



Order F23-64

## MINISTRY OF TRANSPORTATION & INFRASTRUCTURE

Elizabeth Vranjkovic  
Adjudicator

August 16, 2023

CanLII Cite: 2023 BCIPC 74  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 74

**Summary:** In Order F23-51, the adjudicator ordered the Ministry of Transportation & Infrastructure (Ministry) to produce some information to the Office of the Information and Privacy Commissioner so that she could make a decision respecting the public body's application of s. 16(1)(a)(iii) and (c) (harm to intergovernmental relations) to that information. The Ministry complied and produced that information for the adjudicator's review. In this order, the adjudicator determined that the Ministry was authorized to withhold some of the information that remained in dispute under s. 16(1)(a)(iii) but ordered the Ministry to disclose the balance of the information to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, s. 16(1), 16(1)(a)(iii) and 16(1)(c).

### INTRODUCTION

[1] An individual (applicant) requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a variety of records containing information about him.

[2] The Ministry of Transportation and Infrastructure (Ministry) disclosed most of the responsive records to the applicant but refused to disclose some information under several exceptions to disclosure in FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation by the OIPC did not resolve the issues in dispute and they proceeded to inquiry.

[4] On June 28, 2023, I issued Order F23-51. I determined that the Ministry was not authorized to withhold three email chains and two attachments to those

email chains under s. 14.<sup>1</sup> The Ministry was also withholding those email chains and attachments under s. 16(1) but did not provide them for my review in the first instance. As a result, I ordered the Ministry to produce for my review the email chains and attachments so that I could determine whether the Ministry was authorized to withhold them under s. 16(1).

[5] In accordance with Order F23-51, the Ministry provided me with a copy of the email chains and attachments. With those records now available to review, I proceed in this order to resolve the remaining issues in this inquiry.

***Preliminary matter – additional submissions on s. 16(1)***

[6] During the inquiry process, the Ministry requested an opportunity to provide additional submissions on s. 16(1) in the event I did not uphold its application of s. 14.<sup>2</sup> Additionally, the Ministry provided additional information about the email chains and attachments in its letter enclosing those records for my review. For the reasons that follow, I have not considered this additional information in my decision, nor will I provide the Ministry a further opportunity to submit evidence about s. 16(1).

[7] First, I am satisfied that the evidence before me is sufficient to make a determination about the application of s. 16(1). Second, public bodies must, as a rule, put their best foot forward from the very start and tender whatever necessary evidence there is to meet its case.<sup>3</sup> Finally, in my view, it would be unfair to consider the additional information provided by the Ministry because the applicant has not seen or had a chance to respond to this information.

**ISSUE**

[8] The issue to be decided in this inquiry is whether s. 16(1) authorizes the Ministry to refuse to disclose the information in dispute.

[9] Under s. 57(1), the Ministry, as the public body in this case, has the burden of proving that the applicant has no right to access the information in dispute under s. 16(1).

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<sup>1</sup> Whenever I refer to sections throughout this order, I am referring to sections of FIPPA.

<sup>2</sup> Public body's initial submission at para 139.

<sup>3</sup> Order F18-18, 2018 BCIPC 21 at para 17.

## DISCUSSION

### ***Background and records at issue<sup>4</sup>***

[10] The applicant acted as a representative of an Indigenous community (the Nation) in its consultations with various public bodies on numerous matters, including the Coastal GasLink pipeline project (Coastal GasLink).

[11] The Ministry withheld the entirety of three overlapping email chains and two attachments to those email chains under ss. 16(1)(a)(iii) and (c).<sup>5</sup> The first three emails in each email chain are between representatives of government entities involved in Coastal GasLink and representatives of the Nation. The balance of the emails in each email chain are between representatives of several government entities. The attachments are an arbitration decision and a letter.

### ***Harm to intergovernmental relations, s. 16(1)***

[12] The BC Legislature recently amended ss. 16(1)(a)(iii) and (c) of FIPPA and the related definitions in Schedule 1 of FIPPA. These amendments took effect on November 25, 2021, after the Ministry made its decision about what information to withhold, but before the Ministry made its submissions.

[13] In Order F23-51, I determined that the applicable language was the language that was in effect at the time the Ministry made its decision about what information to withhold. In doing so, I relied on the well-established principle that where a legislative amendment affects substantive rights it is presumed to take effect going forward only unless there is evidence that the Legislature intended the amendment to apply to actions that took place before it came into effect. I found there was no evidence of such an intention in the case of this amendment.<sup>6</sup> For the same reasons, in considering the Ministry's application of s. 16(1) to the information that remains in dispute, I rely on the pre-amendment language.

[14] I will first consider s. 16(1)(a)(iii) and then, if necessary, consider s. 16(1)(c).

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<sup>4</sup> I have set out the background in more detail in Order F23-51.

<sup>5</sup> The email chains begin with the same six emails. One email chain ends at the sixth email and the other two email chains have different seventh emails.

<sup>6</sup> *R v Dinely*, 2012 SCC 58 at para 10. This approach was adopted in Order F23-06, 2023 BCIPC 7 at para 60 and Order F23-41, 2023 BCIPC 49 at para 111.

*Harm the conduct of relations with an aboriginal government,*  
s. 16(1)(a)(iii)

[15] Section 16(1)(a)(iii) allows a public body to refuse to disclose information if the disclosure could reasonably be expected to harm the conduct of relations with an Aboriginal government.<sup>7</sup>

[16] The Ministry says that disclosing the information in dispute could reasonably be expected to harm the conduct of relations with the Nation.<sup>8</sup> In paragraphs 133-135 of Order F23-51, I found that the Nation qualifies as an “aboriginal government” under FIPPA. That was because I could see from the records that the Nation is a band as defined in the *Indian Act* and that it was exercising representative functions in communicating with public bodies about Coastal GasLink. I adopt that finding here. As a result, the question under s. 16(1)(a)(iii) is whether disclosing the information in dispute could reasonably be expected to harm the conduct of relations with the Nation.

[17] The Ministry provided extensive submissions about the history and importance of the relationship between the Crown and Indigenous peoples. The Ministry explains that “these sometimes fragile relationships are the result of a history of mistrust, but are essential for the Province to fulfil its obligations to Indigenous peoples.” The Ministry says that in order to build trusting relationships, Indigenous groups must have confidence in their communications with the Province and must not see any indicia of bad faith.<sup>9</sup>

[18] More specifically, the Ministry says that releasing sensitive information in the email chains would be harmful to the Province’s relationship with and negotiations with the Nation.<sup>10</sup> The Ministry also says that releasing some email communications which include representatives from the Nation could harm the provincial government’s relationship with the Nation by breaching the trust and confidence necessary to engage in meaningful and successful negotiations.<sup>11</sup>

[19] In coming to my decision on s. 16(1)(a)(iii), I am mindful of the well-established principle that, under FIPPA, disclosure of information to an applicant in response to an access request is in effect disclosure to the world.<sup>12</sup> I also

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<sup>7</sup> The 2021 FIPPA amendments replace the term “aboriginal government” in s. 16(1)(a)(iii) with “Indigenous governing entity.”

<sup>8</sup> Public body’s initial submission at para 93.

<sup>9</sup> Public body’s initial submission at paras 117-128.

<sup>10</sup> Public body’s initial submission at para 136; affidavit #1 of the Director, Indigenous Relations, Highways & Regional Services Division of the Ministry (Director) at para 32; affidavit #1 of the Regional Executive Director, Northern Region, Highways & Regional Services Division of the Ministry (Regional Executive Director) at para 34.

<sup>11</sup> Public body’s initial submission at para 133; affidavit #1 of the Director at para 29; affidavit #1 of the Regional Executive Director at para 33.

<sup>12</sup> Order F22-31, 2022 BCIPC 34 at para 80.

accept the Ministry's submission regarding the importance and nature of the Province's relationships with Indigenous groups.

[20] I can see that the arbitration decision and the letter attached to the email chain were provided by the Nation to a provincial government employee and that they are documents that were initially sent from an individual outside of government to the Nation. I can also see that they relate to sensitive matters. Based on the contents of the attachments and the context in which they are attached to the email chains, I am satisfied that the Nation would expect them to be kept in confidence. I conclude that disclosing the attachments could reasonably be expected to harm the conduct of relations with the Nation.

[21] I also find that disclosing the substantive content of the emails in the email chains could reasonably be expected to harm the conduct of relations with the Nation. I can see that some of the content relates to a potentially contentious matter. I am not satisfied that the substantive content of the emails is the type of information that the Nation would expect to be openly disclosed. I cannot say more without disclosing the information in dispute.

[22] With respect to the balance of the information in the email chains, I am not persuaded that disclosure could reasonably be expected to harm the conduct of relations with the Nation. For example, I do not see how disclosing the title of the attachments could reasonably be expected to harm the conduct of relations with the Nation when this information has already been revealed in the revised table of records attached to the lawyer's supplemental affidavit. Additionally, some of this information does not, in my view, reveal anything significant about the Nation or any public body. This information includes:

- Page numbers;
- The date and times of emails;
- The names, email addresses, and email signatures of people involved in the email chains; and
- Phrases commonly used in email correspondence, such as greetings.

[23] I do not see how disclosing any of this information could reasonably be expected to harm the conduct of relations with the Nation. Therefore, I find that s. 16(1)(a)(iii) does not apply to this information.

*Harm the conduct of negotiations relating to aboriginal self-government or treaties, s. 16(1)(c)*

[24] I found some information in the email chains withheld under s. 16(1) could not be withheld under s. 16(1)(a)(iii). Therefore, I will consider whether the Ministry can withhold it under s. 16(1)(c).

[25] Section 16(1)(c) allows a public body to refuse to disclose information if the disclosure could reasonably be expected to harm the conduct of negotiations relating to aboriginal self-government or treaties.

[26] The Ministry has not identified any negotiations relating to aboriginal self-government or treaties that might be at risk of harm. Moreover, I do not see how disclosing the type of insignificant information that I found could not be withheld under s. 16(1)(a)(iii) could reasonably be expected to harm the conduct of negotiations relating to aboriginal self-government or treaties. As a result, I find that s. 16(1)(c) does not apply to the information I found could not be withheld under s. 16(1)(a)(iii).

*Summary, s. 16(1)*

[27] I conclude that disclosing the attachments and some of the information in the emails could reasonably be expected to harm the conduct of relations with the Nation, which qualifies as an aboriginal government. Therefore, the Ministry is authorized to withhold that information under s. 16(1)(a)(iii).

[28] However, I conclude that disclosing the rest of the information at issue in the emails could not reasonably be expected to harm the conduct of relations with the Nation or harm the conduct of negotiations relating to aboriginal self-government or treaties. Therefore, the Ministry is not authorized to withhold that information under s. 16(1)(a)(iii) or s. 16(1)(c).

## **CONCLUSION**

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

1. Subject to item 2 below, the Ministry is authorized to withhold the information in dispute under s. 16(1).
2. The Ministry is not authorized to refuse to disclose the information I have highlighted on pages 170-173, 222-225 and 235-238 of the records provided to the Ministry with this order.
3. I require the Ministry to give the applicant access to the highlighted information.
4. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the records it provides to the applicant.

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[30] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **September 28, 2023**.

August 16, 2023

**ORIGINAL SIGNED BY**

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Elizabeth Vranjkovic, Adjudicator

OIPC File No.: F20-82765