



OFFICE OF THE
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Order F16-22

(Reconsideration of Order F14-20)

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Celia Francis
Adjudicator

April 25, 2016

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Summary: In a court-ordered reconsideration of Order F14-20, the adjudicator found that s. 12(1) applies to the withheld information on the tolling framework for the Port Mann Bridge. The adjudicator ordered the Ministry to withhold this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c); 25(1)(b); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: B.C.: Order F14-20, 2014 BCIPC 23 (CanLII); 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 F16-18, 2016 BCIPC 20 (CanLII); Order No. 48 1995, [1995] B.C.I.P.C.D. No. 21; Order F11-10, 2011 BCIPC 13 (CanLII); Investigation Report F15-02, 2015 BCIPC No. 30.

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); *Clubb v. Saanich (District)*, 1996 CanLII 8417 (BCSC).

INTRODUCTION

[1] This order is a court-ordered reconsideration of part of Order F14-20.¹ In that order, the adjudicator found that s. 12(1) (Cabinet confidences) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) applied to some but not all of the information in dispute.

ISSUES

[2] The issues before me are these:

1. Does s. 12(1) of FIPPA require the Ministry of Transportation and Infrastructure (“Ministry”) to withhold information?
2. Does s. 13(1) of FIPPA authorize the Ministry to withhold information?

[3] Under s. 57(1), the Ministry has the burden of proving that the applicant (“journalist”) has no right of access to the record under s. 12(1) and s. 13(1).

DISCUSSION

Preliminary matter – late raising of s. 25

[4] In his response submission, the journalist referred briefly to s. 25(1)(b) of FIPPA.² This section reads 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

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

[5] Section 25(1)(b) overrides all of FIPPA’s discretionary and mandatory exceptions to disclosure. Consequently, there is a high threshold before it can properly come into play.³ Previous orders have explained this concept as follows: “... the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (*i.e.*, unmistakably) in the public interest ...”⁴ More recently, Commissioner Denham expressed the view that “clearly means something more

¹ 2014 BCIPC 23 (CanLII).

² Journalist’s submission, para.17.

³ See Investigation Report F15-02, 2015 BCIPC No. 30, pp. 28-29.

⁴ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, citing Order No. 165-1997, [1997] B.C.I.P.C.D. No. 22. Emphasis in original.

than a ‘possibility’ or ‘likelihood’ that disclosure is in the public interest.” She added that s. 25(1)(b) “requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.”⁵

[6] The journalist did not elaborate on his reference to s. 25(1)(b), although he did argue more generally that the information in dispute should be disclosed because the bridge has failed to meet financial projections. In his view, government therefore ought to show if it performed due diligence in its financial forecasts for the bridge.⁶ The Ministry objected to the journalist raising this issue at the inquiry stage, noting that it was not at issue here.⁷

[7] Past orders have said that a party may raise a new issue at the inquiry stage only if given permission to do so.⁸ The journalist did not raise s. 25 during mediation of this review and it was not listed as an issue in the fact report and notice of inquiry that the OIPC issued to the parties at the start of the inquiry. The journalist also did not seek permission to add this issue to the inquiry. 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.

[8] I have nevertheless considered the journalist’s reference to s. 25, as well as his general arguments on the government’s duty to be transparent and accountable. I accept that, in light of subsequent events, the public may be interested in the options and implications for the tolling framework that Cabinet considered. However, “‘public interest’ is not merely that which the public may be interested in learning or defined by public curiosity”.⁹ My review of the withheld information does not suggest to me that its disclosure is “plainly and obviously in the public interest”. There is therefore, in my view, no basis for calling s. 25(1)(b) into play in this case.

Background

[9] The Transportation Investment Corporation (“TI Corp”) is a provincial Crown corporation. Under the 2010 Port Mann Highway 1 Bridge Concession Agreement (“Concession Agreement”) with the Province of British Columbia, TI Corp is responsible for managing and implementing the Port Mann/Highway 1 Improvement Project (“Project”),¹⁰ including the design, construction, operation and rehabilitation of the bridge. Under the Concession Agreement, TI Corp has

⁵ Investigation Report F15-02, 2015 BCIPC No. 30, pp. 28-29.

⁶ Journalist’s submission, para. 5.

⁷ Ministry’s reply submission, para. 4.

⁸ See, for example, Order F11-10, 2011 BCIPC 13 (CanLII), at paras. 16-19. See also orders cited at footnote 4 of this order.

⁹ Investigation Report F15-02, 2015 BCIPC No. 30, p. 30. See also *Clubb v. Saanich (District)*, 1996 CanLII 8417 (BCSC).

¹⁰ The Ministry is responsible for the Port Mann Bridge.

financial responsibility for the operating and maintenance costs of the Project until 2090. It is also permitted to impose tolls on bridge users until March 2050. In July 2012, Treasury Board and Cabinet considered options for charging tolls for use of the bridge (the “tolling framework”). In mid-September 2012, the Minister of Transportation and Infrastructure announced that the initial toll for the Port Mann Bridge would be a “low introductory rate” of \$1.50 per passenger vehicle, to encourage drivers to register.¹¹ According to the journalist, this was a 50% reduction of the toll.¹²

Chronology of proceedings

[10] In September 2012, the journalist made the following request under FIPPA to the 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.

[11] The Ministry responded by disclosing three records in severed form. It told the journalist it was applying s. 12(1) and s. 13(1) (advice or recommendations) to the withheld information. The journalist asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the Ministry’s decision to deny him access to information. Mediation did not resolve the matter and it proceeded to inquiry. Order F14-20 decided that inquiry. The adjudicator found there that s. 12(1) applied to some of the information and ordered the Ministry to withhold it. He also found that s. 12(1) did not apply to some of the information and ordered the Ministry to disclose it (“disclosure order”).¹³

[12] The Ministry then began judicial review proceedings respecting the disclosure order. By consent, the Court ordered that the disclosure order be quashed and remitted to the OIPC for a re-hearing and reconsideration of the question of whether s. 12(1) requires or s. 13(1) authorizes the Ministry to withhold information.

[13] The OIPC conducted a new inquiry in which the parties were invited to make new submissions. The OIPC received new submissions from the Ministry and the journalist.

¹¹ Ministry’s initial submission, paras. 4.01-4.11; Affidavit of Max Logan, Vice President, Tolling and Customer Engagement, TI Corp, paras. 4-5.

¹² Journalist’s submission, para. 2. I gather the journalist means it was a 50% reduction of a previously-announced toll rate.

¹³ In light of his findings regarding s. 12, the adjudicator did not need to consider s. 13.

Records in Dispute

[14] The three records in issue here concern the tolling framework for the Port Mann Bridge. They are:

- a Treasury Board submission
- a PowerPoint presentation
- an Analysis Document

[15] The Ministry stated that it has since concluded that some of the withheld information may be disclosed.¹⁴ I do not, therefore, consider this information here. However, the Ministry argued, s. 12(1) and s. 13(1) apply to the remainder.¹⁵ This is the information in dispute.

Cabinet confidences – s. 12(1)

[16] The Ministry said that the information in the Treasury Board submission was prepared for submission, and was submitted, to Treasury Board. It also said that the information in the PowerPoint presentation was prepared for submission, and was submitted, to the Priorities and Planning Committee. The Ministry further argued that information in the Analysis Document formed “a key part in the development” of the Treasury Board submission and the PowerPoint presentation. The Ministry argued that disclosure of the disputed information in these records would reveal the substance of deliberations of Cabinet committees and that s. 12(1) therefore applies to it.¹⁶ The journalist did not address s. 12(1).

[17] Section 12(1) 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.

[18] 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:¹⁷

¹⁴ The Ministry explained which information it had decided to disclose but did not say why it had decided to disclose it. However, it is some of the information the adjudicator ordered disclosed in Order F14-20, because he found that s. 12(1) did not apply to it.

¹⁵ Ministry’s initial submission, para. 4.12 (a).

¹⁶ Ministry’s initial submission, para. 4.29.

¹⁷ *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 [*Babcock*]. See also Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 69, citing *Babcock*.

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.¹⁸

[19] Past orders and case law also provide useful guidance on the meaning of “substance of deliberations”. For example, the BC Court of Appeal, in *Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)*,¹⁹ 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. ...²⁰

[20] Order 01-02²¹ said that the test that emerges from *Aquasource* is whether information in dispute under s. 12(1) formed the basis for Cabinet deliberations.²² A number of other orders have also dealt with the interpretation of s. 12(1).²³ I take the same approach here.

Are Treasury Board and the Priorities and Planning Committee Cabinet committees?

[21] 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, both Treasury Board and the Priorities and Planning Committee are so designated. I find that they are committees of the Executive Council for the purposes of s. 12(1).

Would disclosure of the information reveal the substance of deliberations?

[22] **Treasury Board submission** — The Ministry said that the Treasury Board submission sought approval from Treasury Board regarding a final tolling framework for the new Port Mann Bridge. The Ministry’s evidence is that Ministry

¹⁸ *Babcock*, at para. 18.

¹⁹ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) [*Aquasource*].

²⁰ *Aquasource*, at para. 39. See also Order 02-01, 2001 CanLII 21556 (BC IPC), which referred to this finding.

²¹ Order 01-02, 2001 CanLII 21556 (BC IPC).

²² At para. 13.

²³ 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), and Order F16-18, 2016 BCIPC 20 (CanLII).

and TI Corp staff prepared this record for submission to Treasury Board and that it was submitted to Treasury Board on July 26, 2012.²⁴

[23] The already-disclosed information in the record states that TI Corp has proposed a tolling framework for the new Port Mann Bridge and that Treasury Board approval is required to proceed. The information in dispute consists of recommendations, advice and options for the tolling framework, as well as financial and other implications of those options. I am satisfied that this information formed the basis for the deliberations of Treasury Board, a committee of the Executive council. I find that its disclosure would reveal the substance of deliberations of that committee.

[24] **PowerPoint presentation** — The Ministry said that TI Corp and Ministry staff prepared the PowerPoint presentation. The Ministry's evidence is that the PowerPoint presentation was prepared for, and presented to, the Priorities and Planning Committee on July 16, 2012 and that this Committee considered the PowerPoint presentation as part of its deliberations concerning the tolling framework for the Port Mann Bridge.²⁵

[25] The information in dispute consists of advice, recommendations, considerations, options and implications of those options regarding the proposed Port Mann Bridge tolling framework. I am satisfied that this information formed the basis for the deliberations of the Priorities and Planning Committee, a committee of the Executive council. I find that its disclosure would reveal the substance of deliberations of that committee.

[26] **Analysis Document** — The Ministry said that the Analysis Document was not presented directly to Treasury Board or the Priorities and Planning Committee. However, the Ministry said that TI Corp staff developed the Analysis Document for the Ministry's consideration and use in developing the PowerPoint presentation and Treasury Board submission.²⁶ The Ministry's evidence on development and use of the Analysis Document is as follows:

- TI Corp staff developed proposed tolling options for the Port Mann Bridge for TI Corp's Board of directors, with the expectation that the information would be used to advise Cabinet

²⁴ Affidavit of Kevin Richter, Assistant Deputy Ministry, Highways Department, Ministry of Transportation and Infrastructure, para. 6; Affidavit of Alexander Chandler, Executive Director, Economic Development, Treasury Board Staff, paras. 6-8; Exhibit A to Chandler affidavit (Treasury Board minute referring to Treasury Board decision made in relation to this Treasury Board submission).

²⁵ Affidavit of Elizabeth MacMillan, Deputy Cabinet Secretary, Office of the Premier, paras. 8-9; Exhibit B, Record of Decision of Cabinet confirming that the PowerPoint presentation was presented to the Priorities and Planning Committee on July 16, 2012.

²⁶ Ministry's initial submission, paras. 4.48-4.51.

- following the Board's consideration of the Analysis Document, TI Corp staff submitted it, on a confidential basis, to the Ministry for its use in formulating its submissions to the Priorities and Planning Committee and Treasury Board
- TI Corp staff worked with Ministry staff to develop the PowerPoint presentation and the Treasury Board submission, based on information in the Analysis Document
- the Priorities and Planning Committee and Treasury Board deliberated and made decisions on the tolling framework²⁷

[27] The disputed information in the Analysis Document consists of details, opinions, advice and recommendations on the tolling options, considerations and financial and other implications of those options. I am satisfied that the Analysis Document was prepared for use, and was used, in formulating the PowerPoint Presentation and Treasury Board submission. I am thus satisfied that the disputed information in the Analysis Document formed the basis for the deliberations of Treasury Board and the Priorities and Planning Committee, committees of the Executive Council. I find that its disclosure would allow the drawing of accurate inferences about the substance of deliberations of those committees.

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

[28] 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.

[29] In Order 01-02,²⁸ 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 these categories may be

²⁷ Logan Affidavit, paras. 7-8; Richter Affidavit, para. 11.

²⁸ 2001 CanLII 21556 (BC IPC).

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.²⁹

[30] 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).³⁰

[31] The Ministry argued that s. 12(2)(c) does not apply to the information in dispute as it relates directly to the issues on which Treasury Board and the Priorities and Planning Committee deliberated.³¹ The journalist argued that the Ministry applied s. 12(1) too broadly and that it does not appear to have considered whether any of the disputed information falls under s. 12(2)(c). He argued that all three parts of s. 12(2)(c) apply to the disputed information, saying, for example, that the decision to charge a toll on the bridge pre-dates 2011. He also pointed to Order No. 48-1995³² where former Commissioner Flaherty said, “... it is my judgment that documents prepared for submission to Cabinet do not *automatically* reveal the substance of Cabinet deliberations and must be considered for release to an applicant on their individual merits under the language of section 12(2)(c).”³³ The Ministry disputed the journalist’s arguments.³⁴

[32] I recognize that the decision to impose a toll on the Port Mann Bridge was made public and has been implemented, although five years have not yet passed since that decision was made. 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. For example, it is not factual and does not discuss background explanations. It is also not incidental or useful background to the issues.³⁵

[33] On the contrary, I agree with the Ministry that the information in dispute relates directly to the issues that the two Cabinet committees considered. Rather it consists of the very options, analyses, implications, advice, recommendations and considerations on which Treasury Board and the Priorities and Planning Committee deliberated. I find that s. 12(2)(c) does not apply to it.

²⁹ At para. 15.

³⁰ *Aquasource*, at paras. 50-51.

³¹ Ministry’s initial submission, para. 4.47.

³² [1995] B.C.I.P.C.D. No. 21, at p. 13.

³³ Journalist’s submission, paras. 22-27. Emphasis in original.

³⁴ Ministry’s reply submission, paras. 5-9.

³⁵ The Ministry has, in my view, already disclosed any information to which s. 12(2)(c) applies, or will disclose it, in the case of the information it has now decided may be disclosed.

Conclusion on s. 12(1)

[34] I find that s. 12(1) applies to the information in dispute and that s. 12(2)(c) does not. The Ministry has, in my view, met its burden of proof regarding s. 12(1). I find that the Ministry is required to withhold the disputed information under s. 12(1).

Section 13(1) – Advice or recommendations

[35] The Ministry applied s. 13(1) to information to which it also applied s. 12(1). As I found above that s. 12(1) applies to this information, it is unnecessary for me to decide if s. 13(1) applies to the same information.

CONCLUSION

[36] For reasons set out above, under s. 58(2)(c) of FIPPA, I require the Ministry to refuse to disclose to the applicant the information it withheld under s. 12(1) of FIPPA.

[37] I remind the Ministry to provide the applicant with a copy of the records, severing only the information that I found must be withheld under s. 12(1). I also ask that it simultaneously copy the Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

April 25, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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