



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F16-18

**BRITISH COLUMBIA PAVILION CORPORATION,
AND
MINISTRY OF JOBS, TOURISM AND SKILLS TRAINING**

Celia Francis
Adjudicator

March 31, 2016

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Summary: A journalist requested copies of Treasury Board submissions related to funding BC Place renovations. The adjudicator found that s. 12(1) (Cabinet confidences) applied to most of the information in dispute and that s. 22(1) (harm to personal privacy) applied to the rest. The adjudicator ordered the public bodies to withhold the information under these sections.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(1), 22(1), 22(2), 22(3)(d), 22(4); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: B.C.: Order F15-64, 2015 BCIPC 70; Order F14-49, 2014 BCIPC 53 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 01-02, 2001 CanLII 21556 (BC IPC); Order 02-50, 2002 CanLII 42488 (BC IPC); Order F15-59, 2015 BCIPC 62 (CANLII); Order F15-03, 2015 BCIPC 3 (CanLII); Order F10-05, 2010 BCIPC 8 (CANLII); Order F14-22, 2014 BCIPC 25 (CANLII); Order 01-18, 2001 CanLII 7416 (BC IPC); Order F09-24, 2009 CanLII 66956 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC).

Cases Considered: *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57; *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

INTRODUCTION

[1] This order arises out of a journalist's requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for records regarding funding of BC Place Stadium ("BC Place") renovations. The first request, to the Ministry of Jobs, Tourism and Skills Training ("MJTST"), was for the Treasury Board submissions and supporting documents (including the business case and cost-benefit analysis) regarding funding of BC Place renovations.¹ The second request, to the British Columbia Pavilion Corporation ("PavCo"), which owns and operates BC Place, was for the August 25, 2008 "Review of B.C. Place Business Plan 2010-2014" by Burgess Cawley Sullivan & Associates ("Burgess").²

[2] Each public body responded by disclosing records in severed form. MJTST told the journalist that it was applying s. 12(1) (Cabinet confidences), s. 17(1) (harm to financial interests), s. 21(1) (harm to third-party business interests) and 22(1) (harm to third-party personal privacy). PavCo told the journalist it was applying ss. 17(1) and 21(1).

[3] The journalist requested reviews by the Office of the Information and Privacy Commissioner ("OIPC") of the public bodies' decisions to withhold information. Mediation did not resolve the requests for review and the matters proceeded to inquiry (the "MJTST inquiry" and the "PavCo inquiry").

[4] After the OIPC issued the notices of inquiry, the Ministry of Transportation and Infrastructure ("MOTI")³ requested permission to participate in the PavCo inquiry and MJTST asked that PavCo be invited to participate in the MJTST inquiry. The OIPC agreed to both requests. At that time, the exceptions to disclosure also changed.⁴

[5] Although the inquiries took place separately, the applicant journalist is the same in both cases and the issues, records and public bodies overlap. I have therefore dealt with the two inquiries in this one order.

[6] The OIPC received inquiry submissions from the journalist, MJTST, MOTI and PavCo. The OIPC invited Burgess to participate in the inquiries but it declined.

¹ OIPC file F14-57093.

² OIPC File F14-56440.

³ When the journalist made his requests, MJTST was the ministry responsible for PavCo. MOTI is now the responsible ministry.

⁴ MJTST requested and received permission from the OIPC to add s. 13(1) as an issue in the MJTST inquiry. It also said it was no longer relying on s. 21. MOTI stated that it would argue that s. 12(1) requires PavCo to withhold information in the PavCo inquiry.

ISSUES

[7] The issues before me are these:

1. Is MJTST authorized by ss. 13(1) and 17(1) and required by ss. 12(1) and 22(1) to withhold information?
2. Is PavCo authorized by s. 17(1) and required by ss. 12(1) and 21(1) to withhold information?

[8] Under s. 57(1) of FIPPA, MJTST and PavCo have the burden of proving that the applicant is not entitled to access information under ss. 12(1), 13(1), 17(1) and 21(1). Under s. 57(2), the journalist has the burden of proving that disclosure of third-party personal information would not be an unreasonable invasion of third-party privacy.

DISCUSSION

Preliminary matter – late raising of s. 25

[9] In his response submissions, the journalist argued that ss. 25(1)(a) and (b) of FIPPA apply to the records. These sections read as follows:

- 25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.

[10] Although the journalist referred to both ss. 25(1)(a) and (b), his arguments related to s. 25(1)(b) which he said applies because

Citizens have a right to know about every aspect of the project that required \$514 million of public funds to renovate B.C. Place Stadium. This non-essential public building was allowed to jump the queue, ahead of [other projects] ...⁵

[11] PavCo argued that s. 25(1)(b) does not apply in this case.⁶

⁵ Journalist's submissions, paras. 32-35 in each case.

⁶ PavCo inquiry: PavCo's reply submission, para. 4.

[12] The journalist did not raise s. 25 during mediation of either of these reviews and it was not listed as an issue in the fact reports and notices of inquiry that the OIPC issued to the parties at the start of the inquiries. The journalist also did not seek permission to add this issue to the inquiries. He also did not provide any explanation as to why he did not raise it before this late stage nor why he should be permitted to do so now. Therefore, I will not consider the journalist's submission on s. 25 any further.⁷

Records in Dispute

[13] **MJTST inquiry** — Four Treasury Board submissions, along with their appendices and attachments, are at issue in the MJTST inquiry. Two Treasury Board submissions are dated July 8, 2008, the third is dated July 9, 2008 and the fourth is dated November 12, 2008.

[14] **PavCo inquiry** — The only record at issue in the PavCo inquiry is a document entitled "Review of BC Place Business Plan, 2010-2014", which is dated August 25, 2008. It is part of the attachment ("BC Place Roof Replacement Business Case") to the November 12, 2008 Treasury Board submission at issue in the MJTST inquiry.⁸

Cabinet confidences – s. 12(1)

[15] The public bodies argue that s. 12(1) applies to most of the withheld information.⁹ This section reads 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.

[16] Past orders and case law have commented on the public interest in maintaining Executive Council (*i.e.*, Cabinet) confidentiality, noting that this is reflected in the mandatory nature of the s. 12(1) exception:¹⁰

⁷ See Order F14-49, 2014 BCIPC 53 (CanLII), at para. 6, for a similar finding on the late raising of s. 25.

⁸ PavCo inquiry: PavCo's initial submission, para. 6; MOTI's initial submission, para. 4; PavCo's reply submission, para. 5. MJTST inquiry: PavCo's reply submission, paras. 4-7.

⁹ MJTST withheld pp. 107-110 and 121-123 under s. 22(1) but did not apply s. 12(1) to this information. I consider s. 22(1) below.

Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before 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.¹¹

[17] Past orders and case law also provide useful guidance on the meaning of “substance of deliberations”. For example, Order 01-02¹² referred to the BC Court of Appeal decision in *Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)* which held that:

... “substance of deliberations” refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. ...

... 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. ...¹³

[18] Order 01-02 went on to say that the test that emerges from *Aquasource* is whether information in dispute under s. 12(1) formed the basis for Cabinet deliberations.¹⁴ A number of other orders have also dealt with the interpretation of s. 12(1).¹⁵ I take the same approach here.

Is Treasury Board a Cabinet committee?

[19] Under s. 12(5) of FIPPA, the Lieutenant Governor in Council may designate a committee for the purposes of s. 12. Under the *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005, Treasury Board is so designated. I find that Treasury Board is a committee of the Executive Council for the purposes of s. 12(1).

Would disclosure of the information reveal the substance of deliberations?

¹⁰ For example, see Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 69, citing *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 [*Babcock*].

¹¹ *Babcock*, at para. 18.

¹² 2001 CanLII 21556 (BC IPC).

¹³ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) [*Aquasource*]. at para. 39.

¹⁴ Order 01-02, 2001 CanLII 21556 (BC IPC), at para. 13.

¹⁵ See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, Order 02-50, 2002 CanLII 42488 (BC IPC), and more recently Order F15-59, 2015 BCIPC 62 (CANLII).

[20] MJTST and MOTI say that the ministry responsible for PavCo¹⁶ prepared and submitted the records in issue to Treasury Board for its decision on funding requests related to BC Place renovations.¹⁷

[21] The already-disclosed parts of the Treasury Board submissions state that they were created for Treasury Board's decision. The ministries' evidence is that the four Treasury Board submissions (one of which includes the record in issue in the PavCo inquiry) were prepared for, and submitted to, Treasury Board for its decision on various PavCo funding issues and that Treasury Board made a decision on those issues.¹⁸ The withheld information consists of advice, recommendations, considerations, opinions, analyses and options for the PavCo funding issues, including the implications of those options. I am satisfied that this information (*i.e.*, the Treasury Board submissions and their appendices and attachments) formed the basis for the deliberations of Treasury Board, a committee of Executive Council, and that its disclosure would reveal the substance of deliberations of that committee.

Does s. 12(2)(c) apply?

[22] Section 12(2)(c) states that s. 12(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] In Order 01-02,¹⁹ former Commissioner Loukidelis discussed the meaning of s. 12(2)(c):

The previous Commissioner [Flaherty] acknowledged, as I do, that it can be difficult to distinguish between information that forms the "substance of deliberations" and that which forms "background explanations or analysis". He acknowledged that in some cases

¹⁶ The former Ministry of Tourism, Culture and the Arts and the current MJTST.

¹⁷ MJTST inquiry: MJTST's initial submission, paras. 4.13-4.30; Manderville affidavit, paras. 6-23. PavCo inquiry: MOTI's initial submission, paras.15-32.

¹⁸ See affidavit of Brad Manderville, Strategic Advisor, Capital, Treasury Board, and attached exhibits: relevant Treasury Board minutes, Treasury Board Chair decision letters, Cabinet Record of Decision.

¹⁹ 2001 CanLII 21556 (BC IPC).

these categories may be interchangeable. In Order No. 48-1995, he nonetheless expressed the view (at p.13) 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.²⁰

[24] The Court in *Aquasource* confirmed that ss. 12(1) and 12(2)(c) cannot be read as watertight compartments and that Commissioner Flaherty correctly interpreted s. 12(2)(c) in relation to s. 12(1).²¹

[25] The three public bodies argue that s. 12(2)(c) does not apply to the withheld information because none of it is “background information”.²² The journalist submits that s. 12(2)(c) applies for the following reasons: the records are seven years old; several of the funding announcements discussed in the records were made in 2008 and 2009; the government admitted in October 2009 that the project’s budget was \$563 million; and BC Place stadium re-opened in 2011. He also pointed to Order No. 48-1995 where former Commissioner Flaherty said, at p. 10, “I do not automatically assume that Cabinet submissions in all cases would ‘reveal’ the substance of Cabinet deliberations without at least some inferential evidence”.²³ PavCo disputed the journalist’s arguments.²⁴

[26] I acknowledge that the decision to renovate BC Place stadium was made more than five years ago, and that it was made public and has been implemented. However, in my view, the purpose of the severed information was not to present “background explanations and analysis”, as is required in order for s. 12(2)(c) to apply. Rather, the information at issue consists of advice, recommendations, considerations and other information that formed the basis of Treasury Board deliberations. I find that s. 12(2)(c) does not apply to it.

²⁰ At para. 15.

²¹ *Aquasource*, at paras. 50-51.

²² MJTST inquiry: MJTST’s initial submission, para. 4.30; PavCo’s reply submission, paras. 4-7. PavCo inquiry: MOTI’s initial submission, para. 32; PavCo’s reply submission, para. 5.

²³ MJTST inquiry: journalist’s submission, paras. 42-46.

²⁴ MJTST inquiry: PavCo’s reply submission, paras. 5-6.

Conclusion on s. 12(1)

[27] I find that s. 12(1) applies to the severed information in issue and that s. 12(2)(c) does not. MJTST and PavCo have, in my view, met their burden of proof regarding s. 12(1). I find that they are required to withhold the severed information under s. 12(1).²⁵

Sections 13(1), 17(1) and 21(1)

[28] MJTST and PavCo applied ss. 13(1), 17(1) and 21(1), in various combinations, to the information to which they applied s. 12(1). As I found above that s. 12(1) applies to this information, it is unnecessary for me to decide if ss. 13(1), 17(1) and 21(1) also apply to the same information.

Harm to third-party personal privacy – s. 22(1)

[29] MJTST withheld a few pages of information under s. 22(1).²⁶ This is the only exception it applied to these pages.

Approach to applying s. 22(1)

[30] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

Numerous orders have considered the approach to s. 22 of FIPPA, which states that a “public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.” This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party’s personal privacy.²⁷

²⁵ This finding does not apply to pp. 107-110 and 121-123. MJTST withheld these pages under s. 22(1) only.

²⁶ Pages 107-110 and 121-123. PavCo did not rely on s. 22 to withhold any information from records.

²⁷ 2015 BCIPC 3 (CanLII), at para. 58.

[31] I have taken the same approach in considering the s. 22 issues here.

Is the information “personal information”?

[32] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information.²⁸ The journalist questions whether the information being withheld under s. 22 is “personal information”.²⁹ MJTST did not address this issue.

[33] The information in issue appears in the résumés of identifiable individuals. It is information about them and I find that it is “personal information”.

Does s. 22(4) apply?

[34] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy. MJTST did not address this provision. The journalist referred to s. 22(4)(d) and argued that research and the gathering of statistics “is an inherent purpose of any journalist”.³⁰

[35] Section 22(4)(d) states that disclosure of information is not an unreasonable invasion of a third-party’s personal privacy if the disclosure is for a research or statistical purpose and is in accordance with s. 35. Section 35 of FIPPA permits a public body to disclose personal information for a research purpose, under specified conditions. The conditions include the requirement that an applicant sign a research agreement with the public body. The journalist did not explain how he might use the personal information in issue for a research purpose. There is also no evidence that he has a research agreement with MJTST. I find that s. 22(4)(d) does not apply to the personal information in issue here.

[36] Other than s. 22(4)(d), the journalist did not explain how any of the other provisions of s. 22(4) apply. He did, however, refer to Order F10-05³¹ as support for his argument that s. 22(4) applies.³²

²⁸ Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.” See Schedule 1 of FIPPA for this definition.

²⁹ MJTST inquiry: journalist’s submission, para. 69.

³⁰ MJTST inquiry: journalist’s submission, para. 76.

³¹ 2010 BCIPC 8 (CANLII).

Order F10-05 does not assist the journalist. My discussion there was in the context of a request for bonuses paid to executives of the Insurance Corporation of BC. The information in this case is different and the considerations in Order F10-05 do not apply here. I see no basis for the application of any of the s. 22(4) provisions here. I find that s. 22(4) does not apply to the withheld information in issue.

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[37] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party's personal privacy. MJTST argued that s. 22(3)(d) applies to the withheld personal information. The journalist did not deal with s. 22(3).

[38] The relevant provision reads as follows:

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

[39] I find that the résumés relate to the educational and employment history of the third parties in question. This finding is consistent with other BC orders where s. 22(3)(d) was found to apply to the personal information in résumés.³³ I find that s. 22(3)(d) applies to the withheld information, so its disclosure is presumed to be an unreasonable invasion of third-party personal privacy.

Relevant circumstances – s. 22(2)

[40] In determining whether disclosure of personal information is an unreasonable invasion of personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set out in s. 22(2). At this point, the presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy may

³³ Order F14-22, 2014 BCIPC 25 (CanLII); Order 01-18, 2001 CanLII 7416 (BC IPC); Order F09-24, 2009 CanLII 66956 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC).

³³ Order F14-22, 2014 BCIPC 25 (CanLII); Order 01-18, 2001 CanLII 7416 (BC IPC); Order F09-24, 2009 CanLII 66956 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC).

be rebutted. The journalist did not deal with this issue. MJTST argued that no relevant factors under s. 22(2) rebut the presumption.

[41] I agree with the Ministry on this point. The project is long finished and, in my view, disclosure is not, at this point, desirable for public scrutiny of the public bodies under s. 22(2)(a). Nor do I consider that any of the other circumstances in s. 22(2) is relevant here.

Conclusion on s. 22(1)

[42] I found that the information withheld under s. 22 is personal information. I also found s. 22(4) does not apply to it, but that s. 22(3)(d) does. I also found that no relevant factors favouring disclosure under s. 22(2) apply. I find the applicant has not met his burden of proof in this case and the s. 22(3)(d) presumption is not rebutted. I find that s. 22(1) requires that all of the personal information in dispute be withheld.

CONCLUSION

[43] For reasons set out above, under s. 58(2)(c), I make the following orders:

1. I require MJTST and PavCo to withhold the information they withheld under s. 12(1) of FIPPA.
2. I require MJTST to withhold the information it withheld under s. 22(1) of FIPPA.

March 31, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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