Office of the Information & Privacy Commissioner for British Columbia

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Order F16-08

MINISTRY OF JUSTICE

Caitlin Lemiski
Adjudicator

February 26, 2015

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Summary: An applicant requested records concerning meetings between the Ministry and various stakeholders in regards to the purchase or lease of certain properties in the Tofino area. The Ministry disclosed some records, but withheld some information under s. 12(1) (cabinet confidences) and s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The adjudicator found that some information must be withheld under s. 12(1) and other information may be withheld under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1) and 14.

Authorities Considered: B.C.: Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21; Order 00-07, 2000 CanLII 7711 (BC IPC); Order 00-38, 2000 CanLII 14403 (BC IPC); Order 01-02, 2001 CanLII 21556 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F07-13, 2007 CanLII 30398 (BC IPC); Order F08-17, 2008 CanLII 57360 (BC IPC); Order F09-26, 2009 CanLII 66959 (BC IPC); Order F10-23, 2010 BCIPC 34 (CanLII); Order F13-10, 2013 BCIPC 11 (CanLII); Order F14-17, 2014 BCIPC 20 (CanLII); Order F15-15, 2015 BCIPC 16 (CanLII); Order F15-41, 2015 BCIPC 44 (CanLII); Order F15-61, 2015 BCIPC 67 (CanLII).

Cases Considered: *Canada v. Solosky,* 1979 CanLII 9 (SCC); *Hunt v. T & L plc* (1992), 68 B.C.L.R. (2d) 133 (S.C.) (aff'd (1993) 1993 CanLII 1424 (BC CA), 77 B.C.L.R. (2d) 391 (C.A.)); *Seller v. Grizzle* (1994), 1994 CanLII 1479 (BC SC), 95 B.C.L.R. (2d) 297 (B.C.S.C.); *R. v. B.,* 1995 Can LII 2007 (BCSC); *Sutherland v. D. A. Townley &*

Associates Ltd., [1997] B.C.J. No. 471 (Q.L.) (B.C.S.C.); *Stevens v. The Prime Minister of Canada (the Privy Council),* 1997 CanLII 4805 (FC), [1997] 2 F.C. 759 (F.C.T.D.); *Hatlen v. Hughes*, [1998] B.C.J. No. 767 (Q.L.) (B.C.S.C. Master); *Aquasource Ltd. V British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA); *Babcock v. Canada (Attorney General),* [2002] S.C.J. No. 58, 2002 SCC 57 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 112 (CanLII).

INTRODUCTION

[1] This inquiry involves an applicant's request to the Ministry of Justice ("Ministry") for records created between 1984 and 2013 concerning meetings between the Ministry and various stakeholders regarding the purchase or lease of certain properties in the Tofino area. The Ministry identified responsive records and provided them to the applicant. However, it withheld some information in those records under s. 12(1) (cabinet confidences), s. 14 (solicitor client privilege) and s. 16 (disclosure harmful to intergovernmental relations or negotiations) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant was not satisfied with the Ministry's response, and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). OIPC mediation did not resolve the issues in dispute, and the matter proceeded to inquiry.

[3] After the Notice of Inquiry was issued to the Ministry and to the applicant, the Ministry fully disclosed additional records to the applicant but continued to withhold other records in their entirety. The Ministry also advised the applicant that it was no longer relying on s. 16 of FIPPA to withhold responsive information.

ISSUES

[4] The issues in this inquiry are:

1. Is the Ministry required by s. 12(1) of FIPPA to refuse access to the requested information because disclosure would reveal cabinet confidences?

2. Is the Ministry authorized by s. 14 of FIPPA to refuse access to the requested information because it would reveal information that is protected by solicitor client privilege?

[5] The Ministry has the burden of proof under s. 57(1) of FIPPA, to establish that the applicant has no right of access to the information withheld under ss. 12(1) and 14.[1]

DISCUSSION

[6] **Records in dispute —** The Ministry withheld one cabinet submission in its entirety under ss. 12(1) and 14 of FIPPA.[2] In its submissions, the Ministry has not revealed to the applicant anything about the specific contents of the cabinet submission, including what the cabinet submission is about. In addition to the cabinet submission, the Ministry also withheld emails and other records in their entirety under s. 14 of FIPPA.

[7] With respect to pages 90 and 97-103, the Ministry has made submissions about how s. 14 applies to these pages, but the records themselves and a redactions report provided by the Ministry both show that the Ministry has disclosed these pages in full to the applicant. Therefore, they are not in dispute and I have not considered them.

[8] The Ministry provided complete copies of all the records in dispute in this case for my review, including records over which it is claiming solicitor client privilege applies. I will begin by considering whether s. 12(1) applies to the cabinet submission.

[9] **Cabinet confidences (s. 12(1)) —** The Ministry withheld one cabinet submission in its entirety under s. 12(1) on the basis that the information is advice and recommendations that were prepared for and submitted to Cabinet, so disclosing this information would reveal the substance of Cabinet's deliberations.[3] Section 12(1) states:

> 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.

[10] The Supreme Court of Canada has affirmed the purpose of s. 12(1), stating that "[t]hose charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before

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[1] The Ministry acknowledges it has the burden of proof in regards to s. 12(1) and s. 14 (public body's submission at para. 2.02).
[2] At pp. 105-119.
[3] Public body's submission at paras. 3.17 and 3.18.

them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny."[4]

[11] In *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*,[5] the BC Court of Appeal held 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] The Court stated that the phrase "substance of deliberations" in s. 12(1) must be interpreted in light of the examples listed after the word "including", and consequently must be read as widely protecting the confidence of Cabinet communications.[7]

[12] As stated in previous orders, the issue under s. 12(1) is whether disclosure of the withheld information – alone or in connection with other available information – would directly reveal, or allow the applicant to draw accurate inferences about, the substance of Cabinet deliberations.[8]

[13] **Analysis of s. 12(1)** — Previous OIPC orders have established that information that was submitted to Cabinet (including one of its committees) will not automatically receive protection from disclosure under s. 12(1) without at least some inferential evidence that disclosure could, directly or by inference, reveal the substance of the deliberations of Cabinet or of one of its committees.[9]

[14] In this case, the sworn evidence of the Director of Cabinet Operations, Office of the Premier (the "Director"), is that a designated Cabinet committee considered the cabinet submission and made a recommendation to Cabinet. Cabinet then met and approved a cabinet minute describing the Cabinet committee's recommendation.[10]

[15] The applicant did not make any argument or submissions regarding the application of s. 12(1) to the disputed information.

[16] Based on the sworn evidence of the Director, I am satisfied that most of the information severed from the cabinet submission formed the basis of the

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[4] *Babcock v. Canada (Attorney General),* [2002] S.C.J. No. 58, 2002 SCC 57 (CanLII), (at para. 18) as quoted in Order 02-38, 2002 CanLII 42472 (BC IPC).
[5] *Aquasource Ltd. v. British Columbia* (*Freedom of Information and Protection of Privacy Commissioner*), 1998 CanLII 6444 (BC CA).
[6] *Aquasource,* supra, at para. 39.
[7] *Aquasource*, supra, at para. 41.
[8] In Order F10-23, 2010 BCIPC 34 (CanLII) at para 16; Order F09-26, 2009 CanLII 66965 (BC IPC), 2009, CanLII 66965 at para. 23.
[9] See Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21 as quoted in Order 01-02, 2001 CanLII 21556 (BC IPC), at para. 10. Section 12(5) states that the Lieutenant Governor in Council, by regulation, may designate a committee of the Executive Council for the purposes of s. 12(1).
[10] Affidavit of the Director of Cabinet Operations, Office of the Premier, and attached exhibit "B".

Cabinet committee's deliberations and must be withheld under s. 12(1). The information severed includes details related to a specific plan, options, and a recommendation, which the Cabinet committee considered and then made a decision on. In these circumstances, I find that disclosing this information would allow someone to make accurate inferences about the substance of the Cabinet committee's deliberations.

[17] However, consistent with the findings made in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*,[11] I have determined that s. 12(1) does not apply to the title of the cabinet submission, some headings and other information, such as the Minister responsible, the key contact person, the Ministry's document number and the date of the cabinet submission. The Ministry has not addressed how disclosing this information (such as the title of the cabinet submission) would reveal the substance of cabinet deliberations, either directly or by inference. I find that disclosing this information would not reveal the substance of the Cabinet committee's deliberations. I have highlighted this information in the copy of the records that I am providing to the Ministry with this order.[12]

Section 12(2)(c) exceptions

[18] Section 12(2)(c) lists exceptions to s. 12(1). It is as follows:

> (2) Subsection (1) does not apply to
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> …
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> (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
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> (i) the decision has been made public,
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> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered.

[19] In this case, over five years have passed since the decision about the matter at issue in the cabinet submission was made by the Cabinet committee and considered by Cabinet. Therefore, if I determine that the purpose of the

[11] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 112 (CanLII), para. 96-100. In that case, the British Columbia Supreme Court affirmed the Adjudicator's decision in Order F08-17, 2008 CanLII 57360 (BC IPC), that disclosing agenda item headings (in that case, of Cabinet committee meetings) did not reveal the substance of deliberations of those meetings.

[12] Highlighted information is at pp. 105, 106, 108, 109 and 110.

information in the cabinet submission is "to present background explanations or analysis" to the Cabinet committee in making its decision, then s. 12(1) does not apply.[13]

[20] In considering whether s. 12(2)(c)(iii) applies, former Commissioner Flaherty in Order No. 48-1995, stated:

> …"Background explanations" include, at least, 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. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it. Records prepared for submission to Cabinet should not be presumed to automatically reveal the substance of deliberations and must be considered for release to an applicant under section 12(2)(c).[14]

[21] On appeal of that Order, the Court in *Aquasource* affirmed the former Commissioner's interpretation:

> …The two provisions cannot be read as watertight compartments and the Commissioner was correct in harmonizing them. He accepted the government's submission that the exception relates to the purpose for which the information is given: if it is to provide background or analysis and is not interwoven with any of the items listed in s. 12(1), the information can be disclosed. …[15]

[22] I follow this approach in this case.

[23] In this case, while there is information whose purpose is to provide background explanations or analysis, most of it is interwoven with information that directly or by inference reveals advice, recommendations and policy considerations. However, I find that the first sentence on page 2 of the cabinet submission is factual information and it is not interwoven with any of the items listed in s. 12(1). I therefore find that s. 12(2)(c)(iii) applies to that one sentence, so the Ministry cannot withhold it under s. 12(1). I have highlighted this sentence in the copy of the records that I am providing to the Ministry with this order.[16]

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[13] The Director's affidavit (including exhibits) shows that the cabinet submission in dispute in this case was considered by the Cabinet committee in April, 2008 and the minutes from that meeting of the Cabinet committee were approved by Cabinet at a cabinet meeting in May, 2008. The applicant requested the records in dispute in this inquiry in early August of 2013 (para. 1 of the OIPC Fact Report).

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

[15] *Aquasource,* supra, at para. 50.

[16] At p. 106 of the disputed records.

[24] I find that the balance of the severed information does not present background explanations or analysis, so s. 12(2)(c)(iii) does not apply. The Ministry is required to continue to withhold this information under s. 12(1).

[25] In conclusion, the Ministry is required to continue to withhold the cabinet submission under s. 12(1), except for the title, some headings, the identity of the Minister responsible, the key contact person, the Ministry's document number, the date of the cabinet submission, and the first sentence on the second page.[17]

Solicitor client privilege – s. 14

[26] Section 14 states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The Ministry withheld, in their entirety, pages 45-89, 91-96, and 104-324 of the responsive records under s. 14.[18] I will also consider the Ministry's application of s. 14 to the information in the cabinet submission that I found could not be withheld under s. 12(1).

[27] The law is well established that s. 14 encompasses both types of solicitor client privilege found at common law: legal professional privilege (also referred to as legal advice privilege) and litigation privilege.[19] The Ministry submits that the information it has withheld under s. 14 in this case is subject to legal advice privilege.[20]

[28] For legal advice privilege to apply the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.[21]

[29] The above criteria have consistently been applied in BC Orders, and I will take the same approach here. If these conditions are met, then a communication (and papers relating to it) is privileged.[22]

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[17] Page 106 of the records in dispute.
[18] The Ministry disclosed pp. 1-45, 90, 97-103 in full to the applicant.
[19] Order F15-61, 2015 BCIPC 67 (CanLII) at para. 50.
[20] Public body's submissions at para. 3.27.
[21] For a statement of these principles see also *R. v. B.,* 1995 Can LII 2007 (BCSC), para. 22 and *Canada v. Solosky,* 1979 CanLII 9 (SCC), p. 13.
[22] Order F15-61, supra, at para. 52; also Order F15-51, supra. at para. 10, citing Order 01-53, 2001 CanLII 21607 (BC IPC) and Order F13-10, 2013 BCIPC 11 (CanLII).

[30] The Ministry provided me with copies of all of the records in dispute at this inquiry. The Ministry provided affidavit evidence from two lawyers in its Legal Services Branch, who deposed that the information in these pages came from their files. They also deposed that they used or wrote this information in the course of seeking, formulating and providing legal advice to their client, who is Her Majesty the Queen in Right of the Province of British Columbia ("provincial government"), specifically its ministries and Land and Water British Columbia Inc. ("LWBC") (a wholly owned subsidiary of the provincial government that acted as the delegate for the minister responsible for the *Land Act)*.

[31] The applicant did not make any argument or submissions regarding the application of s. 14 to any of the disputed information.

[32] In this case, I have considered the four part of the test for establishing legal advice privilege, and based on my review of pages 45-89, 91-96, and 104-324 and the affidavit evidence supplied by the Ministry, I am satisfied that these records are written communications between the provincial government, as client, and the provincial government's lawyers. I am satisfied that the communications are confidential, because the evidence is that these communications were only between Ministry lawyers and the provincial government's representatives (i.e., its ministries and LWBC). I am also satisfied that these communications are directly related to the seeking, formulating, or giving of legal advice, because it is apparent to me from reviewing this information that it is legal advice, information used to prepare legal advice, or information attached to and supporting the legal advice.

[33] Some of the records consist of attachments to emails, which I find are protected by privilege. Previous orders have determined that records that are attached to privileged emails are part of a privileged communication.[23] In this case, based on the context in which the attachments appear, I find that they are privileged because they are part of the privileged emails.

Email from federal Department of Justice

[34] There is one email, however, that is unlike the others in that it is not a communication between a lawyer and a client that is directly related to the seeking, formulating, or giving of legal advice. [24] It is an email from a lawyer with the federal Department of Justice ("DOJ") to two Ministry lawyers and copied to two individuals whose identities have not been provided in the Ministry's submissions and evidence. With respect to this email, one of the Ministry lawyers deposed that the email was sent to him and another Legal Services Branch lawyer, and it "confirmed Canada's views on some legal issues associated with a

[23] Order 00-38, 2000 CanLII 14403 (BC IPC) at p.14; Order F14-17, 2014 BCIPC 20 (CanLII) at para. 29.
[24] At pp. 168-169 and 323-324.

joint land and cash offer that the Province and Canada were to make" and it "was received from [the DOJ lawyer] in confidence and on the basis of common interest privilege."[25] Other than the Ministry lawyer's assertion that this email is subject to common interest privilege, the Ministry made no other submissions or argument in relation to common interest privilege.

[35] Common interest privilege is an exception to circumstances that might otherwise amount to a waiver of privilege.[26] It protects against waiver when a privileged communication is disclosed to someone who otherwise would have no right to it (but with whom the party has a common interest). Absent any supporting argument or evidence from the Ministry, I am not satisfied that this principle applies in this case. That is because the email does not meet the criteria for legal advice privilege in the first place. It is not a communication between a solicitor and client, and, based on my review of the email, it does not contain a communication that is directly related to the seeking, formulating, or giving of legal advice.

Information in the cabinet submission

[36] The Ministry is withholding the entire contents of the cabinet submission under s. 12(1) and s. 14. I must therefore consider whether s. 14 applies to the small amount of information in the cabinet submission to which I have determined s. 12(1) does not apply. This includes the title and some headings of the cabinet submission, and information such as the Minister responsible, the key contact person, the Ministry's document number, the date and the first sentence on the second page of the cabinet submission.

[37] The Ministry did not provide any sworn evidence that the cabinet submission is protected by solicitor client privilege. The cabinet submission is a recommendation from the Ministry to Cabinet. There is no evidence before me that the information, in the cabinet submission that I found could not be withheld under s. 12(1), is a confidential communication between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice. Absent further evidence from the Ministry in this case, I am not satisfied that the information in the cabinet submission, to which I have determined s. 12(1) does not apply, is a communication between a client and a legal advisor, or that this information relates to communications that are protected by solicitor client privilege. I am satisfied that disclosing this information in the cabinet submission would not directly reveal or allow one to accurately infer anything about legal advice or privileged communications. I therefore find that s. 14 does not apply to the information in the cabinet submission to which I have determined s. 12(1) does not apply, and that the Ministry must disclose this information.

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[25] Affidavit of KB at para. 7.

[26] *Buttes Gas and Oil v. Hammer (No. 3),* [1980] 3 All ER 475, at 484; *Sable Offshore Energy Inc. v. Ameron International*, 2013 NSSC 131 (CanLII), para 118.

CONCLUSION

[38] For the reasons given above, under s. 58 of FIPPA, I order that:

1. Subject to paragraph 3 below, the Ministry must refuse to disclose to the applicant the information withheld under s. 12(1) of FIPPA;

2. Subject to paragraph 3 below, the Ministry may refuse to disclose to the applicant the information withheld under s. 14 of FIPPA.

3. The Ministry must disclose the information highlighted in yellow on pages 105, 106, 108, 109, 110, 168, 169 and 323 in the records which accompany the Ministry's copy of this Order.

4. The Ministry must disclose the information highlighted in yellow before April 12, 2016 pursuant to s. 59 of FIPPA. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

February 26, 2016

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

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