



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F14-20

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Hamish Flanagan
Adjudicator

June 30, 2014

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Summary: The applicant journalist requested documents about the rationale for changes to the tolling framework for the Port Mann Bridge. The Ministry of Transportation and Infrastructure withheld information in three records citing Cabinet confidences under s. 12 of FIPPA, and some information in one record it said constituted advice and recommendations under s. 13 of FIPPA. The adjudicator determined that the Ministry was authorized to withhold some of the information under s. 12(1) because disclosure would reveal the substance of the deliberations of Cabinet. Other information must be released because it was either not covered by s. 12(1) or was background material and analysis under s. 12(2)(c). Section 13 did not need to be considered because the information to which it had been applied was protected under s. 12 of FIPPA.

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

Authorities Considered: B.C.: Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21; Order 01-02, 2001 CanLII 21556; Order 02-38, 2002 CanLII 42472; Order No. 33-1995, [1995] B.C.I.P.C.D. No. 4; Order F07-23, 2007 CanLII 52748; Order F09-26, 2009 CanLII 66965. **ONT.:** Order PO-1851-F, 2000 CanLII 20842.

Cases Considered: *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

INTRODUCTION

[1] The Port Mann Bridge is a tolled bridge opened in December 2012. The bridge is operated by Transportation Investment Corporation (“TI Corp”), a Crown

corporation, under an agreement with the Province of British Columbia. When the tolling framework for the bridge was publicly announced in September 2012, the Minister for Transportation and Infrastructure announced tolls would be discounted 50% from those originally planned.¹

[2] The applicant journalist wanted to know the rationale for this change in pricing strategy, so he requested from the Ministry of Transportation and Infrastructure (“Ministry”):

The business case and cost/benefit analysis justifying a decrease or discount in toll charges for the Port Mann bridge and advice to Minister(s) and briefing notes on the topic.

[3] The Ministry released some information, but withheld portions of three records because it submitted disclosure would reveal the substance of deliberations of Cabinet under s. 12 FIPPA. The withheld records are titled:

- 1) *Treasury Board Submission – Request for Decision* (“Treasury Board submission”) dated 26 July 2012;
- 2) *PMH1 Project Update: Tolling Framework* (“Powerpoint presentation”) dated July 2012; and
- 3) *Transportation Investment Corporation Port Mann/Highway 1 Improvement Project Toll Pricing Options Analysis* (“Analysis document”) dated July 2012.

[4] A small portion of the Analysis document was withheld by the Ministry on the basis that it constituted advice and recommendations under s. 13 of FIPPA.

[5] The applicant requested a review of the Ministry’s decision by the Office of the Information and Privacy Commissioner (“OIPC”). The issues in dispute were not resolved by mediation, so this inquiry proceeded under Part 5 of FIPPA.

ISSUES

[6] The issues for this inquiry are:

- 1) Is the Ministry required to withhold the information it withheld under s. 12 FIPPA?
- 2) Is the Ministry authorized to withhold the information it withheld under s. 13 FIPPA?

¹ http://www2.news.gov.bc.ca/news_releases_2009-2013/2012TRAN0084-001331.htm.

DISCUSSION

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

- 1) Treasury Board submission;
- 2) Powerpoint presentation; and
- 3) Analysis document.

[8] **Cabinet Confidences—s. 12 of FIPPA**—Section 12(1) of FIPPA requires public bodies to withhold information that would reveal the substance of deliberations of the Executive Council (also known as Cabinet) and any of its committees.² 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.

[9] The scope of s. 12(1) is determined in part by the term “substance of deliberations” which was interpreted in Order No. 48-1995 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.³

[10] The British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*⁴ considered the principles for interpreting ss. 12(1) and (2) of FIPPA, which have subsequently been applied in orders of this Office.⁵ 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

[11] Section 12(1) applies to records that reveal Cabinet’s deliberations, whether they have been submitted directly to a Cabinet committee or not, where the records would reveal Cabinet’s deliberations.⁷ For example, previous orders

² The Committees are listed in s. 1 of the *Committees of the Executive Council Regulation*.

³ [1995] B.C.I.P.C.D. No. 21 at p. 9

⁴ 1998 CanLII 6444 (BC CA).

⁵ See for example Order 01-02, 2001 CanLII 21556 and Order 02-38, 2002 CanLII 42472.

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

have applied s. 12 to drafting instructions and internal briefing documents that were not themselves submitted to Cabinet but which allowed accurate inferences about draft legislation that was submitted to a Cabinet committee.⁸ In Ontario Order PO-1851-F,⁹ 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.

[12] For s. 12(1) to apply, disclosure of the withheld information must *reveal* the substance of the deliberations of Cabinet. Previous orders have found that disclosure of the withheld information—alone or in combination with other 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 documentary evidence, for example records that have been submitted directly to a Cabinet committee that reveal Cabinet’s deliberations.¹¹ However, in other cases 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

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

Treasury Board submission

[14] The Ministry provided an *in camera* copy of Treasury Board minutes to support its assertion that the Treasury Board submission was submitted to the Treasury Board.¹³ In light of those minutes, I have reviewed the Treasury Board

deliberations’ and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications.”

⁸ Order F10-23, 2010 BCIPC 34.

⁹ 2000 CanLII 20842 (ON IPC).

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 its language would have revealed the substance of Cabinet deliberations by allowing accurate inferences to be made about what Cabinet discussed. 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 accurate inferences about the substance 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. See also Order F09-26, 2009, CanLII 66965.

¹³ Section 1 of the *Committees of the Executive Council Regulation* designates Treasury Board as a committee of the Executive Council for the purposes of s. 12 of FIPPA.

submission and am satisfied that disclosing it would reveal the substance of the deliberations of Cabinet. The document was clearly submitted to Cabinet and reveals the body of information Cabinet considered.

PowerPoint presentation

[15] The Ministry provided an *in camera* copy of an excerpt of a Cabinet minute to establish that the PowerPoint presentation was submitted to the Priorities and Planning Committee, a Cabinet committee¹⁴ and was considered by that committee. I have reviewed the PowerPoint presentation and am satisfied that disclosing it would reveal the substance of the deliberations of Cabinet. The presentation was clearly submitted to Cabinet and reveals the body of information Cabinet considered.

Analysis document

[16] This document was prepared by TI Corp to outline a proposed toll pricing framework for the Port Mann Bridge for TI Corp's Board of Directors.¹⁵ It was not submitted to a Cabinet committee, but the Ministry says that it contains information that was used to develop the PowerPoint presentation and the Treasury Board submission.¹⁶ The Ministry argues that the Analysis document must be withheld under s. 12 because disclosure of the withheld information in it will permit accurate inferences about the substance of the deliberation of Cabinet.

[17] As noted in the introduction to this order, the applicant knows of the decision to discount tolls for the Port Mann Bridge because the decision was publicly announced and implemented. He wants to know why that decision was made. However, s. 12 operates to keep this reasoning confidential to the extent it discloses Cabinet deliberations, because it is presumed to be in the public interest to maintain Cabinet confidentiality.¹⁷

[18] The nature of the Analysis document, the applicant's knowledge and the narrow scope of his request satisfy me that release of some of the information would permit an accurate inference about the substance of deliberations of Cabinet. This includes parts of the record that the Ministry has withheld under s. 13 but not s. 12 and some information the Ministry has already disclosed to the applicant.¹⁸

¹⁴ Section 1 of the *Committees of the Executive Council Regulation* designates the Priorities and Planning Committee as a committee of the Executive Council for the purposes of s. 12 of FIPPA.

¹⁵ Affidavit of M Proudfoot at para 11.

¹⁶ Affidavit of M Proudfoot at para 8.

¹⁷ See for example Order 02-38 for a discussion of the rationale for Cabinet confidentiality as protected by s. 12 FIPPA.

¹⁸ Because s. 12 is a mandatory not discretionary exemption, even where a public body does not withhold information under s. 12, the information must be withheld if s.12 applies.

[19] However, some parts of the record can be disclosed without revealing the substance of Cabinet deliberations.

[20] I am satisfied that some of the information in the Analysis document is neither in the documents submitted to Cabinet nor would it permit accurate inferences about the information that was submitted to Cabinet. The analysis document is broader in scope than the documents submitted to Cabinet, and contains information and analysis that was not in the documents at issue that were submitted to Cabinet. Some of the information relates to matters that are simply outside the scope of the deliberations of Cabinet. Other information outlines TI Corp's earlier thinking about the tolling framework, before its publicly known change of position, and would not permit accurate inferences about its eventual submission to Cabinet and Cabinet's deliberations. In the instances where information about TI Corp's earlier thinking about the tolling framework would permit accurate inferences about the substance of the deliberations of Cabinet it must be withheld.

[21] In summary, I am satisfied that parts of the Analysis document can be released without allowing accurate inferences about the substance of Cabinet's deliberations.

Section 12(2) Exceptions

[22] Section 12(2) sets out situations where information that falls within s. 12(1) cannot be withheld under s. 12. 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, or
 - (iii) 5 or more years have passed since the decision was made or considered.

[23] The ultimate decisions made about tolling of the Port Mann Bridge, to which the documents in issue relate, is a matter of public record.

[24] 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.¹⁹ The decision in *Aquasource*²⁰ 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.²¹

[25] From my review of the records, some of the withheld information in the three records is background explanations or analysis for Cabinet for its consideration in making a decision.²² In the Treasury Board submission it is information of a general nature about TI Corp's legislative and contractual obligations, and a factual summary of consultation activities undertaken in relation to the development of the Port Mann Bridge. In the PowerPoint presentation it is a summary of a communication plan regarding the bridge opening as well as a small amount of information that is the same as information found under the heading "Background/Context" in the Treasury Board submission described above. This information is background material to the issue of the tolling framework for the bridge that was the substance of deliberations of Cabinet.

[26] I previously determined that some information in the Analysis document is neither the subject of Cabinet deliberations nor allows accurate inferences about the substance of Cabinet deliberations, so is not subject to s. 12(1). In addition, even if this information was subject to s. 12(1), much of it would be background explanations or analysis under s. 12(2)(c) because it provides information about TI Corp's early thinking on a tolling framework. Other information in the Analysis document that I find comprises background explanation or analysis to Cabinet's deliberations is a summary of TI Corp's legislative and contractual obligations as well as details about its future obligations.

[27] In summary, I find that s. 12(1) applies to the information the Ministry is withholding in the Cabinet concept paper and the Treasury Board submission, and to some information in the Analysis document. All three records also contain some background explanations or analysis which can be released because s. 12(2)(c) FIPPA applies.

¹⁹ Order 01-02, 2001 CanLII 21556 at para. 15; Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21.

²⁰ 1998 CanLII 6444 (BC CA).

²¹ [1995] B.C.I.P.C.D. No. 21, at p. 13.

²² A paragraph and some sentences in the Background/Context section and some background factual information on pp. 7, 8, 9, 10 and 11 that does not disclose the substance of the deliberations of Cabinet.

Advice and Recommendations – s. 13

[28] The Ministry withheld one portion of the analysis document under s.13. However, I do not need to consider the Ministry's application of s. 13 because I have already found that information must be withheld under s. 12(1).

CONCLUSION

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

1. Subject to para. 3 below, the Ministry is required to continue to withhold the information it has withheld under s. 12 FIPPA.
2. The Ministry is also required to withhold under s. 12 the information highlighted in green in the records which accompany the Ministry's copy of this Order.
3. The Ministry is required to release the information highlighted in yellow in the records which accompany the Ministry's copy of this Order.
4. The Ministry is required to disclose the information highlighted in yellow **August 13, 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 records.

June 30, 2014

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F12-51575