



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

Order F10-23

MINISTRY OF HEALTHY LIVING AND SPORT

Michael McEvoy, Adjudicator

June 17, 2010

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Summary: The applicant asked the Ministry for any report about policy and regulatory options the Ministry was considering in relation to replacing the Sewage Disposal Regulation. The Ministry refused on the basis that disclosure of this information would reveal the substance of Cabinet deliberations. The Ministry was required to refuse disclosure of most of the records under s. 12(1) of FIPPA but was not required to withhold a small amount of information disclosure of which would not reveal the substance of Cabinet deliberations.

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

Authorities Considered: **B.C.:** Decision 08-02, [2008] B.C.I.P.C.D. No. 4; 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 F07-23, [2007] B.C.I.P.C.D. No. 38; **Ont.:** Order PO-1851-F, [2000] O.I.P.C. No. 237; Order PO-1663, [1999] O.I.P.C. No. 40; Order P-956, [1995] O.I.P.C. 269.

Cases Considered: *Babcock v. Canada (Attorney General)*, 2002 SCC 57; *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C. J. No. 1027 (C.A.); *O'Connor v. Nova Scotia*, NSSC 6 (aff'd, 2001 NSCA 132, leave to appeal denied, [2001] S.C.C.A. No. 582).

1.0 INTRODUCTION

[1] The Sewerage System Regulation Improvement Coalition (“applicant”) wrote to the Ministry of Healthy Living and Sport (“Ministry”)¹ requesting:

...documents or reports [between January 1, 2002 and the end of 2005] which set out the policy and regulatory options the Ministry was considering in relation to replacing the in force Sewerage Disposal Regulation, also under the Health Act. I am hoping that there was at least one internal discussion paper, white paper or similar document which identified the problems with the SDR and proposed on or more solutions.

[2] The Ministry responded by denying access to all of the requested records under ss. 12, 13, 14, 17, 21 and 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). The applicant asked the Office of Information and Privacy Commissioner (“OIPC”) to review this response. Mediation resulted in the Ministry’s disclosure of a number of records and its withdrawal of reliance on ss. 17, 21 and 22 as a basis for withholding the remaining records. When mediation failed to resolve all of the issues, the matter was referred to inquiry under Part 5 of FIPPA. During the inquiry process the Ministry disclosed more records and stated it would rely only on s. 12 of FIPPA in withholding the remaining records.

2.0 ISSUE

[3] The issue in this inquiry is whether the Ministry is required to refuse access to the records under s. 12(1) of FIPPA. Section 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.

[4] In its initial submission, the applicant argued for disclosure of the records based on s. 25 of FIPPA. The applicant did not raise this issue in its request for review nor does the notice of inquiry or the Portfolio Officer’s Fact Report identify it as an issue. Parties may not raise new issues at inquiry without permission because it would undermine the mediation process that assists the parties in defining the issues prior to inquiry.² The applicant makes no case as to why I should depart from this general rule nor do I see any. Therefore, I will not entertain the applicant’s s. 25 submissions.

¹ The original request was made to the Ministry Health Services but responsibility for the matter was subsequently transferred to the Ministry of Healthy Living and Sport. The OIPC added the Office of the Premier as an appropriate person during the course of mediation. A single legal counsel represents both the Ministry and Office of the Premier and I will refer to their joint argument as the Ministry submission.

² See Decision 08-02, [2008] B.C.I.P.C.D. No 4.

3.0 DISCUSSION

[5] **3.1 Cabinet Confidences**—Section 12 of FIPPA requires a public body to withhold information that would reveal the substance of Cabinet deliberations. The relevant parts of s. 12 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.
- (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,
 - (ii) the decision has been implemented, or
 - (iii) 5 or more years have passed since the decision was made or considered.

[6] The Supreme Court of Canada's decision in *Babcock v. Canada (Attorney General)* outlines the purposes underlying the common law principle of cabinet confidentiality.³ In addition, the British Columbia Court of Appeal in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*⁴ considered the principles for interpreting ss. 12(1) and (2) of FIPPA and subsequent orders such as Order 01-02⁵ and Order 02-38⁶ discussed them further. The Court in *Aquasource* found that s. 12(1) "must be read as widely protecting the confidence of Cabinet communications." It also 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."

[7] **3.2 The Records**—Draft regulations are among the enumerated matters listed in s. 12(1) and are, along with related records, at the heart of this case.

³ *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paras. 18 to 20.

⁴ *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927 (C.A.).

⁵ [2001] B.C.I.P.C.D. No. 2.

⁶ [2002] B.C.I.P.C.D. No. 38.

[8] The Ministry aptly describes the records as follows:⁷

- Correspondence to Stakeholder groups, asking for feedback on the draft regulation (see for example document 2 and 5);
- Notes of consultation with Stakeholder groups (see for example document 4, 7, 8, and 36);
- Draft versions of the regulation and/or drafting instructions (see for example documents 3, 10, 18, 20, 23, 41, and 44 to 55); and
- Internal briefing documents which discuss substantive content of the regulation, implementation of the regulation or summarize feedback from stakeholder groups (see for example documents 9, 11, 13, 14, 15, 16, 17, 19, 20, 37 and 38).

[9] The Ministry withheld 243 pages of information, either completely or partially.⁸

[10] **3.3 The Submissions**—The Ministry submits it is clear on the face of the records that the severed information relates to the substance of, and consultation on, the proposed regulatory changes. This is, it argues, the very information that Cabinet was to deliberate on in the course of deciding whether to approve the draft Regulation.

[11] The Ministry says that the Cabinet discussed draft regulations concerning sewerage on July 6, 2004.⁹ The Ministry provided me, *in camera*, a copy of Cabinet minutes confirming this. Cabinet approved the *Sewerage System Regulation*, B.C. Reg. 411/85 (“Regulation”) on July 7, 2004 with its effective date stated as May 31, 2005.¹⁰ The Ministry contends it is clear from records in issue that their disclosure would reveal the substance of the draft Regulation prepared for Cabinet and thus be information relating to their deliberations.

[12] The Ministry points to Order F07-23¹¹ in support of its view that s. 12(1) of FIPPA properly applies to records relating to the stakeholder groups and that none of this information is “background information or analysis” under s. 12(2).

[13] The applicant submits that none of the disputed records, if disclosed, would reveal the substance of Cabinet deliberations. In the alternative the applicant contends that some or all of those records provide background explanation or analysis to Cabinet and therefore are subject to disclosure under

⁷ Ministry initial submission, para. 28.

⁸ Pages numbers here are in reference to those the Ministry provided. The applicant also provided me with a helpful chronological organization of these records.

⁹ A copy of the Cabinet minutes of July 6, 2004 was attached to the Affidavit of Kevin Jardine, Deputy Secretary of Cabinet Operations.

¹⁰ Exhibit C to the Affidavit of Kevin Jardine.

¹¹ [2007] B.C.I.P.C.D. No. 38.

s. 12(2)(c)(i). In this regard, the applicant says the decision concerning the Regulation was made public and implemented more than five years ago.

[14] The applicant also argues it is evident from records already released to it that the Ministry has provided external third parties, in particular the BC Onsite Sewage Association (“BCOSSA”), with a Ministerial briefing note related to the draft regulation. In doing so, the applicant says the Ministry has effectively waived its right to now withhold these records because they are in the public domain. The applicant argues that if certain materials were shared with BCOSSA the Ministry must identify those and share them with the applicant as well.

[15] The Ministry replies that the application of s. 12 is not determined by whether the information in dispute has previously been made available in some form to a member of the public. The Ministry submits that Order F07-23 determined that consultation documents can be provided to stakeholders, but this does not change the fact that the contents of those documents reveal the substance of deliberations of Cabinet and therefore must be withheld. Moreover, on this point the Ministry says there is no basis in FIPPA for the applicant’s assertion that it has a positive duty to identify any responsive records it may have provided to third parties.

Findings

[16] Section 12 of FIPPA specifically notes that the “substance of deliberations” protected from disclosure under s. 12(1) encompasses draft regulations submitted or prepared for submission to Cabinet. The evidence establishes that Cabinet considered a regulation dealing with sewerage at its meeting on July 6, 2004. The Regulation, as noted above, was subsequently approved by Cabinet July 7, 2004. It is this Regulation, in its various draft forms, prepared for Cabinet, that appears in 146 pages of the disputed records.¹² Therefore, the evidence is clear that the Ministry properly withheld these records because their disclosure would reveal the substance of Cabinet deliberations.

[17] While not formal drafts of the proposed Regulation, another group of records describes the sections of the Regulation, denotes policy considerations for each and sets out recommendations for their implementation. The detail of these descriptions, including policy commentary and recommendations, is such that it effectively reveals the Regulation’s contents. The Ministry cited Ontario Order PO-1851-F¹³ to support its submission that s. 12(1) applies to these records. That Order concerned the application of the Ontario equivalent of s. 12 of FIPPA to draft regulations. The public body in that case withheld several versions of regulation drafts, as well as comments made on specific sections of

¹² These are pages 41-49, 74-79, 158 and 191-320.

¹³ [2000] O.I.P.C. No. 237.

the regulations that, if disclosed, would reveal the contents of the draft itself. The Adjudicator concluded that the materials were properly withheld because their disclosure would permit accurate inferences to be drawn with respect to actual Cabinet deliberations.¹⁴

[18] In Order F07-23 Adjudicator Austin-Olsen agreed with the line of reasoning in Ontario Order PO-1851-F and I agree with it as well. In applying that rationale to the records described in para. 17 above it is clear that the s. 12(1) exception applies to them.¹⁵

[19] I also apply this rationale and reach the same conclusion about the application of s. 12(1) to severed information contained in several briefing notes. There are three briefing notes to Cabinet Ministers¹⁶ and two other briefing notes to unidentified recipients¹⁷ connected with the draft Regulations. The first of these, chronologically speaking, is a briefing note to a Cabinet Minister¹⁸ describing the proposed Regulation that Cabinet ultimately approved. It also identifies the policy considerations associated with both the existing and proposed regulations. The severed passages in this and all of the briefing notes that follow are virtually identical. None of the information found in these briefing notes can be characterized as “background information or explanations” under s. 12(2). Therefore, I find that all of this withheld material reveals the substance of the proposed regulations deliberated upon by Cabinet with the result that these records are excepted from disclosure pursuant s. 12(1) of FIPPA.

[20] There is one additional briefing note requiring separate treatment.¹⁹ This note deals with two interrelated topics, one being sewage regulation and the other the “Rose Garden Estates.” The briefing note’s purpose is to provide background information to a Cabinet Minister prior to her meeting with two MLAs respecting their constituents’ concerns. The Ministry quite properly disclosed the material relating to the Rose Garden Estates as it has no relationship to the draft Regulation. The Ministry severed the rest of the information in the briefing note. This information largely concerns an explanation of a sewage regulation that preceded the one in existence now. A small portion of this explanation refers to the draft Regulation but most does not. None of it, on its face, relates to the stakeholder consultation referred to by the Ministry at para. 12 above. There is no evidence that any of this material would reveal the substance of Cabinet’s deliberations on the draft regulations. For this reason, only a small amount of the information on pages 71 and 72 relating to the draft regulations is properly withheld.

¹⁴ Order PO-1663, [1999] O.I.P.C. No. 40 in which Adjudicator Cropley also referred to Ontario Order PO-1663.

¹⁵ These are pp. 102-108, 118 and 166-190.

¹⁶ These are pp. 81, 87, 88, 97 and 98.

¹⁷ Pages 151-155.

¹⁸ Pages 96-98.

¹⁹ At pp. 71, 72 and 73.

[21] A large group of records in dispute relates to the stakeholder consultation process respecting the Regulation. Some of these records describe the Regulation and/or invite stakeholder input.²⁰ Some describe stakeholders input concerning the draft Regulation²¹ including, in some cases, a description of all stakeholder feedback of the draft Regulation on a section-by-section basis.²²

[22] The gist of the applicant's position is that Ministry waived its right to invoke s. 12(1) in this case because it shared the draft Regulation or the essence of it with selected stakeholder groups. Adjudicator Austin-Olsen dealt with a similar issue in Order F07-23. That case concerned stakeholder consultation of draft funeral home legislation. The public body, on a confidential basis, invited the funeral home industry to assist in the creation of draft legislation concerning the industry. The Adjudicator stated:

[34] The Ministry also relies on *O'Connor v. Nova Scotia*²³ and Ontario Order P-956²⁴ 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:²⁵

...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 Act*. 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.

[23] I concur with this analysis and find that in this case the Ministry did not relinquish its right to apply s. 12(1) because it undertook a confidential

²⁰ Pages 39, 40, 56-59, 100 and 101.

²¹ Pages 50-55, 62, 63, 91, 93 and 145-148.

²² Pages 64-70.

²³ 2001 NSSC 6 (aff'd, 2001 NSCA 132, leave to appeal denied, [2001] S.C.C.A. No. 582).

²⁴ 1995] O.I.P.C. 269.

²⁵ At p. 6.

stakeholder consultation in developing the Regulation. The evidence here persuades me that the draft Regulation disseminated to, and commented on, by stakeholders subsequently formed the focus of Cabinet deliberations on July 6, 2004. I also find that this information is not properly characterized as “background information or explanations” under s. 12(2). For these reasons, I find that this information if disclosed would reveal the content of the Draft commented on and therefore reveal the substance of Cabinet’s deliberations.

[24] The remaining information in issue is in a five-page document entitled “A New Way of Doing Business” (“New Way record”). The New Way record is a draft of a brochure for public consumption explaining the new sewerage Regulation. The Ministry disclosed the first three pages of the record and withheld the final two.²⁶ The contents of the disclosed pages are essentially the same as the withheld portions. Dated November 2004, they collectively describe the new sewerage Regulation and at points contrast it with the previous one.

[25] The Ministry fails to persuade me that the New Way record discloses draft Regulations prepared for cabinet or that it in any way would reveal Cabinet’s deliberations. The *Sewerage System Regulation* became law and was public four months prior to the creation of the New Way record. All this record reveals are details of the publicly available Regulation and describes, in a factual way, differences between it and the previous regulation. There is nothing apparent, explicitly or implicitly on the face of the New Way record that reveals the draft Regulation or the substance of Cabinet deliberations. There is in fact little difference between the pages of the New Way record already released to the applicant and those pages withheld. For these reasons, I find that s. 12(1) of FIPPA does not apply to the New Way record.

4.0 CONCLUSION

[26] For the reasons given above I make the following orders under s. 58 of FIPPA:

1. Subject to para. 2 below, I confirm that the Ministry is required to refuse to disclose the information that it withheld under s. 12(1) of FIPPA.
2. I require the Ministry to give the applicant access to pages 112 and 113 and to those portions of pages 71 and 72 I have highlighted in yellow on a copy of those pages I have provided the Ministry.

²⁶ Pages 112 and 113.

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3. I require the Ministry to give the applicant access to the information identified in para. 2 immediately above within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before July 30, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

June 17, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No. F08-36985