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Order F15-47

MINISTRY OF FINANCE

Caitlin Lemiski
Adjudicator

September 3, 2015

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Summary: The applicant requested records from the Ministry of Finance related to the provincial government's decision to fund the Times of India Film Awards. The Ministry withheld some information in the responsive records, citing Cabinet confidences under s. 12 of FIPPA. The adjudicator determined that the Ministry is required to withhold some information under s. 12 because disclosing it would reveal the substance of Treasury Board deliberations. The Ministry must disclose some titles, headings, and basic topic information because s. 12 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(5); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: B.C.: Order 8-1994, 1994 CanLII 1093 (BC IPC); Order 33-1995, [1995] B.C.I.P.C.D. No. 4 (QL); Order 00-39, 2000 CanLII 14404 (BC IPC); Order 01-02, 2001 CanLII 21556 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F05-28, 2005 CanLII 30678 (BC IPC); Order F07-11, 2007 CanLII 30396 (BC IPC); Order F08-17, 2008 CanLII 57360 (BC IPC); Order F09-26, 2009 CanLII 66959 (BC IPC); Order F10-23, 2010 BCIPC 34 (CanLII); Order F14-51, 2014 BCIPC 55 (CanLII); Order F14-55, 2014 BCIPC 59 (CanLII).

Cases Considered: *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA); *Babcock v. Canada (Attorney General)*, [2002] 3 SCR 3, 2002 SCC 57 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII).

INTRODUCTION

[1] This inquiry involves a request to the Ministry of Finance (the “Ministry”) for records related to the provincial government’s decision to fund the Times of India Film Awards (“Awards”), held in 2013.¹

[2] The Ministry identified four records as responsive to the request: a Financial Impact Assessment prepared by a Treasury Board staff member, a Treasury Board submission with eight appendices, a briefing note, and a letter containing details of Treasury Board’s decision (“Decision Letter”). Some information in the records was withheld under ss. 12 (Cabinet and local public body confidences), 13 (policy advice or recommendations), 17 (disclosure harmful to the financial or economic interests of a public body) and 21 (disclosure harmful to business interest of a third party) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant was not satisfied with the Ministry’s response to his request. He requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision. Mediation did not resolve the issues in dispute, so this matter proceeded to inquiry.

[4] After the OIPC issued the Notice of Inquiry, the Ministry released some of the information it was withholding.² For the remaining information, the Ministry submits that the only section it is still relying on is s. 12 (Cabinet and local public body confidences) of FIPPA.³

[5] The Ministry made initial and reply submissions to the inquiry, and the applicant made initial submissions.

ISSUE

[6] The issue in this inquiry is whether the Ministry must refuse to disclose information under s. 12(1) of FIPPA. The Ministry has the burden of proof, under s. 57(1) of FIPPA, to establish that s. 12(1) requires it to refuse to disclose the requested information.

¹ Orders F15-48 (Ministry of Jobs, Tourism and Skills Training), and F15-47 (Ministry of Finance), each relate to an applicant’s request for records related to the Times of India Film Awards.

² Public body’s initial submission at para. 3.01.

³ Public body’s initial submission at para. 3.02.

DISCUSSION

[7] **Background** — In June 2012, the Times Group, a media company,⁴ approached the British Columbia government with a proposal to host the Awards in BC. Treasury Board agreed to provide funding to hold the event. The Ministry of Jobs, Tourism and Skills Training (“JTST”) entered into a contract with the Times Group to hold the Awards.⁵ In January 2013, the applicant submitted his request to the Ministry for records related to the government’s decision to fund the Awards.⁶

[8] **Records in Dispute** — The records in dispute are a Financial Impact Assessment prepared by a Treasury Board staff member, a Treasury Board submission with eight appendices, a briefing note, and the Decision Letter. The Ministry has severed substantial amounts of information in these records, citing s. 12.

[9] **Cabinet Confidences (s. 12)** — Section 12(1) states:

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.

[10] In *Babcock v. Canada (Attorney General)*, 2002 SCC 57, the Supreme Court of Canada stated that the purpose of exempting Cabinet deliberations from disclosure under access to information legislation is that “[t]hose 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.”⁷

[11] In *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) the British Columbia Court of Appeal determined the appropriate test for questions under s. 12(1) is: Does the information sought to be disclosed form the basis for Cabinet deliberations?⁸

⁴ Information released to the applicant on p. 3 of the Treasury Board Submission in dispute at this inquiry states that the Times Group is the common name given to the company Bennett Coleman and Company Limited, and that it is the “largest mass media company in India.”

⁵ Public body’s reply submission at paras. 8 and 9. The Times of India is part of the Times Group.

⁶ Page one of the applicant’s submission.

⁷ *Babcock v. Canada (Attorney General)*, 2002 SCC 57, (at para. 18) as quoted in Order 02-38.

⁸ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) at para. 48.

[12] In this case, recognizing the purposes of protecting Cabinet confidentiality, I must consider whether the information the Ministry is withholding formed the basis for Cabinet deliberations. Previous Orders have said that in some circumstances, this will be clear from information that has been submitted directly to a Cabinet committee, but in other cases there may be inferential evidence or other surrounding circumstances that confirm that disclosing the information at issue would “reveal” the substance of deliberations.⁹

[13] **Position of the parties** — The Ministry’s position is that s. 12(1) requires the Ministry to withhold the disputed information as its disclosure would reveal the substance of Treasury Board deliberations.¹⁰ It submits that previous orders issued by the OIPC and the Court of Appeal’s decision in *Aquasource* support the Ministry’s application of s. 12(1) to the information in dispute.¹¹

[14] The applicant contends that the Ministry is applying s. 12(1) too broadly and has not adequately considered the exceptions to it in s. 12(2)(c).¹² He also submits that the Ministry is using s. 12(1) as a means of withholding information that the Ministry would otherwise be required to disclose under FIPPA, for example information in a draft contract attached as an appendix to the Treasury Board submission that is in dispute.¹³

[15] **Analysis** — I will now consider whether s. 12(1) requires the Ministry to continue to withhold the disputed information.

Designation as an Executive Committee

[16] The Ministry submits that the information in the records deals with the deliberations of Treasury Board, and that Treasury Board is a committee of the Executive Council designated under s. 12(5) of FIPPA.¹⁴ Section 12(5) states that the Lieutenant Governor in Council by regulation may designate a committee for the purposes of s. 12(1). I agree that Treasury Board has this designation, which means that it is a committee of Executive Council within the meaning of s. 12.

⁹ In Order F10-23, 2010 BCIPC 34 at para 16; Order F09-26, 2009, CanLII 66965 at para. 23.

¹⁰ Public body’s initial submission at para. 4.17.

¹¹ Public body’s initial submission at para. 4.17.

¹² Applicant’s initial submissions at para. 37. I address s. 12(2) later in this decision.

¹³ Applicant’s initial submission at para. 30. In its submissions, the Ministry refers to the draft contract as a “finalized copy of the Transfer Under Agreement” (see para. 4.34).

¹⁴ Public body’s initial submission at paras. 4.10 and 4.15. The Committees are listed in s. 1 of the *Committees of the Executive Council Regulation*. In this Order, my references to Cabinet include Treasury Board.

Records submitted to Treasury Board

[17] The Ministry has severed most of the briefing note and much of the Treasury Board submission and its eight appendices. The Ministry disclosed some background information from the body of the briefing note and the Treasury Board submission. The Ministry also disclosed information from two appendices to the Treasury Board submission, namely details of the provincial government's trade strategy with India and parts of a draft contract related to the Awards.

[18] The Executive Director of the Treasury Board Staff (the "Executive Director") deposes that the Chair of Treasury Board (the "Chair") reviewed the briefing note and the Treasury Board submission at a Treasury Board minor meeting and made a decision called a minor minute.¹⁵ The minor minute was then presented to the full Treasury Board, and the full Treasury Board ratified the Chair's decision.¹⁶ The Executive Director deposes that the Chair then sent the Decision Letter to JTST advising that Treasury Board had approved funding.¹⁷

[19] Based on this evidence, I am satisfied that the briefing note and the Treasury Board submission were submitted to the Chair at a minor meeting. I consider the process of submitting records to the Chair for consideration at a minor meeting to be submitting records to Treasury Board for the purposes of s. 12.¹⁸ Therefore, I am satisfied that these records were submitted to Treasury Board.

[20] In considering whether s. 12(1) requires the Ministry to withhold information severed from the briefing note and the Treasury Board submission, I have considered the following from Order 33-1995, which was referred to with approval by the Court in *Aquasource*:

...a Cabinet submission, by its nature and content, comes within the ambit of s. 12(1).

It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal' the substance of Cabinet deliberations[,] because it would permit the drawing of accurate inferences with respect to the deliberations (Argument for the Public Bodies, pp. 9-10).¹⁹

¹⁵ Affidavit of Gord Enemark, Executive Director, at paras. 9-10.

¹⁶ Affidavit of Gord Enemark at para. 13.

¹⁷ Affidavit of Gord Enemark at para. 14 and "Exhibit D" to that Affidavit.

¹⁸ See Order F14-51 2014 BCIPC 55 (CanLII), at paras. 22-23, citing with approval Order F07-11, 2007 CanLII 30396 (BC IPC).

¹⁹ Order 33-1995 at p. 6, as quoted in *Aquasource* at para. 48.

[21] In that Order, then Commissioner Flaherty determined that information severed from a Cabinet submission was “clearly” within the scope of s. 12(1).²⁰

[22] However, the British Columbia Court of Appeal in *Aquasource* also quoted then Commissioner Flaherty’s assertion in Order 8-1994 that “I do not automatically assume that Cabinet Submissions in all cases reflect the “substance of Cabinet deliberations” without some at least inferential evidence.”²¹

[23] Taken together, I conclude that these excerpts from Order 33-1995 and Order 8-1994 as quoted in *Aquasource* mean that records submitted to Cabinet will normally be protected from disclosure under s. 12(1), so long as there is at least some inferential evidence that disclosure would reveal the substance of Cabinet deliberations.

[24] In this case, I am satisfied that most of the information severed from the briefing note and the Treasury Board submission formed the basis for Treasury Board deliberations and must be withheld under s. 12(1). The information severed includes details related to funding and hosting the Awards, which Treasury Board considered and then made a decision on those details.²² In these circumstances, disclosing this information would allow someone to make accurate inferences about the substance of Treasury Board deliberations.

[25] However, consistent with the findings made in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*,²³ I have determined that s. 12(1) does not apply to some of the titles, headings, and basic topic information the Ministry severed from the briefing note and the Treasury Board submission. It would not be possible to understand what the deliberations of Treasury Board were from reading this information. I have highlighted this information in the copy of the records that I am providing to the Ministry with this order.

²⁰ Order 33-1995 at p. 8.

²¹ *Aquasource* at para. 36 quoting from Order 8-1994 at p. 10.

²² Public body’s initial submission at paras. 4.17, 4.18 and para. 9 of the affidavit of the Ministry’s Executive Director, Strategic Initiatives, Tourism and Small Business Division, which refers to the Decision Letter at p. 103 of the disputed records.

²³ *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), para. 96-100. In that case, the British Columbia Supreme Court affirmed the Adjudicator’s decision in Order F08-17 that disclosing agenda item headings (in that case, of Cabinet Committee meetings) did not reveal the substance of deliberations of those meetings.

Records not submitted to Treasury Board*The Financial Impact Assessment*

[26] The Financial Impact Assessment is one page, and the Ministry has partially severed it. Information already disclosed to the applicant from the Financial Impact Assessment states that the Financial Impact Assessment is advice to the Minister about the Film Awards, and that it was submitted by a Treasury Board staff member to the Minister. The Ministry does not argue that the Financial Impact Assessment was submitted to Cabinet or to any of its committees.

[27] The Ministry refers to Order F09-26²⁴ in support of its position that information in a record not submitted to Cabinet may still be protected under s. 12(1).²⁵ In that case, the Ministry of Transportation and Infrastructure withheld a business case for a bridge project that was later used as a basis for developing several records that were submitted to Treasury Board. The Ministry argued that disclosing the business case would therefore allow someone to draw accurate inferences about the contents of records submitted to Treasury Board that form the basis of Treasury Board deliberations.²⁶

[28] Unlike Order F09-26, the Ministry does not argue that the severed parts of the Financial Impact Assessment were used as a basis for preparing records that were submitted to Treasury Board. The Ministry submits however, that the information severed from the Financial Impact Assessment appears in records that were submitted to Treasury Board and disclosing this information would therefore permit accurate inferences to be drawn about the substance of Treasury Board deliberations.²⁷

[29] The Financial Impact Assessment predates the related Treasury Board submission and briefing note by a month, and it was written by a Treasury Board staff member.²⁸ The Executive Director deposes that he “oversaw and participated directly” in drafting the briefing note.²⁹ The briefing note was submitted to and deliberated on by Treasury Board. Based on this evidence, the Ministry’s submission that the information severed from the Financial Impact Assessment appears in records that were submitted to Treasury Board, and my

²⁴ Order F09-26, 2009 CanLII 66965 (BC IPC). The public body’s initial submission at paras. 4.40 and 4.41. Other orders have determined that s. 12(1) may still apply to information in a record that was not submitted to Cabinet if disclosing the information would reveal information that is protected by s. 12(1). See Order 01-02, 2001 CanLII 21556 (BC IPC); Order F14-55, 2014 BCIPC 59 (CanLII).

²⁵ Public body’s initial submission at paras. 4.41 and 4.42.

²⁶ Order F09-26, 2009 CanLII 66959 (BC IPC), at para. 20.

²⁷ Public body’s initial submission at paras. 4.40 and 4.41.

²⁸ This information has already been disclosed to the applicant.

²⁹ Affidavit of the Executive Director, at para. 8.

own review of the Financial Impact Assessment and the briefing note, I find that s. 12(1) applies to the severed parts of the Financial Impact Assessment. Disclosing this information would permit the drawing of accurate inferences about the substance of Treasury Board deliberations if it were disclosed.³⁰

The Decision Letter

[30] The Decision Letter is from the Chair of the Treasury Board to the Minister. The Ministry has disclosed the part of the Decision Letter that reveals that Treasury Board decided to approve funding to host the Awards, but it has severed the part of the Decision Letter following the words “subject to”. The Ministry submits that s. 12(1) applies to this information because it would reveal “the very substance” of Cabinet deliberations.³¹ In this case, the Executive Director deposes that the Decision Letter reflects Treasury Board’s approval of the decision at issue.³² Beyond that, the Ministry does not provide evidence to support its assertion that disclosing the severed parts of the Decision Letter would reveal the substance of Treasury Board deliberations.

[31] In determining whether s. 12(1) applies to the information withheld from the Decision Letter, I have considered the severed parts of the Decision Letter as a form of evidence.³³ The details of Treasury Board’s decision in this case (which are revealed by the withheld information) are evidently the product of deliberations leading to that decision. Therefore I am satisfied that disclosing the information in the Decision Letter that the Ministry has severed following the words “subject to” would directly reveal the substance of Treasury Board’s deliberations. This is consistent with Order F05-28, where former Commissioner Loukidelis found that s. 12(1) applied to records submitted to Treasury Board and records originating from the Chair of the Treasury Board, which contained information about Treasury Board decisions.³⁴

Section 12(2)(c) Exceptions

[32] Section 12(2) provides exceptions to s. 12(1). The applicant contends that the Ministry is applying s. 12(1) too broadly and that it has not adequately considered the exceptions to it in s. 12(2)(c).³⁵ The Ministry argues that s. 12(2)(c) does not apply.³⁶

³⁰ In Order 01-02, 2001 CanLII 21556 (BC IPC), former Commissioner Loukidelis determined that s. 12(1) applied to information in a record that was the same as information in a Treasury Board Submission because disclosing it would reveal the substance of Treasury Board deliberations (see para. 24).

³¹ Public body’s initial submissions at para. 4.33.

³² Affidavit of the Executive Director, at para. 14.

³³ See Order 00-39, 2000 CanLII 14404 (BC IPC) at p. 4.

³⁴ Order F05-28, 2005 CanLII 30678 (BC IPC) at paras. 11 to 13.

³⁵ Applicant’s initial submissions at para. 37.

³⁶ Public body’s initial submission at para. 4.05.

[33] Section 12(2)(c) is as follows:

(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.

[34] In this case, the Ministry disclosed that Treasury Board approved funding to host the Awards, and the Awards have already been held, therefore the decision has been made public and it has been implemented.

[35] The key question in this case then in regards to s. 12(2)(c) is whether the purpose of the information I found would reveal the substance of deliberations is to present background explanations or analysis to Cabinet or any of its committees for their decision-making consideration.

[36] In considering whether s. 12(2)(c) applies, I have followed the approach set out by former Commissioner Flaherty in Order 48-1995. He stated:

..."Background explanations" include, at least, 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. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it. Records prepared for submission to Cabinet should not be presumed to automatically reveal the substance of deliberations and must be considered for release to an applicant under section 12(2)(c).³⁷

[37] On appeal of that Order, the Court in *Aquasource* affirmed the former Commissioner's interpretation:

...The two provisions cannot be read as watertight compartments and the Commissioner was correct in harmonizing them. He accepted the government's submission that the exception relates to the purpose for which the information is given: if it is to provide background or analysis and is not

³⁷ No. 48-1995 [1995] B.C.I.P.C.D. No. 21, at p. 13.

interwoven with any of the items listed in s. 12(1), the information can be disclosed. ...³⁸

[38] Following the former Commissioner and the Court's interpretations of the relationship between ss. 12(1) and 12(2), and from my careful review of the records, I have determined that ss. 12(2)(c)(i) and (ii) do not apply to any of the information to which s. 12(1) applies.

[39] For instance, there is some information in dispute whose purpose was not to provide analysis of background or explanations. For example, the information severed from the Decision Letter contains a series of "subject to" conditions of Treasury Board's decision to fund the Awards. This is information communicating Cabinet's decision to JTST, and not information prepared for the purpose of providing background analysis or explanations. In another example, information severed from the document of understanding that is attached to the Treasury Board submission is not background information because it describes issues that are directly related to funding and hosting the Awards. I therefore find that s. 12(2)(c) does not apply to this information.

[40] In other instances, the disputed information is analysis of background or explanations, but I find that it cannot be reasonably severed because it is so interwoven with s. 12(1) information. For example, there is information severed in the "Background" section of the Treasury Board submission³⁹ related to funding and hosting the Awards, but this information is directly intertwined with policy considerations. The result is that none of the information can be disclosed without revealing the substance of Treasury Board's deliberations.

CONCLUSION

[41] I have determined that s. 12(1) requires the Ministry to continue to withhold most of the information it severed because disclosure of this information would reveal the substance of Cabinet's deliberations. However, there are some instances where I have determined that s. 12(1) does not apply to topic headings and the titles of appendices because the information only reveals the subject of what Cabinet discussed without revealing the substance of Cabinet's deliberations, either directly or by inference. I have also determined that none of the exceptions in s. 12(2) apply to the information to which s. 12(1) applies.

³⁸ *Aquasource* at para. 50.

³⁹ At p. 14 of the disputed records.

ORDER

[42] For the reasons given above, under s. 58 of FIPPA, I order that:

1. Subject to para. 2 below, the Ministry is required to withhold the information it has withheld under s. 12 of FIPPA.
2. The Ministry is required to disclose the portions of the disputed information that I have highlighted in yellow on or before October 19, 2015 pursuant to s. 59 of FIPPA. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

September 3, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-53159