



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

Order F09-09

(Re-opening of Order F08-17)

OFFICE OF THE PREMIER

Celia Francis, Senior Adjudicator

May 20, 2009

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Summary: Re-opening of Order F08-17 to consider s. 12(7), which was enacted in 2002 but only first published after Order F08-17 was issued and before the time for compliance by the public body had expired. New subsection does not affect the outcome in Order F08-17. Decision in Order F08-17 stands.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(5), 12(7); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: B.C.: Order F08-17, [2008] B.C.I.P.C.D. No. 30.

1.0 INTRODUCTION

[1] Order F08-17¹ concerns the application of s. 12(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to information in records the applicant, the Freedom of Information and Privacy Association, requested from the Office of the Premier (“Premier’s Office”).

[2] Order F08-17 was issued on November 5, 2008. Before the date for compliance had passed, counsel for the Premier’s Office learned that when ss. 12(5) and (6) were enacted in 2002, subsection 12(7) was also enacted but its publication was overlooked by the Queen’s Printer. As a result of this, now corrected, publication error, the existence of s. 12(7) was unknown to the parties or me when Order F08-17 issued.

¹ [2008] B.C.I.P.C.D. No. 30.

[3] The Premier's Office requested me to re-open Order F08-17 to consider s. 12(7). I decided that, in these unusual circumstances, even though the inquiry process itself had been procedurally fair, I would re-open Order F08-17 to consider the significance of s. 12(7). I gave the parties an opportunity to make submissions and this is my decision on the significance, if any, of the new subsection.

2.0 ISSUES

[4] The issue is whether s. 12(7) alters the outcome in Order F08-17.

3.0 DISCUSSION

[5] **3.1 Cabinet confidences**—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

- (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.

....

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

(6) A committee may be designated under subsection (5) only if

- (a) the Lieutenant Governor in Council considers that
 - (i) the deliberations of the committee relate to the deliberations of the Executive Council, and
 - (ii) the committee exercises functions of the Executive Council, and

- (b) at least 1/3 of the members of the committee are members of the Executive Council.
- (7) In subsections (1) and (2), “committee” includes a committee designated under subsection (5).

[6] **3.2 Order F08-17**—The information in issue in Order F08-17 consisted of parts of agendas for:

- the Government Caucus Committee on Social Development for January to September 2006; and
- the Government Caucus Committee on Natural Resources for January to October 2006.

[7] The Premier’s Office had disclosed to the applicant meeting dates, general headings and similar information in the agendas. It withheld under s. 12(1) subject-specific headings and agenda items.

[8] I accepted (see paragraph 17 of Order F8-17) that the *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005, made under s. 12(5), designated the two committees in question as committees of the Executive Council (Cabinet committees) for purposes of s. 12. I analyzed the case accordingly, that is, on the premise that the disputed records were agendas of Cabinet committees.

[9] Concluding that s. 12(1) did not require access to be refused to the information that had been withheld, I ordered the Premier’s Office to disclose it to the applicant.

[10] **3.3 Section 12(7)**—The Premier’s Office submits that the non-exhaustive word “includes” in subsection (7) changes the meaning of “committee” in subsection (1), by signifying that there may be committees under subsection (1) other than those designated by regulation under subsection (5).

[11] I agree with the Premier’s Office about the effect of the word “includes” in subsection (7). However, in my view, subsection (5) has the same effect on the meaning of “committee” in subsection (1), with or without subsection (7). A “committee” under subsection (1) is a committee of the Executive Council at common law or as designated in legislation (such as the Treasury Board in the *Financial Administration Act*) or a regulation under subsection (5). The discovery of subsection (7) does not give new and different meaning to subsection (5). It merely confirms the existing meaning.

[12] I say this recognizing that the regulations made under subsection (5) have included Cabinet committees, such as Treasury Board, that did not need to be designated by regulation. I do not know, nor do I need to determine, whether the

drafter did this simply to ensure there was a published list of all the Cabinet committees under subsection (1) or because the drafter interpreted (in my view misinterpreted) subsection (5) to limit “committee” in subsection (1) to mean only a committee designated by regulation under subsection (5).

[13] **3.4 Does s. 12(7) Affect the Outcome in Order F08-17?**—The discovery of the existence of subsection (7) does not affect the outcome in Order F08-17 because there was no issue about whether the disputed records were agendas of Cabinet committees under s. 12(1). I accepted that they were. The agendas being 2006 records, there was no issue of them pre-dating the regulations that designated committees under s. 12(5) and subsection (7) is not instrumental to my analysis and conclusions regarding the severing of the records.

4.0 CONCLUSION

[14] On re-opening Order F08-17 to consider the significance of s. 12(7), which was enacted in 2002 but only first published after Order F08-17 was issued and before the time for compliance by the Premier’s Office had expired, I conclude for the reasons given that subsection (7) does not affect the outcome in Order F08-17.

[15] The decision in Order F08-17 stands with the addition of these reasons on re-opening and with the variation for compliance by the Premier’s Office within 30 days of the date of this order, as “day” is defined in the *Freedom of Information and Protection of Privacy Act*, that is, on or before July 2, 2009, and with a concurrent copy to me of its cover letter to the applicant and the records disclosed.

May 20, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator