



BY FAX

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Inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* (“Act”) – Lheidli T’enneh First Nation (“applicant”) – Ministry of Attorney General (“public body”) – BCG Reference 94528/2 – OIPC File No. 13317

On November 23, 2001, at the close of the oral hearing in the above inquiry, counsel for the applicant applied for access to the public body’s *in camera* affidavits and submissions, subject to an undertaking of confidentiality on her part. Counsel for both parties have since provided me with written argument on that application. For the reasons given below, I have decided to deny that application.

Counsel have made thoughtful arguments on the question of whether, in conducting an inquiry under Part 5 of the Act, I can and should allow the applicant’s counsel to, on an undertaking of confidentiality, have access to the public body’s *in camera* evidence and argument and to the unsevered disputed record itself. (I have assumed that the confidentiality undertaking the applicant’s counsel has suggested giving would be given with her client’s irrevocable consent.) Counsel for the applicant says I have the authority to give her such access to the *in camera* material. She cites s. 56(4)(b) of the Act as the source of this authority, and says that authority to give her access to the *in camera* material “is also derived from the duty to act fairly” (para. 5, written submission). She refers as well to Federal Court of Canada authority under provisions of the federal *Access to Information Act* (“Federal Act”) that she says are similar to those of the Act. By contrast, counsel for the public body argues that s. 56(4) is subject to ss. 47 and 49 of the Act, with the result that I do not have the authority to disclose *in camera* material that contains information subject to an exception under the Act.

I have decided it is not necessary to resolve the relationship between s. 56(4), on the one hand, and ss. 47 and 49, on the other, because – even if I do have authority to permit applicant’s counsel to, on an undertaking of confidentiality, have access to *in camera* material and the unsevered disputed record under Part 5 of the Act – I would not exercise that authority to give access in this case. This is because I am satisfied that giving access – in relation to the *in camera* material alone or in conjunction with the unsevered disputed record – is not absolutely necessary to permit the applicant to argue its position. As well, it would, in my judgement, irretrievably and significantly compromise the interests that are at stake for the public body in this inquiry and therefore would be an unacceptable prejudice to the public body.

In reaching this conclusion I have taken into account the desirability of making as much information as possible known to the applicant, or its counsel, to enable the argument for access to be made in an informed way. I have also taken into account the nature and content of the disputed information in this case, the nature of the disclosure exceptions the public body relies on, the degree to which critical content of the disputed records would be revealed even if only the public body’s *in camera* evidence and arguments were made accessible to the applicant’s counsel, and the degree to which access to that information by the applicant’s counsel – even on an undertaking not to disclose it to her client – would necessarily compromise the interests for which the public body is arguing in this case.

Applicant’s Submissions

In arguing that she should, subject to a confidentiality undertaking, be permitted to have access to the public body’s *in camera* material, counsel for the applicant cites a number of Federal Court of Canada decisions in which access to such information was granted. She refers to the Federal Court of Appeal’s decision *Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] 3 F.C. 186. In that case, the applicant sought access, under the Federal Act, to declarations filed by the Prime Minister, Cabinet members and others under the federal government’s conflict of interest guidelines and post-employment conduct guidelines. The government denied the applicant’s access request and the Information Commissioner of Canada denied his complaint under the Federal Act. In proceedings in the Federal Court, Trial Division under the Federal Act, the Court had ordered that the applicant’s counsel was to have access to the disputed records, subject to an undertaking of confidentiality by counsel. The Federal Court of Appeal overturned that order, holding that it was not necessary for the applicant’s counsel to see the disputed records themselves in order to prepare properly for the proceeding. The Court of Appeal noted that the nature of the information collected, rather than the actual contents of the records, was at issue. This meant that access to the disputed information was not necessary.

Counsel for the applicant here relies on the following passage from the reasons of Decary J.A., at para. 29 of *Hunter*:

I might add that while this practice [of the courts to allow conditional access to information in some civil cases, outside the Federal Act] has generally been justified in terms of natural justice and advantage to counsel, it has also proved

most useful to judges. Issues in which confidential documents are at risk tend to be rather complex, either technically, as in commercial matters, or legally, *as in public interest matters*, and it is not always fair to the Court to force it to make important decisions when having heard one side of the argument only. [emphasis added by applicant's counsel]

Counsel for the applicant submits, at para. 18 of her submission on this application, that in this case

... the specific content of the appraisal information is at issue in determining whether there is a reasonable risk of any of the harms specified in ss. 16 or 17 of the Act, whether s. 12 applies and whether disclosure should be made in any event, in the public interest, under s. 25. Accordingly, at a minimum, counsel should be given access to the *in camera* affidavits and submissions of the Ministry, and if necessary to understand the specific content of the information, a copy of the unsevered records themselves.

Counsel for the applicant also relies on *Bland v. Canada (National Capital Commission)*, [1988] F.C.J. No. 561, a decision of the Federal Court of Canada, Trial Division. In that case, the Court gave counsel access to an *in camera* affidavit, subject to an undertaking to keep the contents of the affidavit confidential. Cullen J. decided that counsel should be given access to the affidavit, on the basis that it would be difficult for counsel to properly argue the case without access to that information. As Cullen J. put it, at p. 4, “[j]ustice here demands that the applicant’s counsel have access.”

The applicant also cites two Ontario decisions, both of which involved judicial review proceedings respecting decisions by the Information and Privacy Commissioner of Ontario and access by counsel to disputed information for the purposes of the judicial review proceedings. (*Hunter* and *Bland* also dealt with an application for judicial review, in those cases under s. 41 of the Federal Act. They did not deal with proceedings before the Information Commissioner of Canada under the Federal Act.)

Of the two Ontario decisions, *N.E.I. Canada Ltd. v. Ontario (Information and Privacy Commissioner)*, [1990] O.J. No. 701 (Div. Ct.) is closer to the situation before me. In that case, Steele J. observed, at p. 78, that, in order to argue the judicial review application properly, “all parties should be aware of what the records contain.” He observed that, without having access to the information, a party “could not properly argue whether the records reveal the types of information exempted.” In ordering disclosure, subject to a confidentiality undertaking, Steele J. said (at p. 3) that he agreed “with the practice in the federal court” in cases such as *Bland*.

Public Body’s Submissions

Counsel for the public body refers to two decisions of the Information and Privacy Commissioner of Ontario (Order 164 and Order P-345) in which requests for access to material by an applicant’s counsel were denied. Both of these decisions arose in the context of the now-abandoned policy of the Information and Privacy Commissioner of Ontario not to exchange the parties’ submissions *at all* during the course of an inquiry

such as the one in which this application arises. These decisions are not of assistance for present purposes.

The public body also emphasizes that the Federal Court of Appeal in *Hunter* held that there is no absolute rule to be followed in determining the issue of whether legal counsel should be given access. The public body says *Hunter* also stands for the proposition that one must consider the degree of confidentiality that should be afforded to the type of information in issue. It would not be appropriate, the public body says, to permit the applicant's counsel to have access to records over which the s. 12(1) disclosure exception has been claimed. Section 12 is a mandatory exception and s. 49 of the Act contemplates that the Information and Privacy Commissioner cannot delegate his or her power to inspect information for which s. 12(1) is claimed. The *Hunter* case held that the objective in each case is to protect confidentiality of the information while allowing an intelligent debate on the question of its disclosure. The public body says, in this respect, that there is no evidence that the applicant requires *in camera* material in order to argue its position and that access to *in camera* material is simply not necessary for a fair determination of the issues in this inquiry.

The public body also argues that the prospect of granting restricted access to the applicant's counsel might place her in a conflict between her obligations to her client and her obligation to comply with a non-disclosure undertaking that includes an obligation not to disclose information to her client.

Last, the public body has made a brief *in camera* submission that describes, with specific reference to substantive content of the disputed record, precise harm it foresees to its interests if *in camera* submissions in this inquiry are disclosed to the applicant's counsel.

Discussion

The Federal Court of Canada decisions that the applicant relies on acknowledge that a decision as to whether access to *in camera* materials should be permitted must be made in the circumstances of each case. In *Hunter*, Decary J.A. (with whom Mahoney J.A. agreed) concluded, at para. 40, that s. 47 of the Federal Act did not direct the Court to deny counsel access to *in camera* material. He went on to say, at para. 43, that Parliament did not, on the other hand, intend to give counsel access to such material in all cases. At para. 45, Decary J.A. expressed the view that the Court should, in most cases, "tend to give counsel, if not access, at least enough relevant information to enable him/her to argue the application" under the Federal Act. He observed that, in cases such as *Hunter*, "where it is the nature of the information collected rather than its specific content which is at issue in the main proceeding", counsel need not see "the actual information at issue in order to prepare adequately for the application." At para. 46, he said the following:

What constitutes the "minimum standard of disclosure" will be a question of fact in each case. The Court has the power to control access to counsel, the extent of that access and the conditions of that access. It can refuse access to the actual information and to be satisfied, as it should have in this case, with the communication to counsel of a summary or a general description of the actual

information. ... The objective in each case is to protect the confidentiality of the information while allowing an intelligent debate on the question of its disclosure.

In *Bland*, Cullen J., in giving the applicant's counsel access to an affidavit, said the following, at p. 4:

Also, I feel some consideration must be given to the nature of the information to be released to counsel. Despite an eloquent plea by counsel for the Privacy Commission[er], I disagree that we are dealing only with a matter of legal principle and personal information should not be disclosed at any time to anyone, for any purpose whatever the nature of the information. I believe the Court must consider the nature of the information and concur with the Associate Chief Justice [in his decision in *Maislin Industries Ltd. v. Canada (Ministry of Industry, Trade and Commerce) et al*, [1984] 1 F.C. 939 (T.D.)] that, "the determination will vary with the circumstances of each case." Here we are talking about rents, not national security, nor a psychiatrist's or doctor's report, nor personal information of a kind that one applying to immigrate might reveal but would not want made public. Considering the nature of the information is a precursor to the decision ultimately made.

The later decision of Cullen J. in *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 516 – a case referred to here by counsel for the applicant – affirms Cullen J.'s approach to the question of disclosure to counsel. It does not add to his approach to the issue.

In *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127. the Federal Court of Appeal overturned the motions judge's order granting the applicant's counsel access to information subject to solicitor client privilege. In *Canada (Minister of Environment)*, the motions judge had concluded that it was necessary to grant counsel access to material that was allegedly protected by solicitor client privilege in order to argue the case. The Federal Court of Appeal held that it was not "absolutely necessary" to allow counsel to have access, in that case, to "confidential material to avoid the unfairness of forcing the court to make important decisions 'having heard one side of the argument only'" (para. 22).

As was the case in *Canada (Minister of Environment)*, I have decided that it is not necessary to give the applicant's counsel access to the public body's *in camera* material. I have kept in mind the amount of information that has already been made available to the applicant and its counsel before and during the inquiry and the nature of the information in dispute. The nature of the disputed record – an appraisal of parcels of land – is not such as to require that the specific contents of that record be made available to counsel for the applicant in order to argue this matter.

As I said above, I also consider that the interests at stake in this inquiry – as reflected in the nature of the information in the disputed record and the exceptions under the Act claimed by the public body – are relevant to my determination of whether to permit access. This approach is supported by the Federal Court of Canada cases to which I have referred. In this case, the public body contends that s. 12(1) of the Act prohibits disclosure of information in order to protect the substance of deliberations of a Cabinet

committee. Section 12(1) is a mandatory disclosure exception – if it applies, the public body has no discretion to waive its benefit and disclose the protected record or information. A lesser, but nonetheless persuasive, consideration is the fact that the disputed information is connected with, the public body argues, relations between British Columbia and Canada and disclosure of the information, it is alleged, could reasonably be expected to harm those relations. I have also taken into consideration the risk of harm through disclosure that is posed in the public body’s brief *in camera* submission on this application.

The last issue raised by the public body relates to the possible impact of restricted access on the solicitor-client relationship between the applicant and its counsel. In a reply submission, the applicant’s counsel takes the position that this contention is irrelevant and that her professional relationship with the applicant is not a matter that concerns the public body or me. This issue raised by the public body has not been a factor in my decision on this application. I note, in passing, that in *R. v. Guess*, [2000] B.C.J. No. 2023, 2000 BCCA 547, the Law Society of British Columbia saw fit to intervene on this question – albeit in a somewhat different context – and the members of the Court of Appeal sitting on that case divided in their views on this same issue.

For the reasons given above, the application to give the applicant’s counsel access, on an undertaking of confidentiality, to the public body’s *in camera* material and the unsevered disputed record is denied.

Sincerely yours,

David Loukidelis
Information and Privacy Commissioner
for British Columbia

cc: Helga Driedger, Registrar