



OFFICE OF THE
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Order F17-15

MINISTRY OF FINANCE

Celia Francis
Adjudicator

March 31, 2017

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Summary: The Peace Valley Landowners Association (“PVLA”) requested a review of the Ministry’s decision to withhold a briefing note related to the Site C Clean Energy Project, under ss. 12(1) (Cabinet confidences), 13(1) (advice or recommendations) and 17(1) (harm to public body’s financial interests) of FIPPA. The PVLA also argued that the Ministry was required to disclose the briefing note under s. 25(1)(b) (public interest override). The adjudicator found that s. 25(1)(b) did not apply to the briefing note. The adjudicator also found that s. 12(1) did apply to the information in the briefing note and required the Ministry to refuse the PVLA access to it. It was not necessary to consider ss. 13(1) and 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2), 25(1)(b); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

Authorities Considered: B.C.: Order F07-23, 2007 CanLII 52748 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Investigation Report F15-02, 2015 BCIPC 30 (CanLII); Investigation Report F16-02, 2016 BCIPC 36 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 01-02, 2001 CanLII 21556 (BC IPC); Order 02-50, 2002 CanLII 42488 (BC IPC); Order F15-59, 2015 BCIPC 62 (CanLII); Order F16-18, 2016 BCIPC 20 (CanLII).

Cases Considered: *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57; *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

INTRODUCTION

[1] This order flows from a request for records related to the Site C Clean Energy Project (“Site C”). In January 2015, the Peace Valley Landowners Association (“PVLA”) made a request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the Ministry of Finance (“Ministry”) for briefing notes and other records for various topics related to Site C. The Ministry responded in July 2015 by disclosing records in severed form. It told the PVLA that it was withholding information under several exceptions, including ss. 12(1) (Cabinet confidences), 13(1) (advice or recommendations) and 17(1) (harm to public body’s financial interests) of FIPPA.

[2] The PVLA requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision to withhold information in the records, in particular, a Treasury Board staff briefing note of December 4, 2014 entitled “BC Hydro Site C Business Case and Risk Management Plans” (“briefing note”). The PVLA noted that it had made a similar request to the BC Hydro and Power Authority (“BC Hydro”) and that, while the Ministry had withheld the briefing note in full,¹ BC Hydro had disclosed the briefing note in severed form. The PVLA also argued that the Ministry was required to disclose the entire briefing note under s. 25(1)(b) (public interest override) of FIPPA.

[3] Mediation by the OIPC resulted in narrowing the request for review to the Ministry’s decision to apply ss. 12(1), 13(1) and 17(1) to the briefing note but was otherwise not successful. The PVLA asked that the matter proceed to inquiry regarding the exceptions, as well as whether the Ministry is required by s. 25(1)(b) to disclose the briefing note. The OIPC invited and received submissions from the Ministry and the PVLA. BC Hydro was not a party in the inquiry.²

ISSUES

[4] The issues before me are whether the Ministry is

- required by s. 12(1) and authorized by ss. 13(1) and 17(1) to withhold the briefing note; and
- required by s. 25(1)(b) to disclose the briefing note.

¹ It appears that the Ministry disclosed the title and date of the briefing note, on p. 1, and a brief section on p. 11 containing staff contact information, but withheld the body of the briefing note and its attachments.

² OIPC did not consider BC Hydro to be an appropriate person to invite to participate in the inquiry and BC Hydro did not seek to be added as a party. However, the Ministry’s evidence included an affidavit from its Manager of Commercial Negotiations for BC Hydro.

[5] Under s. 57(1) of FIPPA, the Ministry has the burden of proof respecting ss. 12(1), 13(1) and 17(1). Section 57 is silent as to who has the burden of proof respecting s. 25(1)(b). Past orders have said that, in light of the absence of a statutory burden of proof, “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.”³

DISCUSSION

Record in dispute

[6] The record in dispute is a 21-page briefing note, which includes nine pages of appendices. The briefing note relates to financial projections and financial risk management for Site C. The Ministry withheld the briefing note in full under ss. 12(1) and 13(1). It also applied s. 17(1) to portions of the briefing note.

[7] While BC Hydro disclosed the same briefing note in severed form,⁴ the PVLA did not explicitly narrow the issue in this inquiry to the information that BC Hydro withheld. I have therefore considered the Ministry’s decision to withhold the entire briefing note.

Background

[8] Site C is a project to build a dam and hydroelectric generating station on the Peace River in northeast BC. It will provide enough energy to power 450,000 homes. It is the most expensive public work undertaken in BC to date and has a cost estimate of \$8.3 billion. In December 2014, the Province announced its decision to proceed with the project. Construction on the project began in July 2015 and is expected to last approximately 10 years.⁵

Section 25(1)(b) – public interest override

[9] Section 25(1)(b) reads as follows:

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

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

³ See, for example, Order F07-23, 2007 CanLII 52748 (BC IPC), and Order 02-38, 2002 CanLII 42472 (BC IPC).

⁴ It withheld approximately 13 of the 21 pages.

⁵ Ministry’s initial submission, paras. 4-6, 20; Affidavit of Doug Foster, Assistant Deputy Minister, Strategic Initiatives, Ministry of Finance, paras. 14-15.

[10] Section 25(1)(b) overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.⁶ Consequently, there is a high threshold before it can properly come into play.⁷ Previous orders have explained this concept as follows: "... the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (*i.e.*, unmistakably) in the public interest ..."⁸ More recently, former Commissioner Denham expressed the view that "clearly means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest." She added that s. 25(1)(b) "requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest." The Commissioner provided a non-exhaustive list of factors public bodies should consider in determining whether s. 25(1)(b) applies to information. These factors include whether the information would contribute to educating the public about the matter and would contribute in a substantive way to the body of information already available about the matter.⁹

Parties' submissions

[11] The PVLA said that the Site C project has a long history, during which the need for, costs of and alternatives to the "controversial project have been matters of considerable public debate". The PVLA believes the briefing note would shed light on what was before the BC Government before it decided to proceed with Site C and whether it made "a fiscally prudent and sound decision when it approved the \$8.8 [*sic*] billion public expenditure", including in light of Site C's impacts on the environment, BC Hydro rates and the provincial debt. The PVLA argued that these "issues continue to be of public interest and importance", which it says is demonstrated by numerous media articles on Site C (copies of which it provided). In the PVLA's view, the factors former Commissioner Denham listed in her discussion of s. 25(1)(b) all apply here.¹⁰

[12] The Ministry argued that the Province and BC Hydro have made "a significant amount of information regarding Site C – including financial information – publicly available". In its view, the factors for disclosure under s. 25(1)(b) do not apply to the withheld information as disclosure would not, for example, facilitate public discussion. Rather, the Ministry argued, disclosure under this provision "would be an affront to the public interest principles" and objectives of ss. 12(1), 13(1) and 17(1). The Ministry noted that the Province will

⁶ Section 25(2).

⁷ See Investigation Report F15-02, 2015 BCIPC 30 (CanLII), pp. 28-29.

⁸ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, italics in original.

⁹ Investigation Report F16-02, 2016 BCIPC 36 (CanLII), pp. 26-27.

¹⁰ All quotes in this paragraph are from PVLA's initial submission, paras. 12-22, 35-44; exhibits to Moore affidavit.

need Site C to meet its energy needs and that “the project will now necessarily proceed to completion given the passage of time and the resources committed to date”.¹¹ It said that the PVLA wants the briefing note to attempt to stop construction and completion of Site C.¹² The Ministry argued that any delays due to disclosure of the briefing note would result in financial harm and additional project costs (ultimately borne by BC Hydro ratepayers), which would be contrary to the public interest.¹³

Analysis and finding

[13] The withheld information in this case concerns financial projections for Site C and options for proceeding with the project, together with implications and considerations for those options. Former Commissioner Denham held, and I agree, that the public interest may “involve the interests of the public in relation to matters of public finance or financial management”.¹⁴ I also acknowledge that the public has had and will continue to have an interest in knowing about the costs, impacts and other aspects of Site C.

[14] However, it is clear from the Ministry’s submission that the Province and BC Hydro have provided large quantities of financial and other information about Site C, such as: the business case for Site C;¹⁵ cost estimates for Site C; backgrounders on topics such as alternatives to Site C, projected electricity demand, labour requirements, consultations and environmental impacts; quarterly progress reports; construction contracts; due diligence letters; and independent financial reviews.¹⁶ The Province and BC Hydro have also disclosed numerous records about Site C under FIPPA.¹⁷ There have also been extensive public assessments and consultations in which the public have had an opportunity to comment and participate.¹⁸

¹¹ It noted that construction on Site C started in July 2015 and that the Province and BC Hydro have already spent or committed to spending over \$4 billion.

¹² The Ministry said that the PVLA’s judicial reviews of federal and provincial decisions regarding Site C were dismissed. The PVLA said the judicial reviews were an important check on the BC government’s exercise of statutory power; PVLA’s response submission, para. 21.

¹³ All quotes in this paragraph are from the Ministry’s initial submission, paras. 107-114.

¹⁴ IR F15-02, p. 30. Former Commissioner Loukidelis said that s. 25(1)(b) might encompass “financial information, such as information disclosing a clear and large-magnitude error or misrepresentation in published public accounts”; Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 65.

¹⁵ Exhibit I, Foster affidavit.

¹⁶ Ministry’s initial submission, paras. 8; Exhibits D-H, J to Foster affidavit.

¹⁷ Ministry’s initial submission, para. 10; Exhibits C, K, L to Foster affidavit, which included copies of records disclosed under FIPPA.

¹⁸ Foster affidavit, paras. 18, 26.

[15] I accept that the PVLA has an interest in Site C, in that it represents landowners who will be affected by the project. However, as the PVLA itself admitted, it participated in the assessment process for Site C and also launched judicial reviews of provincial and federal decisions regarding Site C.¹⁹ It was apparently well able to do so on the basis of information already available to it and without the benefit of the briefing note.

[16] The PVLA said this about its reasons for requesting the briefing note:

The Request and this inquiry “speak to the consistency of the PVLA’s position, namely its interest in ensuring that any decision to proceed with Site C be subject to thorough justification analysis, including whether the project is economically justified in light of the impacts on the environment as well as BC Hydro rates and the provincial debt. These issues continue to be of significant public interest and importance.

[17] The Ministry has satisfied me that information on the economic justification for Site C, as well as on the other issues the PVLA mentioned, is already publicly available. The briefing note would not in my view add materially to this information. It would also not contribute in a substantive way to or facilitate the public’s understanding of, or debate on, the Site C issues, considering the vast quantity of information already available to the public.²⁰ Moreover, the public already has considerable information to help hold BC Hydro and the BC government accountable for their actions regarding Site C. I also do not consider that this is a case in which the public interest outweighs and overrides all the exceptions to disclosure under FIPPA. It is not, in my view, clearly in the public interest for the briefing note to be disclosed. For these reasons, I find that s. 25(1)(b) does not apply to the briefing note.

Cabinet confidentiality – s. 12(1)

[18] Section 12(1) protects the substance of deliberations both of Cabinet and its committees. It reads 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.

¹⁹ PVLA’s reply submission, paras. 20-21.

²⁰ See Order 02-38, at paras. 66-67, for similar views.

[19] Past orders and case law have commented on the public interest in maintaining Executive Council (*i.e.*, Cabinet) confidentiality, noting that this is reflected in the mandatory nature of the s. 12(1) exception:²¹

Those 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.²²

[20] Past orders and case law also provide useful guidance on the meaning of “substance of deliberations”. For example, the BC Court of Appeal, in *Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)* [*Aquasource*],²³ held that:

... “substance of deliberations” refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. ...

... the class of things set out after “including” in s.12(1) extends the meaning of “substance of deliberations” and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. ...²⁴

[21] Order 01-02 said that the test that emerges from *Aquasource* is whether information in dispute under s. 12(1) formed the basis for Cabinet deliberations.²⁵ This is the test that other BC orders have also taken²⁶ and is the one that I will follow here.

Is Treasury Board a Cabinet committee?

[22] Under s. 12(5) of FIPPA, the Lieutenant Governor in Council may designate a committee for the purposes of s. 12. Under the *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005, Treasury Board is so designated. I find that it is a committee of the Executive Council for the purposes of s. 12(1).

²¹ *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 [*Babcock*]. See also Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 69, citing *Babcock*.

²² *Babcock*, at para. 18.

²³ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

²⁴ *Aquasource*, at para. 39. See also Order 02-01, 2001 CanLII 21556 (BC IPC), which referred to this finding.

²⁵ Order 01-02, 2001 CanLII 21556 (BC IPC), at para. 13.

²⁶ See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, Order 02-50, 2002 CanLII 42488 (BC IPC), and more recently Order F15-59, 2015 BCIPC 62 (CanLII), and Order F16-18, 2016 BCIPC 20 (CanLII).

Would disclosure of the information reveal the substance of deliberations?

[23] The Ministry argued that disclosure of the briefing note would reveal the substance of deliberations of both Cabinet and Treasury Board. The Ministry's evidence is that the briefing note was used "multiple times" both by Cabinet and Treasury Board in their deliberations on Site C over a four-day period in December 2014.²⁷ The Ministry also said the briefing note continues to be used by Cabinet, Treasury Board and other Cabinet committees as part of ongoing decision-making about Site C, so disclosing it would also reveal the substance of subsequent and future deliberations of those bodies.²⁸

[24] The briefing note comprises recommendations on Site C matters, options for proceeding with Site C, the pros, cons and implications for those options, advice and considerations for proceeding with Site C, potential financial and other impacts, risk management options and projected costs. The Ministry's evidence is that Cabinet and Treasury Board considered the information in the briefing note in their deliberations on Site C in December 2014. I therefore accept that it was part of the body of information Cabinet and Treasury Board considered regarding Site C and formed the basis for their deliberations. I find that disclosure of the briefing note would reveal the substance of deliberations of Cabinet and Treasury Board.

Does s. 12(2)(c) apply?

[25] Section 12(2)(c) states that s. 12(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.

[26] In Order 01-02,²⁹ former Commissioner Loukidelis discussed the meaning of s. 12(2)(c):

The previous Commissioner [Flaherty] acknowledged, as I do, that it can be difficult to distinguish between information that forms the "substance of

²⁷ Foster affidavit, para. 42. Mr Foster authored the briefing note and attended the four days of deliberations on Site C by Cabinet and Treasury Board from December 2-5, 2014. He deposed that Cabinet considered the original briefing note on Day 2 of these meetings and that Treasury Board considered a revised version (the version at issue here) on Day 3; Foster affidavit, paras. 34, 36, 42.

²⁸ Ministry's initial submission, para. 50; Foster affidavit, para. 50.

²⁹ 2001 CanLII 21556 (BC IPC).

deliberations” and that which forms “background explanations or analysis”. He acknowledged that in some cases these categories may be interchangeable. In Order No. 48-1995, he nonetheless expressed the view (at p. 13) that “background explanations”

... include 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.³⁰

[27] The Court in *Aquasource* confirmed that ss. 12(1) and 12(2)(c) cannot be read as watertight compartments and that Commissioner Flaherty correctly interpreted s. 12(2)(c) in relation to s. 12(1).³¹

[28] The Ministry said that Cabinet and Treasury Board used the withheld information in deciding whether to provide funding for Site C.³² As such, the Ministry said the withheld information is not background explanations but forms part of the analysis of options. The Ministry added that any information on background explanations or analysis is interwoven with information that falls under s. 12(1). The Ministry argued that, for all these reasons, s. 12(2)(c) does not apply to the withheld information.³³ The PVLA argued that at least some factual material could be separated out from the s. 12(1) information.³⁴

[29] The purpose of the withheld information was not, in my view, to present “background explanations and analysis”, as is required in order for s. 12(2)(c) to apply. For example, it is not incidental to the issues. Rather it consists of the very options, analyses, implications, advice, recommendations and considerations that formed the basis of Cabinet and Treasury Board deliberations. Any background information or analysis is intertwined with the options, analysis and other information to which s. 12(1) applies, such that it could not reasonably be disclosed. I find that s. 12(2)(c) does not apply to the information in the briefing note.

Conclusion on s. 12(1)

[30] I find that s. 12(1) applies to the withheld information and that s. 12(2)(c) does not. The Ministry has, in my view, met its burden of proof regarding s. 12(1). I find that the Ministry is required to withhold the disputed information under s. 12(1).

³⁰ At para. 15.

³¹ *Aquasource*, at paras. 50-51.

³² Foster affidavit, para. 42.

³³ Ministry’s initial submission, paras. 44-57.

³⁴ PVLA’s response submission, paras. 28-29.

CONCLUSION

[31] For reasons given above, under s. 58(2)(c) of FIPPA, I require the Ministry to refuse the PVLA access to the withheld information in the briefing note. Given my finding on s. 12(1), it is not necessary to consider whether ss. 13(1) and 17(1) also apply to the briefing note. In addition, given my finding on s. 25(1)(b), no order on this provision is necessary.

March 31, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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