



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

Order F09-27

FRASER HEALTH AUTHORITY

Celia Francis, Senior Adjudicator

November 25, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 33

Document URL: <http://www.oipc.bc.ca/orders/2009/OrderF09-27.pdf>

Summary: CUPE requested records related to the Surrey Outpatient Facility project. Section 12(1) applies to the withheld information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c), 25(1)(b). *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: **B.C.:** Order No. 165-1997, [1997] B.C.I.P.C.D. No. 23; Order F09-26, [2009] B.C.I.P.C.D. No. 32; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1.

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] The Canadian Union of Public Employees (“CUPE”) requested records from Partnerships BC related to the business cases for P3¹ projects in which Partnerships BC had been involved. Partnerships BC transferred the requests to the individual public bodies responsible for the various projects, including the public body in this case, the Fraser Health Authority (“FHA”), which was responsible for the Surrey Outpatient Facility Project. FHA told CUPE that it had not developed a business case in accordance with the Capital Asset Management Framework for the project but that it did have records related to “business case elements identified in the Framework”.

¹ P3 = Public Private Partnership.

[2] FHA first provided CUPE with a copy of its October 31, 2005 report entitled “Building for the Future: Surrey Health Services Capacity Initiative”, which it said was also available on its website. FHA said this report identified a number of recommendations for relieving congestion at Surrey Memorial Hospital, including the construction of a standalone ambulatory care facility in Surrey. It said the Ministry of Health accepted this recommendation in principle in December 2005 and subsequently FHA had been engaged in planning on the clinical and business case sides in preparation for eventual construction of the Surrey Outpatient Hospital.

[3] FHA later provided CUPE with a few pages from two other reports and said it was withholding the remaining pages under ss. 12(1), 13(1), 17(1) and 21(1) of FIPPA. It also told CUPE it was withholding four more records in full under the same exceptions. FHA said disclosure of a substantial amount of the withheld information would reveal the substance of deliberations of, and recommendations and advice to, Treasury Board, a Cabinet committee. FHA added that, as the decision to proceed with the Surrey Outpatient Facility project by way of a P3 had been made public, it had disclosed background information that fell under s. 12(2)(c) of FIPPA.

[4] CUPE requested a review by this Office (“OIPC”) of FHA’s decision to deny access.² Mediation did not resolve the review and so the matter proceeded to an inquiry under Part 5 of FIPPA. The OIPC invited representations from CUPE, FHA, the Office of the Premier as an appropriate person and, as a third party, Hayward & Associates, LLC (“Hayward”). All but Hayward made submissions.

2.0 ISSUES

[5] The notice for this inquiry stated that the issues are:

1. Whether the public body is required to refuse access under ss. 12(1) and 21 of FIPPA.
2. Whether the public body is authorized to refuse access under ss. 13 and 17 of FIPPA.

[6] FHA later said that Hayward had withdrawn its objections to disclosure of information and that FHA would not rely on s. 21 in this inquiry.³ I therefore need not consider this exception.

² The portfolio officer’s fact report says that CUPE made complaints about FHA’s handling of the request, including its delay in responding. These complaints were the subject of separate OIPC files and are not in issue here.

³ Letter of March 2, 2009.

[7] FHA applied ss. 13(1) and 17(1) to information to which it also applied s. 12(1). Given my finding on s. 12(1), I have decided it is not necessary to consider whether ss. 13(1) and 17(1) apply to the same information. Under s. 57(1) of FIPPA, FHA has the burden of proof for s. 12(1).

Section 25 added

[8] After the OIPC issued the notice, CUPE said it wanted to argue that s. 25 of FIPPA applies in this case, requiring FHA to disclose the disputed information. FHA and the Office of the Premier agreed to CUPE doing so and Adjudicator McEvoy decided to permit CUPE to add s. 25 as an issue in this inquiry. Accordingly, I will also consider whether s. 25 applies in this case. Section 57 is silent regarding the burden of proof under s. 25 and, as past orders have said, it is in the interests of each party to provide argument and evidence in support of its position.

Burden of proof regarding s. 25

[9] The Office of the Premier argued that CUPE as the applicant has the burden of proof regarding s. 25, referring to Order No. 165-1997.⁴ I noted in Order F09-26⁵ that, since 2002, orders have said that there is no statutory burden regarding s. 25 and that both applicant and public body should provide argument and evidence to support their respective positions on s. 25. I trust that my discussion of this issue in Order F09-26 will put an end to the recurring argument from public bodies that applicants have the burden of proof for s. 25.

3.0 DISCUSSION

[10] **3.1 Preliminary Issue**—Before this inquiry began, FHA asked that the parties be permitted to make submissions on s. 12(1) first. If the adjudicator found s. 12(1) did not apply, it argued, the parties could then make submissions on ss. 13(1), 17(1) and 21(1). The Office of the Premier agreed to this approach. CUPE objected, however, on the grounds that, if the adjudicator found s. 12(1) did not apply, there would be further delay and it would have to make more submissions in yet another inquiry.

[11] Adjudicator McEvoy declined FHA's request, saying it is the OIPC's normal practice to hold one inquiry to consider all issues. He also noted that a finding that s. 12(1) did not apply would mean further delay.

[12] **3.2 Records in Dispute**—Both FHA and the Office of the Premier provided copies of the records.⁶ FHA disclosed a few pages from the responsive

⁴ [1997] B.C.I.P.C.D. No. 23; para. 4.36, Office of the Premier's initial submission.

⁵ [2009] B.C.I.P.C.D. No. 32.

⁶ I have referred to the records below by the terms the Office of the Premier used in its submission and affidavit evidence.

records and withheld approximately 380 pages. The Office of the Premier described the withheld information as follows: budgetary issues; procurement options and objectives; land acquisition costs; and planning, pricing and design issues.⁷

[13] **3.3 Public Interest Override**—I have taken, without repetition, the approach in previous orders on s. 25(1)(b),⁸ which reads as follows:

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

[14] FHA and the Office of the Premier argued that there is no temporal urgency compelling disclosure of the records in dispute in this case. Nor, in their view, is disclosure clearly necessary on other grounds. The Office of the Premier also noted that Partnerships BC has many documents on the project on its website and that Partnerships BC would soon be publishing an updated report on the project dealing with value for money.⁹

[15] CUPE argued that P3s will have an enormous impact on British Columbians, are subject to escalating costs and are “an issue of significant concern to the general public”. CUPE noted that there were over 360 articles in the media on P3s over a 12 month period. P3s involve contracts worth billions of dollars, CUPE said, contracts that will “bind governments and taxpayers for decades”. The denial of information shows that there is a lack of transparency and accountability, in CUPE’s view, and the need for release of the withheld information is urgent.¹⁰

[16] While I understand CUPE believes there is a public interest in disclosing the disputed records, and there may well be, this is not the test for s. 25(1)(b). I have examined the records in question and am unable to agree with CUPE that there is an urgent and compelling need for their disclosure. I find that s. 25(1)(b) does not apply to the records in dispute.

⁷ Para. 4.19, Office of the Premier’s initial submission.

⁸ See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38.

⁹ Paras. 4.24-4.42, Office of the Premier’s initial submission; paras. 1-12, FHA’s reply submission.

¹⁰ Paras. 13-29, CUPE’s initial submission.

[17] **3.4 Cabinet Confidences**—Sections 12(1) and 12(2)(c) have been the subject of several orders and I taken the same approach here without repetition.¹¹ 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
- ...
- (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.

[18] The Office of the Premier said that the information in issue relates to the deliberations of Treasury Board, a Cabinet committee under s. 12(5) of the *Committees of the Executive Council Regulation*.¹² I agree that Treasury Board is a Cabinet committee for the purposes of s. 12(1).

[19] The Office of the Premier said that the three records at Tabs 1-3 of Exhibit “A” to the Paul affidavit were part of the package submitted to Treasury Board in 2007 for its consideration. They were therefore part of the body of information Treasury Board considered in relation to the project and their disclosure would reveal the substance of deliberations of Treasury Board. The two records at Tabs 4 and 5 were not part of the submission that went to Treasury Board, it said, but were “key inputs in the development of the business case for the Project” and in the drafting of the Treasury Board submission that went to Treasury Board. The Office of the Premier argued that disclosure of the

¹¹ See for example, Order 02-01, [2002] B.C.I.P.C.D. No. 1, Order 02-38, [2002] B.C.I.P.C.D. No. 38, and Order 02-50, [2002] B.C.I.P.C.D. No. 51. See also *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.).

¹² B.C. Reg. 229/2005. Para. 4.12, Office of the Premier’s initial submission. FHA said it agreed with and adopted the Office of the Premier’s submissions on s. 12(1). Paras. 15 & 16, FHA’s initial submission; para. 9. Goldthorpe affidavit.

two records at Tabs 4 and 5 would allow someone to draw inferences about Treasury Board deliberations.¹³

[20] In CUPE's view,

... Section 12 was not enacted to shield cabinet from public scrutiny surrounding the procurement of programs that are presently being delivered. To this end, the protection of cabinet secrecy provided by *Aquasource* was not meant to allow the government to cover their tracks if decisions to invest public money in procuring public private partnerships end up more costly and less desirably [*sic*] than undertaking such projects publicly.¹⁴

[21] I accept the Office of the Premier's argument and evidence that the records at Tabs 1-3 were submitted to Treasury Board and formed part of the information Treasury Board considered in making its decisions on the Surrey Outpatient Facility project. It follows that their disclosure would reveal the substance of deliberations of a Cabinet committee. I therefore find that s. 12(1) applies to the three records at Tabs 1-3, Exhibit "A" to the Paul affidavit.

[22] I have carefully reviewed the records at Tabs 4 and 5 of Exhibit "A" to the Paul affidavit. I accept the Office of the Premier's arguments and evidence that the two records was used as a basis for developing the business case and for drafting the Treasury Board submission that was submitted to Treasury Board for its consideration and that formed part of the information Treasury Board considered in making its decisions on the Surrey Outpatient Facility project. I therefore find that disclosure of these two records would allow someone to accurately infer the substance of deliberations of a Cabinet committee and that s. 12(1) applies to records at Tabs 4 and 5 of Exhibit "A" to the Paul affidavit.

Section 12(2)(c)

[23] FHA said that, since the project had been approved and had begun before CUPE's request, it disclosed "background explanations and analysis" for the purposes of s. 12(2)(c).¹⁵

[24] CUPE noted that the decisions on the project have been made public and there is already much information publicly available on costs, sizes and dates for the project about these projects. It argued that information should therefore be disclosed under s. 12(2)(c).¹⁶

¹³ Paras. 4.16-4.18, Office of the Premier's initial submission; paras. 8-11, Paul affidavit. The Office of the Premier provided a copy of the Treasury Board submission in question.

¹⁴ Para. 39, CUPE's initial submission.

¹⁵ FHA's decision letter of June 4, 2008; para. 4.20, Office of the Premier's initial submission.

¹⁶ Paras. 31-46, CUPE's initial submission; paras. 9-31, CUPE's reply submission.

[25] I have considered CUPE's detailed arguments carefully. I agree however that FHA has disclosed information of the type that s. 12(2)(c) covers and that s. 12(1) applies to the remaining withheld information.

4.0 CONCLUSION

[26] For reasons given above, under s. 58, I require FHA to refuse access to the information in dispute under s. 12(1). For reasons given above, no order is necessary regarding ss. 13(1), 17(1) and 25(1)(b).

November 25, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File No. F08-35927