



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F07-12

MINISTRY OF FINANCE

Celia Francis, Senior Adjudicator

July 10, 2007

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Summary: Campbell River Indian Band requested records related to its proposed destination casino project. Ministry disclosed some records and withheld and severed others under ss. 12, 13, 14, 16, 17 and 22. Ministry required to withhold information under s. 12(1) and authorized to withhold information under s. 13(1) and s. 14. Ministry ordered to disclose some information that it withheld under s. 17 and the information it withheld under s. 22(1). Ministry also ordered to conduct another search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 12(1), 13(1), 14, 17(1) and 22(1).

Authorities Considered: **B.C.:** Order F07-11, [2007] B.C.I.P.C.D. No. 16; Order F07-13, [2007] B.C.I.P.C.D. No. 18; Order F07-14, [2007] B.C.I.P.C.D. No. 19; Order 00-15, [2000] B.C.I.P.C.D. No. 18; Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

Cases Considered: *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

1.0 INTRODUCTION

[1] This order is a companion to three others—Orders F07-11,¹ F07-13² and F07-14³—involving this applicant, the Campbell River Indian Band (“CRIB”), and three other public bodies, issued concurrently with this order. CRIB submitted the same request for records, related to its proposed destination casino project, to all four public bodies. I reproduce the request in full in Order F07-11. That order also sets out relevant background information on CRIB’s casino project.

[2] The Ministry of Finance (“Ministry”) responded by disclosing some records and withholding information and records under ss. 12, 13, 14, 16, 17 and 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). CRIB requested a review of the Ministry’s decision to deny access and also complained that the Ministry had not retrieved all responsive records. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of FIPPA. This Office invited representations from CRIB, the Ministry and a third party, and received submissions from CRIB and the Ministry.

2.0 ISSUE

[3] The issues before me in this case are:

1. Whether the Ministry is authorized by ss. 13, 14 and 17 to refuse access to information.
2. Whether the Ministry is required by ss. 12 and 22 to refuse access to information.
3. Whether the Ministry complied with its duty under s. 6(1) in conducting its search for responsive records.

[4] I do not need to consider s. 16 here, as the Ministry applied it to information to which I find other exceptions apply.

[5] Under s. 57(1) of FIPPA, the Ministry has the burden of proof regarding ss. 12, 13, 14 and 17 while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

¹ [2007] B.C.I.P.C.D. No. 16.

² [2007] B.C.I.P.C.D. No. 18.

³ [2007] B.C.I.P.C.D. No. 19.

3.0 DISCUSSION

[6] **3.1 Background**—This case overlaps considerably with the orders mentioned above, involving the Ministry of Agriculture and Lands—which now has responsibility for the records requested of Land and Water British Columbia Inc. (“LWBC”)—and the Ministry of Attorney General and Ministry of Public Safety and Solicitor General. The applicant and request are the same in all four cases, as are most of the exceptions and related issues. In addition, many of the records are common to or overlapping in the four inquiries. All four inquiries proceeded together on this basis and the same legal counsel represented the four public bodies.

[7] The Ministry’s submissions overlap considerably with those of LWBC, as well as the other two ministries. To avoid repetition in this order, I have, as appropriate, applied my reasoning in those decisions to the evidence before me in this case. I have also considered the evidence and submissions before me in this inquiry in making my findings and orders here.

[8] **3.2 Information Outside Scope of Request**—The Ministry said that it severed some information in the records as it was outside the scope of the request.⁴ CRIB did not comment on this issue. The material in question is clearly marked as “o/s” and I agree with the Ministry that it is not responsive to CRIB’s request.

[9] **3.3 Inconsistencies in Application of Exceptions**—In reviewing the records in dispute in the four inquiries, I noted a number of inconsistencies in the four public bodies’ severing of information and in their annotation of the records with applicable exceptions, both within their own records and in comparison with the other public bodies’ records. There were also cases where the exceptions noted on the records did not match those on the accompanying severance tables.

[10] CRIB did not raise any objections to these inconsistencies. As it was not clear what positions the four public bodies were taking, however, I offered them the opportunity to reconsider their positions collectively, with a view to reconciling the inconsistencies. As a result, the four public bodies disclosed some more information and records and cleared up some, though not all, of the inconsistencies.

[11] **3.4 Search for Records**—The issue of a public body’s search for records relates to the fulfilment of its duty under s. 6(1) to assist applicants. Section 6(1) reads as follows:

⁴ Para. 4.06, initial submission.

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[12] Numerous orders have dealt with the adequacy of a public body's records search, for example, Orders 00-15,⁵ 00-26⁶ and 00-32.⁷ These orders show that s. 6(1) does not impose a standard of perfection or require a public body to establish with absolute certainty that records do not exist. It should however demonstrate that its efforts have been reasonable, thorough and comprehensive and that it has explored all avenues in attempting to comply with its s. 6(1) obligations.

[13] The Ministry said that, as it did not initiate the casino proposal, most of the responsive records it found originated with other public bodies,⁸ with which it consulted while processing the access request. Drawing on past relevant orders,⁹ the Ministry said a public body is not required to prove a negative, nor is it subject to a standard of perfection but reasonableness. The Ministry then recounted the efforts it had taken in its search, which included canvassing the various divisions within the Ministry that might have responsive records. In the Ministry's view, it has made reasonable efforts to search for records and does not believe any further searches would reveal additional records.¹⁰

[14] CRIB provided copies of several records which it said it had received from other public bodies. Because of their subject matter, CRIB believes it should also have received copies of these records from the Ministry but did not. CRIB requested an explanation of why the Ministry did not provide these records and confirmation that the Ministry had conducted another search.¹¹ The severed records that CRIB provided are briefing notes and emails between Ministry staff and employees of the other public bodies, related principally to property transfer tax exemption matters.

[15] The Ministry replied that it considered some of the records CRIB obtained from other public bodies to be outside the scope of the request, as it read CRIB's request as being for records related to the proposed casino project and to gambling within British Columbia. The Ministry acknowledged that it disclosed some records pertaining to a particular topic (which it named *in camera*) that "happened to be included in the package of records" provided by a group within

⁵ [2000] B.C.I.P.C.D. No. 18.

⁶ [2000] B.C.I.P.C.D. No. 29.

⁷ [2000] B.C.I.P.C.D. No. 35.

⁸ Land and Water British Columbia Inc., Ministry of Attorney General and Ministry of Public Safety and Solicitor General.

⁹ For example, Order 00-32.

¹⁰ Pages 30-34, initial submission; paras. 8-13, first Elbahir affidavit; p. 1, reply submission.

¹¹ Paras. 18-19, initial submission.

Treasury Board staff.¹² The Ministry said that it did not retrieve records on this same topic from the Tax Policy Branch, as it did not consider them to be within the scope of the request.¹³ In any case, the Ministry argued, CRIB has the records and the Ministry does not believe it has any other records besides those ones.¹⁴ In the case of other records that CRIB mentioned, the Ministry pointed out that it had provided some of them with its second release package. It said that it had likely not kept still others, on the grounds that the records were transitory or the Ministry was not the office of primary responsibility.¹⁵

[16] While I accept the Ministry's explanations regarding the latter two categories of records, I do not agree with its comments on the first category, that is, records related to the topic which the Ministry named *in camera*. Judging by the records on this topic that CRIB received from the Ministry and the other public bodies, any other such records in the Ministry's files are related to CRIB's casino project and directly responsive to CRIB's request. Whether or not the Ministry only has duplicates of records that CRIB received from other public bodies is irrelevant.

[17] The Ministry must search for additional responsive records within the Tax Policy Branch and any other program areas within the Ministry that could reasonably be expected to have records responsive to CRIB's request. It must then make a decision as to CRIB's entitlement to any other responsive records it locates. I make the appropriate order below.

[18] **3.5 Cabinet Confidences**—The relevant parts of s. 12 read as follows:

Cabinet and local public body confidences

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.

(2) 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,

¹² Para. 2, second Elbahir affidavit.

¹³ The Ministry did not explain why it disclosed Treasury Board records on this particular topic, when it considered them to be outside the scope of the request.

¹⁴ Some of the Ministry's discussion on this issue was on an *in camera* basis.

¹⁵ Page 2, reply submission; second Elbahir affidavit.

(ii) the decision has been implemented, ...

[19] I have applied here, without repeating them, the principles for interpreting ss. 12(1) and (2) in Order 01-02,¹⁶ Order 02-38¹⁷ and other orders involving s. 12(1), and in *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*.¹⁸

[20] CRIB generally questioned the Ministry's application of s. 12, in particular to emails, suggesting it should disclose background information and analysis that fall under s. 12(2).¹⁹

[21] The Ministry provided the same information on Treasury Board and made the same arguments on s. 12(1) and its interpretation as LWBC did in the related inquiry.²⁰ The Ministry described the records to which it applied s. 12(1) as follows:

- information in a Cabinet Decision Document of June 18, 2003, received by Treasury Board the following day; the severed information relates to the issue going forward to Treasury Board for resolution, the recommendation of the Minister of Sustainable Resource Management and Minister Responsible for Land and Water British Columbia Inc., options, fiscal management considerations, significant implications and the recommendation to Treasury Board
- information relating to the drafting of a submission to Cabinet, that is, the "Cabinet Decision Document" that went to Treasury Board (not Cabinet) for a decision
- communications of April 29, 2003 and June 16, 2003 from a Treasury Board analyst, discussing decisions made by Treasury Board
- information in Treasury Board decision documents of June 16, 2003 and June 19, 2003
- information that, if disclosed, would reveal information in a Treasury Board decision document or information which formed the substance of Treasury Board deliberations, including options for consideration, implications of the various options, financial considerations and recommendations

[22] The information to which the Ministry applied s. 12(1) is in emails discussing the development of the contents of Treasury Board decisions, briefing

¹⁶ [2001] B.C.I.P.C.D. No. 2.

¹⁷ [2002] B.C.I.P.C.D. No. 38.

¹⁸ (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

¹⁹ Paras. 21-23, initial submission; paras. 4-5, reply submission.

²⁰ Paras. 4.11-4.31, initial submission; paras. 4-10, Paul affidavit.

material related to matters for Treasury Board deliberation, a Treasury Board record of decision, Treasury Board decision letters and Cabinet decision documents. There are duplicates of some records, as well as duplication of information within the email strings.

[23] The severed information consists of recommendations, options and policy considerations related to various issues connected with the Campbell River destination casino project that were submitted or prepared for submission to Treasury Board, a committee of Cabinet,²¹ as well as records revealing Treasury Board decisions. I accept that this information formed the basis for Treasury Board deliberations and I am satisfied that its disclosure would reveal the substance of deliberations of Cabinet within the meaning of s. 12(1). I agree with the Ministry that s. 12(2) does not apply to the severed information. I find that s. 12(1) requires the Ministry to withhold all of the information that it withheld under that section.

[24] **3.6 Advice or Recommendations**—The relevant portions of s. 13(1) read as follows:

Policy advice or recommendations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1) ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[25] Numerous orders have considered the interpretation of s. 13(1). See, for example, Order 02-38. I will apply here, without repeating them, the principles for interpreting s. 13(1) set out in those orders.

[26] CRIB argued that the Ministry incorrectly applied s. 13(1) to the records and that the Ministry's interpretation of s. 13(1) would allow the withholding of most documents at the ministerial level. CRIB also suggested, without elaborating, that s. 13(2)(n) applies.²²

[27] The Ministry provided the same discussion and interpretation of s. 13(1) as LWBC did in the related inquiry. The Ministry rejected CRIB's argument about

²¹ See B.C. Reg. 290/2002.

²² Paras. 24-26, initial submission; paras. 6-7, reply submission.

s. 13(2)(n), saying that none of the information in question constitutes the type of information covered by that section. Nor, it said, has CRIB stated what legal rights of CRIB could be at issue in this case.²³

[28] The purpose of s. 13(1) is to protect a public body's internal decision-making and deliberative processes, in particular while those processes are still underway. I find that the information in question all falls under s. 13(1) as previous orders have interpreted this exception. The Ministry may therefore withhold this information. I am also satisfied that s. 13(2), including s. 13(2)(n), and s. 13(3) do not apply.

[29] **3.7 Solicitor-Client Privilege**—Section 14 reads as follows:

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[30] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Order 02-01.²⁴ I will not repeat those principles but apply them here.

[31] CRIB pointed out that solicitor-client privilege does not apply to all communications between solicitor and client and referred to examples of severed records which, in its view, did not appear to contain information subject to solicitor-client privilege. It questioned the number of lawyers that the Ministry claims to have communicated with for the purposes of obtaining legal advice and argued that communications copied to lawyers are not necessarily privileged and that attachments to emails can reasonably be severed.²⁵

[32] The Ministry set out the same discussion of s. 14 as LWBC did in the related inquiry. The Ministry said that the information it withheld under s. 14 is in internal communications that refer to legal advice the government received. Such material is, the Ministry argues, privileged, as it would reveal confidential communications between solicitor and client respecting legal advice. The Ministry relies on legal professional privilege in this case.²⁶

[33] The Ministry applied s. 14 to only one item, a paragraph on p. 3. The Ministry correctly characterized it as referring to legal advice the government received. I am satisfied that this information is protected by solicitor-client privilege and I find that s. 14 applies to it.

²³ Paras. 4.32-4.55, initial submission p. 2, reply submission.

²⁴ [2002] B.C.I.P.C.D. No. 1.

²⁵ Paras. 27-32, initial submission; paras. 8-12, reply submission.

²⁶ Paras. 4.56-4.79, initial submission; paras. 4-10, Proverbs affidavit.

[34] **3.8 Harm to Financial Interests**—Section 17(1)(e) reads as follows:

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information: ...

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

[35] Commissioner Loukidelis reviewed the application of s. 17(1) at length in Order 02-50.²⁷ He found there that, to engage s. 17(1), the evidence must establish a confident, objective basis for concluding disclosure of the disputed information could reasonably be expected to harm a public body's financial or economic interests. General, speculative or subjective evidence is inadequate to establish such harm. A clear and direct connection between the disclosure of the withheld information and the harm alleged must be established. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm that could reasonably be expected to result from disclosure of the information. I have applied here the principles set out in Order 02-50 and other relevant orders.

[36] CRIB referred to the test for applying s. 17 in Order 02-50 and said that, in order for information to fall under this exception, its disclosure must reasonably be expected to harm the public body's financial interests. The Ministry has not done so here, in CRIB's view.²⁸

[37] In the Ministry's view, s. 17(1)(e) applies to information related to negotiations between public bodies and the government of British Columbia. It referred to relevant orders which have found that it is not necessary to prove that harm would result on disclosure of the information in dispute but only a reasonable expectation of some harm to its financial interests. It acknowledged that evidence of speculative harm will not suffice and public bodies must also make a link between disclosure of the information in question and the harm they anticipate occurring. The Ministry referred me to *in camera* affidavit evidence in support of its position.²⁹

²⁷ [2002] B.C.I.P.C.D. No. 51, at paras. 111-112 and 134-137.

²⁸ Paras. 36-38, initial submission; paras. 13-14, reply submission.

²⁹ Paras. 4.88-4.96, initial submission; paras. 11-18, Paul affidavit; paras. 11-25, Proverbs affidavit.

[38] With two exceptions, the Ministry applied s. 17 to information to which I found above other exceptions applied. I need therefore only consider s. 17 where it is the only exception, that is, a phrase at the end of footnote 2 on p. 25, the first page of a Treasury Board briefing note, and a duplicate at p. 31.

[39] The Ministry's arguments on s. 17(1)(e) were mainly in the form of *in camera* evidence, which dealt exclusively with the same *in camera* topic the Ministry discussed in the context of its search efforts (see s. 6 discussion above). Even reading the proffered material before me generously, however, this evidence has no bearing on the information the Ministry withheld under s. 17 on pp. 25 and 31, which appears to be factual, historical information pertaining to another matter. The Ministry did not specifically address the information in question in its submissions and it is not otherwise clear at all how disclosure of this information could reasonably be expected to result in harm of the type contemplated by s. 17(1)(e). I find that s. 17(1)(e) does not apply to it.

[40] **3.9 Personal Privacy**—CRIB believes that the information that the Ministry withheld under s. 22 is someone's name and suggested that s. 22 does not apply to this information because the individual in question is receiving information in his or her official capacity.³⁰

[41] The Ministry provided the same arguments in this case as LWBC did in the related inquiry, saying the information in question is an employee's home email address.³¹ The third party whose email address is in issue was invited to participate in this inquiry but did not make a submission.

[42] I dealt with the same issue in Order F07-11 and, for the reasons described in that decision, make the same finding here, that is, s. 22 does not apply to this individual's email address.

4.0 CONCLUSION

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

1. I require the Ministry to refuse access to the information it withheld under s. 12(1).
2. I confirm that the Ministry was authorized to refuse access to the information it withheld under ss. 13(1) and 14.
3. I require the Ministry to give CRIB access to the information it withheld under s. 17(1) at the end of footnote 2 at the bottom of pp. 25 and 31.

³⁰ Paras. 39-40, initial submission; see also CRIB's table of documents in dispute.

³¹ Paras. 4.97-4.25, initial submission.

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4. I require the Ministry to give CRIB access to the information it withheld under s. 22(1).
 5. I require the Ministry to perform its duty under s. 6(1) to search for responsive records on the *in camera* topic discussed at paras. 15 and 16 above, as related to CRIB's proposed casino project, in the Tax Policy Branch and any other areas within the Ministry that could reasonably be expected to have records responsive to CRIB's request.
 6. Under s. 58(4), I require the Ministry to complete these searches within 30 days after the date of this order and to deliver to me (with a copy to CRIB directly and concurrently) within 10 days after the completion of its search, an affidavit sworn by a knowledgeable person as to the efforts in undertaking these searches and the results of those searches. The Ministry must then make a decision on disclosure to CRIB of any new records it locates as a result of these further searches and provide me with a copy of that decision.

July 10, 2007

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

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