



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F14-11

MINISTRY OF JUSTICE

Hamish Flanagan
Adjudicator

April 1, 2014

CanLII Cite: 2014 BCIPC No. 13

Quicklaw Cite: [2014] B.C.I.P.C.D. No. 13

Summary: The applicant journalist requested documents about possible changes to liquor distribution in BC. The Ministry responsible for the Liquor Distribution Branch withheld information in three documents citing Cabinet confidences under s. 12 of FIPPA, and that the withheld information constituted advice and recommendations under s. 13 of FIPPA. The adjudicator determined that s. 12 or s. 13 applied to most of the withheld information. Neither s. 12 nor s. 13 applied to a small amount of the withheld information in two of the three documents, so that information could be released to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12 and 13.

Authorities Considered: B.C.: Order 01-02, 2001 CanLII 21556; Order 02-38, 2002 CanLII 42472; Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21; Order F10-23, 2010 BCIPC 34; Order No. 33-1995, [1995] B.C.I.P.C.D. No. 4; Order F07-23, 2007 CanLII 52748; Order 01-15, 2001 CanLII 21569; Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII); Order F06-16, 2006 CanLII 25576.
ONT: Order PO-1851-F, 2000 CanLII 20842 (ON IPC).

Cases Considered: *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* 1998 CanLII 6444 (BC CA); *ICBC v ARA*, 2012 BCSC 2025; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

INTRODUCTION

[1] The applicant requested business cases or cost-benefit analyses on the feasibility of the disposition of Liquor Distribution Branch (“LDB”) warehouses, distribution services and other logistics services provided to the liquor industry in BC.

[2] The Ministry responsible for LDB¹ released some information, but withheld portions of three documents titled:

- 1) *Treasury Board Submission – Request for Decision* (“Treasury Board submission”);
- 2) *Cabinet Concept Paper* (“Cabinet concept paper”); and
- 3) *Value in the B.C. Liquor Distribution Model*. (“Value paper”)

[3] The Ministry says the withheld information reveals Cabinet confidences (s. 12 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”)) or contains advice or recommendations (s. 13 of FIPPA). It also says a portion of the Treasury Board submission withheld under s. 12 and s. 13 is also withheld because it contains information harmful to the financial or economic interests of the government of BC (s. 17 of FIPPA).

[4] A review of the Ministry’s decision was conducted by the Office of the Information and Privacy Commissioner (“OIPC”), but the issues in dispute were not resolved. The applicant requested that this matter proceed to an inquiry under Part 5 of FIPPA.

ISSUES

[5] **Preliminary matter—*In Camera* submissions**—The Ministry sought and received approval from the OIPC to submit portions of two affidavits *in camera*. The applicant noted in correspondence to the OIPC and the Ministry that after the Ministry received approval, the name of the person swearing one of the Ministry’s *in camera* affidavits was changed by the Ministry before the affidavit was finally submitted to this inquiry, though the content of the affidavit was largely unchanged. The Ministry subsequently explained the change in correspondence to the applicant and the OIPC and I have accepted the affidavit in question into the inquiry.

¹ The Ministry of Energy Mines and Natural Gas at the time of the request. The LDB is a branch of the Ministry of Justice at the date of this inquiry.

[6] I also note that the Ministry marked portions of its initial submissions as being *in camera*, despite not having sought prior approval from the OIPC to do so. While this is contrary to the OIPC's instructions for submission of *in camera* material,² on this occasion I have accepted the *in camera* portions of the submissions in evidence as they contain content that is consistent with the *in camera* affidavits which were approved by the OIPC.

[7] The remaining issues for this inquiry are:

- 1) Does s. 12 require the Ministry to withhold the information in issue?
- 2) Does s. 13 authorize the Ministry to withhold the information in issue?
- 3) Does s. 17 authorize the Ministry to withhold some information in the Treasury Board submission?

DISCUSSION

[8] **Information in issue**—The information in issue is the withheld portions of the:

- 1) Treasury Board submission;
- 2) Cabinet concept paper; and
- 3) Value paper

[9] **Cabinet Confidences—s. 12 of FIPPA**—Section 12(1) of FIPPA requires public bodies to withhold information that would reveal the substance of the deliberations of the Executive Council (also known as the Cabinet) and any of its committees. If it is determined that s. 12(1) of FIPPA applies to the record, the next step is to consider whether any of the exceptions in s. 12(2) apply. Section 12(1) states:

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 See the OIPC Instructions for Written Inquiries <http://www.oipc.bc.ca/guidance-documents/1431> (Note that revised Instructions will be released this year).

[10] The British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*³ considered the principles for interpreting ss. 12(1) and (2) of FIPPA which have been applied in subsequent orders of this Office.⁴

[11] The scope of s. 12(1) is in part determined by the term “substance of deliberations” which was interpreted in Order No. 48-1995 at p. 9 as:

... recorded information that reveals the oral arguments, pro and con, for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.⁵

[12] In *Aquasource*, Donald J.A. said that the “substance of deliberations” in s. 12(1) refers to:

the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.⁶

[13] Section 12(1) applies to records that reveal Cabinet’s deliberations that have been submitted directly to a Cabinet committee. Further, previous orders have said that s. 12(1) is broad enough to encompass a document that has not actually been submitted to a cabinet committee but nonetheless would reveal Cabinet’s deliberations.⁷ Previous orders have found s. 12 applies to drafting instructions and internal briefing documents that allowed accurate inferences about draft legislation submitted to a Cabinet committee.⁸ In Ontario Order PO-1851-F⁹ the Ontario equivalent of s. 12(1) of FIPPA was applied to information that permitted accurate inferences about draft legislation, regardless of whether the information in issue itself had been submitted to a Cabinet committee.

[14] For s. 12(1) to apply, disclosure of the information must also *reveal* the substance of deliberations of Cabinet. Previous orders have found that disclosure of the disputed information—alone or in combination with other

³ 1998 CanLII 6444 (BC CA).

⁴ See for example Order 01-02, 2001 CanLII 21556 and Order 02-38, 2002 CanLII 42472.

⁵ [1995] B.C.I.P.C.D. No. 21.

⁶ At para. 39.

⁷ This view is supported in *Aquasource*, where Donald J.A. said at para. 41: “It is my view that the class of things set out after ‘including’ in s. 12(1) extends the meaning of ‘substance of deliberations’ and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. I arrive at this conclusion with the assistance of several authorities”.

⁸ Order F10-23, 2010 BCIPC 34.

⁹ 2000 CanLII 20842 (ON IPC).

available information—must allow the applicant, or the world at large, to draw accurate inferences about the substance of Cabinet deliberations.¹⁰ In some circumstances, this will be clear from the document evidence.¹¹ However, in others there must be at least inferential evidence or other surrounding circumstances to confirm that disclosure of a record would “reveal” the substance of deliberations.¹²

[15] I will now apply the law to the withheld information.

Treasury Board submission and Cabinet concept paper

[16] The Ministry provided an *in camera* copy of a Treasury Board minute and a Cabinet Record of Decision to support their assertion that the Treasury Board submission was submitted to the Treasury Board. The Ministry also provided an *in camera* copy of an excerpt of a Cabinet minute to establish that the Cabinet concept paper was submitted to the Priorities and Planning Committee, a Cabinet committee. In accordance with s. 1 of the *Committees of the Executive Council Regulation*, both Treasury Board and the Priorities and Planning Committee have been designated as committees of the Executive Council for the purposes of s. 12(1) of FIPPA.

[17] My review of the withheld contents of the Treasury Board submission and the Cabinet concept paper shows that, with some minor exceptions discussed below, the withheld portions comprise advice, recommendations and policy considerations within the meaning of s. 12(1). If the withheld portions were released, the applicant would be able to make accurate inferences about the substance of Cabinet deliberations, so they must be withheld under s. 12(1).

¹⁰ *Aquasource* at para. 48. This is consistent with the purpose of s. 12(1).

¹¹ The basis for applying s. 12(1) FIPPA in Order No. 33-1995, [1995] B.C.I.P.C.D. No. 4, was that a Cabinet submission identified itself as a document submitted to Cabinet, and the language used in the Cabinet submission itself supported the conclusion that it would reveal the substance of Cabinet deliberations. Thus revealing the information to the applicant would allow the applicant and any recipient of the information to make accurate inferences about the substance of Cabinet deliberations. See also Order 01-02, 2001 CanLII 21556, where a letter that stated the goals of a policy and the fact that Treasury Board had discussed the policy, was found to allow one to accurately infer the substances of Cabinet deliberations.

¹² In Order F10-23, 2010 BCIPC 34, briefing notes on a draft regulation were withheld under s. 12(1). The fact that Cabinet was to consider the draft regulation was public knowledge, so in the circumstances it was found that disclosure of the briefing notes would allow accurate inferences to be drawn about Cabinet’s deliberations. In Order F07-23, 2007 CanLII 52748, a letter in issue clearly linked to, or revealed draft regulations, and it was common knowledge that the draft regulations were submitted to Cabinet. The information in the record itself and other available information together satisfied the requirements of s. 12(1) by establishing that disclosing the information in issue permitted accurate inferences about the substance of cabinet deliberations.

Section 12(2) Exceptions

[18] The relevant parts of s. 12(2) state:

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...

[19] The exception to withholding information under s. 12(2)(c) only comes into play if the decision in question has been made public or has been implemented, or five or more years have passed since the decision was made or considered.¹³

[20] The Cabinet minute excerpts, which were provided *in camera*, establish that Cabinet deliberated on the issues canvassed in the documents in issue. The ultimate decisions made about liquor retail and distribution in BC, to which the documents in issue relate, is a matter of public record.

[21] Previous orders have acknowledged that it can be difficult to distinguish between information that forms the “substance of deliberations” and that which forms “background explanations or analysis”, and that in some cases these categories may be interchangeable.¹⁴ The decision in *Aquasource* confirmed former Commissioner Flaherty’s interpretation of the inter-relationship between ss. 12(1) and 12(2)(c) in Order No. 48-1995, where he expressed the view 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.¹⁵

[22] From my review of the records, I am satisfied that the Treasury Board submission does not contain any withheld information that comprises background explanations or analysis. The Cabinet concept paper contains a small amount of withheld information that is background explanations or analysis. It is on the first page of the Cabinet concept paper, some of which is under the heading “Description” and some of it under the heading “Background/Context”.

¹³ Sections 12(2)(c)(i) – (iii) of FIPPA.

¹⁴ Order 01-02, 2001 CanLII 21556 at para. 15; Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21.

¹⁵ Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21 at p. 13.

[23] In summary, I find that s. 12(1) applies for the most part to require the information in issue in the Treasury Board submission and the Cabinet concept paper to be withheld, with the minor exception of some background explanations or analysis in the Cabinet concept paper¹⁶ to which s. 12(2)(c) FIPPA applies.

Advice and Recommendations – s. 13

[24] The Ministry submits that the information in dispute also comprises advice or recommendations under s. 13(1). Because the Ministry says that the Value paper was created for discussion and deliberation by the Minister,¹⁷ I will first consider the application of the advice or recommendations exception in s. 13(1) to the Value paper. If necessary, I will then consider the application of the s. 12 exception for Cabinet confidences to the Value paper.

[25] The relevant parts of s. 13 for this inquiry are:

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.
- (2) The head of a public body must not refuse to disclose under subsection (1)
- (a) any factual material,

[26] The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether, in accordance with s. 13(1), the disclosure of the information “would reveal advice or recommendations developed by or for a public body or a minister”. If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA.

[27] The purpose of s. 13(1) is 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. For example, in Order 01-15,¹⁸ then Commissioner Loukidelis said this:

[22] This exception is designed, in my view, to protect a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. ...

¹⁶ At p. 6 of the records.

¹⁷ Initial submission at para. 4.33.

¹⁸ 2001 CanLII 21569.

[28] Previous orders have also found that a public body is authorized to refuse access to information which would allow an individual to draw accurate inferences about advice or recommendations.¹⁹ This can include policy issues, possible options for changes to the policy and considerations for these various options, including a discussion of implications and possible impacts of the options.²⁰

[29] In the recent decision in *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*,²¹ s. 13(1) was also stated to include “factual information”. Factual information included information “compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanation necessary to the deliberative process of a public body...”.²² This type of information was distinguished from the “source materials accessed by the experts or background facts not necessary to the expert’s “advice” covered by s. 13(2).

[30] I am satisfied that the majority of the withheld information in the Value paper contains advice or recommendations under s. 13(1). As an excerpt in the Value paper disclosed by the Ministry makes clear, the withheld information comprises a wide ranging discussion of the “option[s] for the retail and wholesale distribution of liquor in BC.”²³ The Value paper was prepared for discussion and deliberation by a Minister and mostly comprises a mix of expert opinion and advice on possible changes to liquor distribution in BC.

[31] A small amount of withheld information in the Value paper²⁴ meets the definition of factual material under s. 13(2). The information that meets s. 13(2) merely sets the scene for the wide-ranging discussion that follows. The information does not allow accurate inferences about advice or recommendations. In my view the information exists sufficiently “separately and independently from the opinions and advice in the reports”²⁵ and therefore may not be withheld under s. 13.

¹⁹ This was also at the heart of the concern in the recent decision in *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 – see paras. 52 and 66.

²⁰ See Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII) at para. 23; Order 02-38, 2002 CanLII 42472 at paras. 102-127; Order F06-16, 2006 CanLII 25576 at para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

²¹ 2013 BCSC 2322. The case is under appeal to the BC Court of Appeal.

²² At para. 94.

²³ Value paper, 1st sentence under heading “Premise” at p. 12 of the records.

²⁴ At pp. 12-14 of the records.

²⁵ 2013 BCSC 2322 at para. 94.

[32] For the same reasons, s. 13(2) also applies to the small amount of information in the Cabinet concept paper that I found could not be withheld under s. 12.

Application of s. 12 to portions of Value paper

[33] Because a small amount of information in the Value paper cannot be withheld under s. 13 because it is factual material under s. 13(2), it is necessary to consider whether that information must be withheld under s. 12.

[34] The Ministry states that even though each page of the Value paper contains a footer that reads “Confidential-prepared for the deliberation of Cabinet”, the Value paper was not actually submitted to a Cabinet committee. Nonetheless, if the Value paper permits accurate inferences to be drawn about the substance of deliberations of a Cabinet committee, as the Ministry argues it does, then it is covered by s. 12(1).

[35] As I said above, when considering s. 12, one must evaluate whether disclosure of the disputed information would permit the drawing of accurate inferences about the substance of deliberations of Cabinet. Where necessary, that includes taking into account any currently disclosed or publically available information.

[36] In my view, the small amount of information in the withheld portions of the Value paper not already withheld under s. 13, would not reveal to the applicant information that would allow him to accurately infer the substance of Cabinet’s deliberations. The information not withheld under s. 13 is merely background information. Some of the information is under the heading “Background” and some of the information is the same as information previously released to the applicant.²⁶ I note that even if the withheld information in issue here did permit accurate inferences so that s. 12(1) applied, the information would squarely fall within the exception in s. 12(2)(c) for background explanations and analysis.

Section 17

[37] It is not necessary for me to consider the Ministry’s s. 17 submission because I have already found the information to which it was applied is exempt from disclosure under s. 12(1).

²⁶ See for example the information released in the Treasury Board Submission under the heading “Background/Context” and in the Cabinet Concept Paper under the headings “Description” and “Background/Context”

CONCLUSION

[38] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to para. 3 below, I require the Ministry to refuse to disclose the information in issue in the Treasury Board submission and Cabinet concept paper under s. 12(1) of FIPPA.
2. Subject to para. 3 below, the Ministry may refuse to disclose the information in issue in the Value paper under s. 13(1) of FIPPA.
3. I require the Ministry to disclose the highlighted information in the Cabinet concept paper and Value paper which accompanies the Ministry's copy of this decision.
4. I require the Ministry to comply with para. 3 above, by **May 15, 2014**, pursuant to s. 59 of FIPPA. The Ministry must concurrently copy me on its cover letter to the applicant, together with a copy of the documents.

April 1, 2014

ORIGINAL SIGNED BY

Hamish Flanagan
Adjudicator

OIPC File No.: F12-49760