Order F07-23

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Justine Austin-Olsen, Adjudicator

November 29, 2007

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Summary: The applicant requested access to submissions by funeral home operators relating to potential changes to funeral laws and regulations. The Ministry is not required by s. 25(1) of FIPPA to disclose the records in the public interest. The Ministry is required by s. 12 of FIPPA to refuse the applicant access to the information severed from the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1) and 25(1), (2).

Authorities Considered: B.C.: Order No. 85-1996, [1996] B.C.I.P.C.D. No. 11; Order No. 162-1997, [1997] B.C.I.P.C.D. No. 20; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 01-02, [2001] B.C.I.P.C.D. No. 2; Order 01-20, [2001] B.C.I.P.C.D No. 21; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order F06-10, [2006] B.C.I.P.C.D. No. 15. **ONT:** Order P-956, [1995] O.I.P.C. 269; Order PO-1663, [1999] O.I.P.C. No. 40; Order PO-1851-F, [2000] O.I.P.C. No. 237.

Cases Considered: *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*), [1998] B.C.J. No. 1927 (C.A.); *Clubb v. The Corporation of Saanich*, [1996] B.C.J. No. 218 (S.C.); *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.); *Tromp v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 761 (S.C.); *O'Connor v. Nova Scotia*, 2001 NSSC 6 (aff'd, 2001 NSCA 132, leave to appeal denied, [2001] S.C.C.A. No. 582); *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General),* [1983] F.C.J. No. 941 (T.D.).

1.0 INTRODUCTION

[1] This Order relates to a request made by the applicant to the Ministry of Public Safety and Solicitor General (the "Ministry") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for copies of:[1]

> …all submissions from funeral home operators – from Jan. 1, 2001 to Feb. 27, 2004 – on potential changes to B.C. funeral laws and regulations, and consumer protection regarding the funeral industry.

[2] In addition, the applicant, who describes himself as a journalist and public interest researcher, asked that the Ministry:[2]

> … "redact and release", *i.e.*, send parts of the request to me as they are completed, rather than waiting till all the records are compiled to send them all at once. If records are available for routine release, or can be viewed in a local "reading room", please inform me. If any of these records are in readable computer format, please send them by disc or email rather than on paper.

[3] The Ministry released the records responsive to the applicant's request in two phases. The records in dispute in this inquiry comprise part of the second phase. The delay in releasing the second phase of records resulted from the Ministry's need to consult with the Office of the Premier about whether s. 12 (Cabinet confidences) of FIPPA applied to any of the records.

[4] The records in dispute contain two types of information that has been severed and withheld from the applicant. First, information that is marked by the Ministry as "OS" (which I take to mean out of scope, meaning that the information is not captured by the wording of the applicant's initial request); second, that which the Ministry severed under s. 12 of FIPPA. The records consist of both letters and emails which in some cases indicate the subject, and where so indicated, the subject suggests the contents involve comment on legislation.

[5] The applicant asked for a review of the Ministry's decision to sever the records under s. 12 and also asserted that s. 25 of FIPPA (disclosure required in the public interest) applied to the records in dispute. Attempts at mediating a settlement of the issues between the parties proved unsuccessful, and so the matter proceeded to inquiry.

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[1] Applicant's letter to the Ministry, March 12, 2004.
[2] Applicant's letter to the Ministry, March 12, 2004.

2.0 ISSUES

[6] The following issues are raised in this inquiry:

1. Is the Ministry required by s. 25(1) of FIPPA to disclose the records?

2. Is the Ministry required to refuse access to the records under s. 12(1) of FIPPA?

[7] Section 57 of FIPPA is silent on the burden of proof under s. 25. On this matter the Ministry says in its submission that it will provide evidence on the applicability of s. 25, however:[3]

> …it is the position of the Ministry that an applicant has an obligation to provide evidence that s. 25 requires disclosure, as discussed by the Commissioner in Order 02-38. The Ministry puts the Applicant to his burden of proving that s. 25 applies in this case.

[8] In fact, the Commissioner in Order 03-02 clarified what is required of both parties in an inquiry when s. 25 is in issue:

> [16] Section 57 is also silent on the question of who, if anyone, bears the burden of establishing that s. 25(1) requires a public body to disclose information. In Order 02-38, [2002] B.C.I.P.C.D. No. 38, I addressed the burden of proof under s. 25(1) at paras. 32-39. As I indicated there, s. 25(1) either applies to information or it does not and it is ultimately up to the commissioner to decide that issue. In an inquiry such as this, *it will be in an applicant's interest, as a practical matter but not as a legal duty, to provide whatever evidence she or he can to support the application of s. 25(1). Similarly, although a public body bears no burden of proof under s. 25(1), it has a practical incentive to assist with any relevant evidence to the extent it can.* [Emphasis added]

[9] As the above excerpt makes clear, the applicant is under no legal duty to provide evidence and so there is no legal "burden" for the Ministry to "put the applicant to." As a practical matter, both parties should provide evidence and argument to support their respective positions in an inquiry where the applicability of s. 25(1) is in issue.

[10] With respect to the application of s. 12(1), s. 57(1) of FIPPA places the burden of proof on the Ministry to demonstrate that it is required to refuse the applicant access to the severed portions of the records.

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[3] Ministry's initial submission, at para. 12.

3.0 DISCUSSION

[11] Two procedural issues were raised during the course of the inquiry. The first arises from the Ministry's inadvertent disclosure of certain records to the applicant in its initial submissions, and the applicant's initial refusal to voluntarily return them to the Ministry. The second relates to the applicant's objection, made in his reply, to the Ministry's reliance in part on *in camera* evidence to support its decision to sever the records under s. 12.

[12] **3.1 Inadvertent Disclosure**—Shortly after filing its initial submission in the inquiry, the Ministry realized that it had inadvertently provided the applicant with copies of records which it determined were not only outside the scope of the original access request but also subject to s. 12(1) of FIPPA. The Ministry contacted the applicant by telephone and mail and explained its error. The Ministry delivered a corrected initial submission to the applicant and asked him to return the original version. The applicant refused to do so. He maintained that the mere fact that information might be outside the scope of his access request was "not a basis for retrieving it from the public record." In his letter to the Ministry he went on to say that:[4]

> [t]his FOI situation is (so far as we know) without precedent, and therefore the Commissioner had best decide it. My arguments on this "swap" issue will be combined with my reply submission, all to be dealt with in the one inquiry.
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> As a means of resolving the issue, we propose that the parties agree to submit to the Commissioner to the issue [of] whether the inadvertently-disclosed portions would be properly exempt from disclosure under the Act, and if so to provide guidance to the parties as to what should be done with the version containing these portions.

[13] The Ministry then wrote to say that it believed it was "extremely important" to protect Cabinet confidences and so, in the interests of securing the erroneously disclosed information, it would consent to the applicant raising his concerns with the Commissioner. The Commissioner proceeded to consider, from a procedural perspective, the Ministry's inclusion and exchange of unintended records in its initial submission.

[14] The Commissioner rejected the applicant's arguments. Referring to s. 56(1) of FIPPA, he first observed that the inquiry process engages the Commissioner's authority and responsibility and that it is "imperative that participants respect all fairness and ethical" process requirements. The Commissioner went on to say:[5]

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[4] Applicant's letter to Ministry counsel, March 14, 2006.
[5] Commissioner's letter to the parties, March 23, 2006.

> It would not be fair or proper for this office's inquiry process to be applied or used to permit a party to take advantage of the public body's inadvertent inclusion of unintended records in its initial submission. The applicant must return the public body's incorrect initial submission to this office, accompanied by the completed form of statutory declaration enclosed with this letter or a statutory declaration that is to substantially the same effect. As the enclosed statutory declaration indicates, neither the applicant nor any other person is to retain … copies of any part of the public body's incorrect initial submission, including inadvertently disclosed records or parts of them.

[15] The Commissioner also declined to permit the inquiry to be expanded to include the inadvertently released out-of-scope records and further declined to either entertain or encourage a request by the applicant to amend his access request so as to cover the inadvertently disclosed records.

[16] The inquiry was adjourned pending the applicant's compliance with the Commissioner's direction to return the inadvertently disclosed material to the Ministry. Once that material was returned, along with the required form of executed statutory declaration, reply submissions were rescheduled.

[17] In his submissions in the inquiry, the applicant continued to take issue with the fact that the Ministry withheld some information on the basis that it was out of scope. He argued that the *Cremation, Interment and Funeral Services Act* is so interrelated to the *Business Practices and Consumer Protection Act* and the *Business Practices and Consumer Protection Authority Act*, one "can hardly consider one statute without regard to the others."[6] On this theory, any withheld information relating to either of these two latter statutes should be considered responsive to his access request. Having reviewed the latter two statutes, I do not accept the applicant's submissions on this point. I find the Ministry quite properly withheld some information as being out of scope and that this information does not relate to the subject matter of the applicant's access request.

[18] **3.2 *In camera* Affidavit Material**—In its submission, the Ministry relied on some *in camera* evidence to support its decision to sever the records in dispute under s. 12 of FIPPA. That *in camera* evidence consists of parts of some letters and emails that were attached as an exhibit to the affidavit of Elizabeth MacMillan, the Executive Director of Cabinet Operations. In his reply submissions, and referring to Order No. 85-1996, the applicant parenthetically objected to the Ministry's use of *in camera* affidavit material.[7]

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[6] Applicant's reply submission, p. 2.
[7] Order 85-1996, [1996] B.C.I.P.C.D. No. 11.

[19] Order No. 85-1996 does not preclude the use of *in camera* affidavits and submissions. It simply emphasizes that their use should be restricted to that which "must truly be confidential."[8] Both the present and previous Commissioner have observed that *in camera* affidavit evidence and submissions may be considered in an inquiry in circumstances where it is necessary to do so in order to protect information that is subject to an exception to access under FIPPA. I note as well that in *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner*[9] and in *Tromp v. British Columbia (Information and Privacy Commissioner)*[10] arguments about the fairness of *in camera* material being relied on in an inquiry were unsuccessful.

[20] The *in camera* material attached as an exhibit to the MacMillan affidavit consists of the very information that is in dispute. As was the case in Order 00-07, it "could not be disclosed to the applicant without rendering this inquiry futile."[11] The evidence is quite properly submitted on an *in camera* basis, as it must remain confidential during the inquiry process. I therefore find no merit in the applicant's objections to its use.

[21] **3.3 Public Interest Disclosure**—Section 25 of FIPPA is an extraordinary provision because it requires a public body to disclose certain information whether or not an access request has been made and despite any of FIPPA's exceptions to the right of access to information. The relevant portions of s. 25 read as follows:

> **Information must be disclosed in the public interest**
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> 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
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> (a) about a risk of significant harm to the environment or 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.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[22] The applicant argues that "formulations of regulations on consumer protection" are of such a nature that the public interest demands the disclosure of the records in full. He also argues that the fact the Ministry agreed to a partial fee waiver is relevant to the application of s. 25. The Ministry's response to this latter point was twofold. First, it pointed out that the relevant factors to be

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[8] Order 85-1996, [1996] B.C.I.P.C.D. No. 11, at para. 23.
[9] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[10] *Tromp v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 761 (S.C.).
[11] Order 00-07, [2000] B.C.I.P.C.D. No. 7 at para. 12.

considered in the two sections are different. Second, and more importantly, it argued the threshold for granting a fee waiver "in the public interest" is lower than the urgent and compelling criteria associated with the mandatory duty to disclose information under s. 25. The Ministry is correct on both points.

[23] The Ministry submits that immediate disclosure of the information severed from the records is not clearly necessary in the interests of public debate or political participation. It is not, as the Ministry characterizes it, one of the "clearest and most serious of situations" warranting mandatory public disclosure under s. 25(1)(b). In taking this position, the Ministry relies on *Clubb v. The Corporation of Saanich*, which held that what constitutes the "public interest" under s. 25 is not defined by various levels of public curiosity and is not so broad as to encompass anything that the public may be interested in learning.[12] Relying as well on Order 01-20[13] and Order 02-38,[14] the Ministry also argues that s. 25 is only engaged if there is an urgent and compelling need for disclosure, which is not the case here.

[24] As the Commissioner said in Order 02-38,[15] s. 25(1)(b) is intended to require disclosure of information "that is of clear gravity and present significance to the public interest." Consistent with the Court's decision in *Clubb*, the Commissioner has been clear that the mere fact that some members of the public are interested in a matter does not render it "in the public interest" for the purpose of s. 25.[16] Section 25(1)(b) also does not compel disclosure of any and all policy and political advice or recommendations, and associated legal advice, even in relation to a matter of significant public concern or debate.

[25] In my view, the public interest concerns raised by the applicant do not even begin to approach the types of concerns that are reflected in the s. 25 disclosure criteria. The evidence simply does not support a finding of urgent and compelling need for disclosure of the records. I therefore find that the Ministry is not required by s. 25(1) to disclose them.

[26] **3.4 Cabinet Confidences**—Section 12(1) requires a public body to withhold information that would reveal the substance of Cabinet deliberations. The purposes underlying this mandatory exception to disclosure have been discussed in orders such as Order F06-10,[17] and the policy underlying the common law principle of cabinet confidentiality has been discussed in cases

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[12] *Clubb v. The Corporation of Saanich*, [1996] B.C.J. No. 218 (S.C.), at para. 33.
[13] Order 01-20, [2001] B.C.I.P.C.D. No. 21.
[14] Order 02-38, [2002] B.C.I.P.C.D. No. 38.
[15] Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 65.
[16] See Order 02-38, [2001] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 21; and Order No. 162-1997, [1997] B.C.I.P.C.D. No. 20.
[17] Order F06-10, [2006] B.C.I.P.C.D. No. 15 at para. 69.

such as *Babcock v. Canada (Attorney General)*.[18] The portions of s. 12 relevant in this inquiry read 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.
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> (2) Subsection (1) does not apply to:
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> (a) information in a record that has been in existence for 15 or more years;
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> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
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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;
>
> ii) the decision has been implemented;
>
> iii) 5 or more years have passed since the decision was made or considered.

[27] The British Columbia Court of Appeal considered the principles for interpreting ss. 12(1) and (2) in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*),[19] and these have been discussed in subsequent orders such as Order 01-02[20] and Order 02-38.[21] In *Aquasource*, the Court found 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, including the type of information specifically there enumerated."[22] Importantly for present purposes, the list of enumerated information includes draft legislation. The Court in

[18] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paras.18 to 20.
[19] *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*), [1998] B.C.J. No. 1927 (C.A.).
[20] Order 01-02, [2001] B.C.I.P.C.D. No. 2.
[21] Order 02-38, [2002] B.C.I.P.C.D. No. 38.
[22] *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*), [1998] B.C.J. No. 1927 (C.A.), at para. 39.

Aquasource further found that s. 12(1) "must be read as widely protecting the confidence of Cabinet communications."[23]

[28] In his submissions the applicant acknowledges that the records in dispute are "…by their nature…materials placed before a Cabinet Committee … supporting the adoption of legislative measures."[24] He also acknowledges that the records "are properly characterized as 'advice, recommendations, policy considerations or draft legislation or regulations' within the meaning of s. 12(1)...".[25] Despite this, the applicant also maintains that the records consist of "explanations or analysis" under s. 12(2) and says he is entitled to have access to them because, under ss. 12(2)(c)(i) and (ii), the records relate to decisions that have either been made public or implemented:[26]

> …that is, decisions that have proceeded to the stage of either being included or omitted from legislative instruments that have proceeded from Cabinet (or, at a minimum, that have been enacted).

[29] He further maintains that s. 12(2) specifically requires the disclosure of records revealing the substance of Cabinet deliberations "if the outcome of those deliberations has since become a 'done deal', so-to-speak."[27] Referring to the MacMillan affidavit, the applicant says the records are there characterized as relating "directly to draft legislation deliberated on…as though materials relating to draft legislation could not contain 'explanations or analysis.'"[28]

[30] The Ministry maintains that the information severed from the records relates to the substance of the proposed regulatory changes that culminated in amendments to the *Cremation, Interment and Funeral Services Act;* it is precisely the information that Cabinet deliberated on in the course of deciding whether to approve the proposed legislation for introduction in the Legislature as a Bill. The MacMillan affidavit, filed in support of the Ministry's decision to withhold the records establishes the following:

- The records relate to commentary on, and a draft version of, the *Cremation, Interment and Funeral Services Act*.

- Proposed (draft) amendments to the *Cremation, Interment and Funeral Services Act* were discussed by the Legislative Review Committee of Cabinet in January 2004.

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[23] *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner*), [1998] B.C.J. No. 1927 (C.A.), at para. 41.
[24] Applicant's reply submission, para. 1.
[25] Applicant's reply submission, para. 2.
[26] Applicant's reply submission, para. 8.
[27] Applicant's reply submission, para. 9.
[28] Applicant's reply submission, para. 5.

- At the January 2004 meeting, Cabinet members had the opportunity to discuss and question legislative counsel and members of the Ministry about the draft legislation.

[31] The Ministry relies on *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General)*, [29] in which Justice Strayer observed that draft legislation has traditionally been protected against disclosure by common law Cabinet privilege. He held that provision in the *Canada Evidence Act* that characterized draft legislation as a confidence of the Queen's Privy Council was properly invoked to protect against disclosure of "various drafts of proposed amendments, and related instructions … and notes of discussions" and observed:[30]

> … it is impossible to separate drafting instructions and notes of discussions on the drafting from the draft legislation itself. To disclose the associated material would very probably be to disclose the substance of the draft.

[32] The Ministry also relies on Ontario Order PO-1851-F, [31] which concerned the application of the Ontario equivalent of s. 12 of FIPPA to draft regulations. In that case, the public body had withheld various versions of drafts of the regulations, as well as comments made on specific sections of the regulations which, if disclosed, would reveal the contents of the draft itself. Relying on Ontario Order PO-1663,[32] Adjudicator Cropley concluded that the materials were properly withheld because their disclosure would permit accurate inferences to be drawn with respect to actual Cabinet deliberations.

[33] In its reply, the Ministry clarified that its communications with members of the funeral home industry was not the result of a White Paper or other public consultation process. In other words, the draft legislation itself was never publicly released. Instead, select members of the industry were invited to assist in the creation of the draft legislation, but only after signing a comprehensive confidentiality agreement, copies of which the Ministry provided as part of its submissions in this inquiry.[33] A review of the severed records reveals that the

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[29] *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General),* [1983] F.C.J. No. 941 (T.D.).

[30] *Smith, Kline & French Laboratories Ltd. v. Canada (Attorney General),* [1983] F.C.J. No. 941 (T.D.) at p. 12.

[31] Order PO-1851-F, [2000] O.I.P.C. No. 237.

[32] Order PO-1663, [1999] O.I.P.C. No. 40.

[33] That confidentiality agreement ("undertaking of confidentiality") provided in part that the signatory can review a copy of a draft of the proposed new legislation only if he/she agrees:

- Not to discuss or disclose the contents of the draft legislation before the government presents the legislation and consequential amendments and transitional provisions to the Legislative Assembly;
- Not to discuss or disclose the contents of the draft legislation before the government presents the legislation and consequential amendments and transitional provisions to the Legislative Assembly, except as expressly permitted by the Minister in writing;

persons who signed the confidentiality agreement include those persons involved in communications with Ministry staff about the draft legislation.

[34] The Ministry also relies on *O'Connor v. Nova Scotia*[34] and Ontario Order P-956[35] to support its position that the benefit of the s. 12(1) exemption is not lost when there is limited and confidential disclosure of protected information to persons who are not Cabinet members. In *O'Connor*, the Court held that the government's disclosure of such information to caucus members who were not also members of Cabinet did not constitute a waiver of Cabinet privilege. Similarly, in Ontario Order P-956, Ontario Assistant Commissioner Glasberg found that:[36]

> …the provincial government had the right to obtain input from third parties on the technical issues to be addressed in the materials prepared for Cabinet…in sharing excerpts from its Cabinet Submission and related documents with Ontario Hydro, the Ministry had no intention of placing these records in the public domain. On this basis, I conclude that the Ministry's decision to share certain written materials with a third party has not made these records publicly available.

[35] My review of the records in dispute reveals that the information severed by the Ministry consists of commentary about specific sections of a draft version of the *Cremation, Interment and Funeral Services Ac*t. The evidence establishes this commentary was given in response to an invitation to select members of the industry by the Ministry on a strictly confidential basis. I agree with the line of reasoning in *O'Connor* and Ontario Order P-956 and find that the confidential disclosure of draft legislation to these select industry members does not render the legislation publicly available or constitute a waiver of the exception to disclosure of Cabinet confidence codified by s. 12(1) of FIPPA. The evidence before me further establishes that a draft of the legislation which was commented on subsequently formed the focus of Cabinet deliberations in January 2004.

[36] I find that the severed information is not properly characterized as "background information or explanations" under s. 12(2), but rather falls squarely within the scope of s. 12(1). It is information which, if disclosed, would reveal the content of the draft legislation commented on and thus would reveal the

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- Not to disclose the content of discussions held in relation to the draft legislation or matters that may be included in the draft legislation
- Not to make copies of the draft legislation
- To keep the draft legislation secure while it is in the undersigned's possession
- To return the draft legislation that has been received to Ministry staff if so directed.

[34] *O'Connor v. Nova Scotia*, 2001 NSSC 6 (aff'd, 2001 NSCA 132, leave to appeal denied, [2001] S.C.C.A. No. 582).

[35] Order P-956, [1995] O.I.P.C. 269.

[36] Order P-956, [1995] O.I.P.C. 269, at p. 6.

substance of Cabinet's deliberations. As such, s. 12(1) requires the Ministry to refuse the applicant access.

4.0 CONCLUSION

[37] I have found that s. 25 does not require disclosure in the public interest, and so no order is necessary in that respect. Under s. 58(2)(c) of FIPPA, I require the Ministry to refuse the applicant access to the information severed from the records in dispute.

November 29, 2007

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator

OIPC File No. F04-23663