

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 304-1999
April 16, 1999**

INQUIRY RE: A request for briefing notes about the Nisga'a Final Agreement in the custody of the Ministry of Environment, Lands and Parks

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on March 3, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the B.C. Liberal Caucus (the applicant) of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to withhold certain portions of Ministry briefing notes about the Nisga'a final agreement.

2. Documentation of the inquiry process

On September 11, 1998 Brian Menzies, on behalf of the B.C. Liberal Caucus, submitted a request to the Ministry for “[a]ll briefing notes on the Nisga'a since January 1, 1998.” On November 4, 1998 the Ministry denied access under sections 12 and 13 of the Act to certain portions of the records.

On December 7, 1998 the applicant requested that this office review the Ministry's decision. The ninety-day period ended on March 3, 1999. Both before and during the inquiry period, the Ministry released additional information. The Notice of Inquiry was sent to the parties on February 9, 1999, setting the inquiry for March 3, 1999.

3. Issue under review and the burden of proof

The issue under review is the decision of the Ministry to apply sections 12 and 13 of the Act to information in the records in dispute. The relevant parts of sections 12 and 13 are as follows:

Cabinet confidences

- 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
- (2) Subsection (1) does not apply to
- (a) information in a record that has been in existence for 15 or more years,
 - (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
 - (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.

....

Policy advice or recommendations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1)
- (a) any factual material,
 - (b) a public opinion poll,
 - (c) a statistical survey,
 - (d) an appraisal,
 - (e) an economic forecast,
 - (f) an environmental impact statement or similar information,

- (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
 - (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
 - (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
 - (j) a report on the results of field research undertaken before a policy proposal is formulated,
 - (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
 - (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
 - (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 12 and 13 it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the record or part of the record.

4. The records in dispute

The records in dispute are: a decision note prepared for the Assistant Deputy Minister, dated July 20, 1998, about the “approach and the source of funding for the assessment of potentially contaminated parcels of land;” and a decision note prepared for the Minister, dated January 27, 1998, about the “proposed amendments to the *Wildlife Act* and the *Water Act* that are required to support implementation of the Nisga’a final agreement.”

5. The Official Opposition of British Columbia’s case

The Liberal Caucus believes that it has not been provided with all of the records that it requested and that exceptions under the Act were improperly applied to those

records that it has received. Since the request for review submitted to my Office by the Liberal Caucus requests only a review of the “information provided,” I am unable to address the issue raised in the Liberal Caucus’s submission regarding the adequacy of the Ministry’s search for the requested documents.

6. The Ministry of Environment, Lands and Parks’ case

Each of the two records in dispute is a “decision note,” which is a type of briefing note “prepared to obtain a decision on a recommended approach to deal with an issue or matter prior to taking any action.”

I have reviewed below the Ministry’s submissions with respect to the application of sections 12 and 13 of the Act to the records in dispute.

7. Discussion

Section 12: Cabinet confidences

The Ministry’s submissions review the interpretation of section 12 of the Act in a decision of the Court of Appeal of British Columbia in the case of *Aquasource Ltd. vs. Information and Privacy Commissioner for the Province of British Columbia*, (1998), 111 B.C.A.C. 95, which concluded that “the provision must be read as widely protecting the confidence of Cabinet communications.” (Submission of the Ministry, paragraphs 5.03 to 5.05)

The Ministry argues that disclosure of the January 27, 1998 decision note will clearly reveal information that forms the basis for Cabinet deliberations with respect to proposed changes to the *Water Act* and the *Wildlife Act*. (Submission of the Ministry, paragraph 5.06) The Ministry has also provided me with an affidavit and *in camera* evidence in this regard. (Submission of the Ministry, paragraph 5.08, and the affidavit of Margaret Eckenfelder, Director, Strategic Management and Legislation, Cabinet Policy and Communications Secretariat, Ministry of Finance and Corporate Relations)

The Ministry submits that section 12(1) of the Act requires it to refuse access to the information in dispute from the January 27, 1998 decision note. It adds that, with respect to section 12(2), “none of the withheld information could be characterized as background explanations or analysis.”

Section 13: Policy advice, recommendations or draft regulations

The Ministry has provided me, and the applicant, with a thorough review of the scope of protection to “advice and recommendations” provided for under section 13 of the Act as interpreted and applied in my earlier Orders. (See Submission of the Ministry, paragraphs 5.11 to 5.13) I have reviewed below its application of section 13 to the two records in dispute.

8. Review of the Records in Dispute

The Ministry has kindly provided me and the applicant with a one-page description of the two records in dispute, the amount of severing that has taken place, the exceptions applied, and why they were applied. I will treat each of them separately.

A. The July 20, 1998 decision note:

It is three pages in length, and approximately two-thirds has been withheld. The record was prepared by the Ministry's Skeena Regional Office for decision by the Assistant Deputy Minister, Environment and Lands Regional Operations. It concerns "the approach and funding for the assessment of potentially contaminated parcels of land that will become part of the Nisga'a treaty lands after the treaty is ratified by all parties."

The Ministry has applied section 13 of the Act to this record, because the severed materials constitute:

Advice developed by and for the Public Body as to options available on the approach and the source of funding for the assessment of potentially contaminated parcels of lands that will become part of the Nisga'a treaty lands, an assessment of these options, and the recommended option which flows from this assessment. (Submission of the Ministry, paragraph 4.01)

Based on my review of the record in dispute, I find that the Ministry has appropriately applied section 13 to the information in dispute.

B. The January 27, 1998 decision note:

This record consists of eight pages, four pages of which are proposed drafting instructions. It was prepared by the Ministry's Corporate Policy Branch for a decision by the Minister with respect to proposed amendments to the *Wildlife Act* and the *Water Act* to support implementation of the Nisga'a Final Agreement. The Minister's decision formed part of a package submitted to the Cabinet Policy and Communications Secretariat. Approximately one-third of the record has been withheld.

The Ministry applied section 12 of the Act "to those parts of the record which would reveal, expressly or by accurate inference, advice, recommendations, policy considerations and draft legislation submitted to Cabinet" and its committees.

The Ministry applied section 13 "to some of the same information as section 12 has been applied to."

That being advice developed by and for the Public Body as to options available with respect to the legislative needs arising from the water and wildlife provisions of the Nisga'a Final Agreement, and the recommended

amendments to the *Water Act* and the *Wildlife Act*. (Submission of the Ministry, paragraph 4.01)

Based on my review of the records in dispute, I can confirm that the Ministry properly applied sections 12 and 13 of the Act to the records in dispute. See Order No. 165-1997, May 20, 1997; and Order No. 220-1998, March 31, 1998. (Submission of the Ministry, paragraph 5.07)

In the case of both records, I am pleased to note that the Ministry has used a narrow interpretation of the exceptions under the Act and has released a substantial amount of information to the applicant.

9. Order

I find that the Ministry of Environment, Lands and Parks was required to withhold information in the records in dispute under section 12(1) of the Act. Under section 58(2)(c), I therefore require the Ministry to refuse to disclose the information withheld under section 12(1) of the Act.

I also find that the Ministry of Environment, Lands and Parks was authorized to withhold information in the records in dispute under section 13 of the Act. Under section 58(2)(b), I therefore confirm the decision of the Ministry to refuse to disclose the information withheld under section 13 of the Act.

David H. Flaherty
Commissioner

April 16, 1999