed all of these types of information in the agendas.

[9] The Premier’s Office withheld most of the information under each heading, e.g., the names of legislation under the heading “Legislation Review”, the names of programs or plans under “Items for Information” and so on. This withheld information is the information in dispute in this inquiry.

⁴ [2002] B.C.I.P.C.D. No. 38.

⁵ (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

⁶ 2007 CanLII 28203 (NL I.P.C.). This matter has been appealed to the Newfoundland and Labrador Supreme Court Trial Division but as of the date of this order the matter had not yet been heard.

⁷ [1994] O.I.P.C. No. 237.

⁸ [1997] A.I.P.C.D. No. 14.

⁹ B.C. Reg. 229/2005.

[10] **3.3 Does Section 12(1) Apply?**—The applicant regards the withholding of the information in question as “unjust” because, in his view,

... the mere mention of an agenda topic ... does not describe the “substance of deliberations” — that latter term means the back-and-forth debates between members upon the topic.¹⁰

[11] The applicant also argued that “background information and analysis” may be released under certain conditions and that, even if s. 12 did apply, some of the information might therefore be releasable.

[12] The Premier’s Office argued that it is required to withhold the severed information under s. 12 and said that the records themselves are a “form of evidence supporting its position in this inquiry”.¹¹

4.16 It will be clear to the Commissioner, upon reviewing the records to which section 12 has been applied, that that exception clearly applies. Those records are agendas of cabinet committees. The severed information, by its very nature, if disclosed would reveal the substance of deliberations of those cabinet committees. That information consists of descriptions of topics of discussion that have been deliberated upon by the cabinet committees in question. Those records were prepared by the Secretary to Cabinet in order to document the issues needed to be addressed by those committees in order to fulfill their roles as committees in the cabinet stream. Disclosure of the severed information would reveal which topics were discussed by the Cabinet Committee in question and, ultimately, by Cabinet itself.

[13] The Premier’s Office acknowledged that, in Order 00-14,¹² the Information and Privacy Commissioner had found that disclosure of the subjects dealt with in a Vancouver Police Board hearing would not reveal the substance of deliberations on those subjects.¹³ Where the headings or topics of discussion “describe the specific issues to be deliberated upon by cabinet or its committees”, however, such information would, in the view of the Premier’s Office, be protected by s. 12.¹⁴ While general headings such as “background” or “options” would not reveal the substance of deliberations, this is not such a case, it argued. Rather,

... the subject headings severed are so specific that the release of them would reveal the substance of the deliberations of the Cabinet Committees in question.¹⁵

¹⁰ Page 3, initial submission.

¹¹ Para. 4.15, initial submission.

¹² [2000] B.C.I.P.C.D. No. 17.

¹³ Para. 4.19, initial submission.

¹⁴ Para. 4.20, initial submission.

¹⁵ Para. 4.18, initial submission.

[14] Relying on *Aquasource*, in which the court said that s. 12 “must be read as widely protecting the confidence of Cabinet communications”, the Premier’s Office argued that s. 12 must extend to “topics of discussion of meetings of Cabinet and its committees”.¹⁶ In its view, a “description of a topic for discussion by cabinet or its committees” falls under s. 12 because disclosure of such information would reveal the “substance” of deliberations which, it suggested, includes the “subject matter of a discourse”.¹⁷

[15] The Premier’s Office also drew my attention to the government’s *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* which suggests that “an agenda, minute or other record that documents the matters addressed by Cabinet (e.g., a list of issues tabled at Cabinet that reflects the priorities of Cabinet)” would reveal the substance of deliberations and that the same reasoning applies to Cabinet committees.¹⁸ As the Commissioner has often said, most recently in Decision F08-07,¹⁹ that manual is not binding on this Office.

[16] The Premier’s Office provided affidavit evidence on the Cabinet committee system, including the names of the committees in existence as of the date of this inquiry, from Robert G.W. Lapper, Q.C., Deputy Cabinet Secretary, who described himself as “the senior government official in Cabinet Operations”. He also deposed that “Cabinet committees are created, and are delegated some of the responsibility to review and analyze submissions to Cabinet, and to recommend to Cabinet appropriate action”.²⁰ He further deposed as follows:

5. Each Cabinet Committee deals with information “in the Cabinet stream” (that is, information that is intended to be submitted to Cabinet).
6. The mandate of government caucus committees is, within the subject area assigned to each, (1) to review and make recommendations to Cabinet on policy, legislation, and programs; (2) to monitor existing programs and services through reviews of ministries’ service plans; and (3) to receive public delegations. This is a mandate that other committees in the Cabinet decision-making system have had in the past.
7. Each government caucus committee operates as a committee that advises Cabinet and is an integral part of the Cabinet decision-making process. Policy issues first go to the Agenda Development Committee, then are referred to the appropriate committee (which could include a government caucus committee),

¹⁶ Para. 4.22, initial submission.

¹⁷ Paras. 4.23-4.24, initial submission.

¹⁸ Para. 4.25, initial submission.

¹⁹ [2008] B.C.I.P.C.D. No. 31.

²⁰ At para. 2.

and then to Cabinet for decision. Government caucus committees review ministry service plans in order to advise Treasury Board for Treasury Board's formulation of recommendations for Cabinet before final Cabinet decisions are made on the budget.

8. Each government caucus committee functions in the same way as do the other cabinet committees. The members of each government caucus committee receive and review submissions intended to go to Cabinet. At meetings of each government caucus committee the issues are discussed, and advice and recommendations are formulated and recorded in minutes taken by a Cabinet officer. The advice and recommendations are for conveyance to Cabinet to assist Cabinet in decision-making. The advice and recommendations typically relate to (1) policy direction; (2) fiscal implications; and (3) implementation and communications strategies.

...

12. Each Cabinet Committee reports back to Cabinet. There is time specifically dedicated on Cabinet agendas to "Committee items", and committees (including government caucus committees) are specifically allocated time on the agenda to make reports during that time. The minutes of Cabinet Committee meetings are provided to Cabinet in the materials binder for the Cabinet meeting for that day. The Chair of the Cabinet Committee attends Cabinet for that item (if he or she is not already a Cabinet member). They will normally speak to any issues of particular concern or matters requiring particular attention arising out of the minutes. They are then there to hear the Cabinet discussion, and respond to questions.

"Substance of deliberations"

[17] The *Committees of the Executive Council Regulation* in effect at the time of the request designates the committees in question under s. 12(5) of FIPPA. The issue thus is whether disclosure of the information in dispute would reveal the "substance of deliberations" of those committees.

[18] The Premier's Office said that the severed portions of the records are "descriptions of topics of discussion that have been deliberated upon by the cabinet committees in question" and that they "describe the specific issues to be deliberated upon by cabinet or its committees". I consider these to be overly expansive characterizations. The severed information does not consist of "descriptions" of the issues or topics of discussion. The severed portions are, rather, a barebones series of subjects or agenda items, each item consisting of only a few words.

[19] The Premier's Office argued that the severed "subject headings" are so specific that their disclosure would reveal the substance of deliberations. The Premier's Office's attempt to equate "subject of deliberations" with "substance of deliberations" is not persuasive. The severed items consist merely of the subjects set for discussion in the committee meetings. They do not record the committee members' discussions, opinions, arguments or debates on those subjects. Nor do they reveal what the members said or thought about the pros and cons of each item or any other types of information that past orders have considered to be the "substance of deliberations". There is no "substance" to them and they reveal no "deliberations".

[20] Commissioner Loukidelis rejected a similar argument in Order No. 326-1999,²¹ regarding a report that the City of Cranbrook had considered at an *in camera* meeting. As the Premier's Office admitted, in Order 00-14, the Commissioner also expressly rejected the argument that disclosure of the subjects of discussion would reveal the "substance of deliberations" under s. 12(3)(b), where he said this:

Nor would disclosure of the subjects dealt with at the Board meetings here in question – regardless of whether a matter was presented to the Board for information or for discussion and action – reveal the substance of the Board's deliberations on those subjects. There may be cases where disclosure of a subject of an *in camera* meeting would, of itself, reveal the substance of deliberations of the governing body. It may be possible, for example, to combine knowledge of the subject matter with other, publicly available, information, such that disclosure of the subject matter itself amounts to disclosure of the "substance of deliberations". The Board has not supplied any evidence or argument that would permit me to decide that this is the case here.²²

[21] The Premier's Office did not attempt to argue that disclosure of the headings would, in combination with other publicly available information, reveal the substance of deliberations. It provided no specific evidence on this point either.

[22] The Information and Privacy Commissioner for Newfoundland and Labrador also rejected an argument that agendas revealed the substance of deliberations of that province's Executive Council in Report 2007-018:

[37] The records to which the Town seeks to deny access on the basis of section 19(1)(c) consist of two Agendas that list proposed matters to be discussed at the Committee meetings on 9 January 2007 and 6 February 2007. I cannot accept that a document that is simply a list of matters that may or may not be discussed at a meeting can reveal such things as what

²¹ [1999] B.C.I.P.C.D. No. 39.

²² At p. 5.

was said by individuals at the meeting or how individuals voted on matters discussed at the meeting. ...

[23] I also do not accept the argument that *Aquasource* should be read as saying that the “topics of discussion of Cabinet or its committees” are, almost by definition, captured by s. 12(1). The court’s finding in *Aquasource* that the meaning of “substance of deliberations” should be “read widely” was directed at the “body of information” that Cabinet considers, such as “advice, recommendations, policy considerations”. It is clear from this that “substance of deliberations” has a meaning other than a simple list of topics or subjects for discussion.

[24] For the reasons given above, I find that s. 12(1) does not apply to the severed information. Given this finding, I do not need to consider whether s. 12(2) applies.

4.0 CONCLUSION

[25] For the reasons given above, under s. 58 of FIPPA, I require the Premier’s Office to give the applicant access to all the information it withheld in the agendas in question under s. 12(1) of FIPPA, within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before December 18, 2008 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

November 5, 2008

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

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