



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

Order F09-26

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Celia Francis, Senior Adjudicator

November 25, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 32

Document URL: <http://www.oipc.bc.ca/orders/2009/OrderF09-26.pdf>

Summary: CUPE requested information on the William R. Bennett Bridge and the Sea to Sky Highway projects. Section 12(1) applies to the withheld information.

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

Authorities Considered: **B.C.:** Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-28, [2003] B.C.I.P.C.D. No. 28; Order F07-23, [2007] B.C.I.P.C.D. No. 38; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order No. 165-1997, [1997] B.C.I.P.C.D. No. 23; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-50, [2002] B.C.I.P.C.D. No. 51.

Cases Considered: *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

1.0 INTRODUCTION

[1] The Canadian Union of Public Employees (“CUPE”) requested records from Partnerships BC related to the business cases for P3¹ projects in which Partnerships BC had been involved, as well as the public sector comparator calculations, comparative cash flows and related consultants’ reports for the P3 projects. Partnerships BC transferred the requests to the individual public bodies responsible for the various projects, including the public body in this case, the Ministry of Transportation, now the Ministry of Transportation and Infrastructure (“Ministry”).

¹ P3 = Public Private Partnership.

[2] CUPE and the Ministry corresponded about the request and CUPE eventually narrowed its request to records on the William R. Bennett Bridge Project in Kelowna and the Sea to Sky Highway Project. The Ministry disclosed some records in severed form and withheld others, applying ss. 12(1) and 17(1) to the withheld information. CUPE requested a review by this Office (“OIPC”) of the decision to deny access to information.² During mediation, CUPE stated that it would be relying on s. 25 of FIPPA. Mediation did not settle the issues in dispute and the matter proceeded to an inquiry under Part 5 of FIPPA. The OIPC invited representations from CUPE, the Ministry and the Office of the Premier as an appropriate person. The Ministry made submissions on behalf of itself and the Office of the Premier.

2.0 ISSUES

[3] The issues in this case are:

1. Whether the Ministry is required by s. 12(1) to refuse access to information.
2. Whether the Ministry is authorized by s. 17(1) to refuse access to information.
3. Whether s. 25(1)(b) applies to the requested information and requires the Ministry to disclose it.

[4] The Ministry applied s. 17(1) to information to which it also applied s. 12(1). Given my finding on s. 12(1), I have decided it is not necessary to consider whether s. 17(1) also applies.

[5] Under s. 57(1) the Ministry has the burden of proof in this inquiry respecting s. 12(1). Section 57 is silent regarding the burden of proof under s. 25 and, as past orders have said, it is in the interests of each party to provide argument and evidence in support of its position.

Burden of proof respecting s. 25

[6] The Ministry argued the applicant has the burden of proof regarding s. 25.³ The Ministry and other public bodies have continued to make this argument despite what orders have said about this issue since 2002. In Order 02-38, the Commissioner acknowledged that previous orders had placed the burden of proof for s. 25 on the applicant but he concluded his discussion by saying that both

² CUPE also complained about the Ministry's failure to search adequately for records and to respond without delay. These complaints were the subject of separate files and are not in issue here.

³ Paras. 3.02 & 4.40, Ministry's initial submission. The Ministry referred first to paras. 37-39 of Order 02-38 [2002] B.C.I.P.C.D. No. 38, and later to Order No. 165-1997, [1997] B.C.I.P.C.D. No. 23.

applicant and public body should assist in determining whether s. 25 applies. In Order 03-28,⁴ the Commissioner said this:

[10] For the s. 25 issue, I have taken the approach to burden of proof that was explained in Order 02-38, [2002] B.C.I.P.C.D. No. 38 and Order 02-50, [2002] B.C.I.P.C.D. No. 51. That is, s. 25(1) requires a public body to disclose information where certain facts exist, whether or not an access request has been made. There is no statutory burden on the applicant to establish that s. 25(1) applies to the disputed information or on the Ministry or the third party to establish that it does not apply. As a practical matter, however, it is in the interests of each of the parties to provide submissions and evidence as to their respective positions on whether or not s. 25(1) compels disclosure.

[7] In Order F07-23,⁵ the public body argued, again with reference to Order 02-38, that the applicant had the burden of proof. Adjudicator Austin-Olsen referred to the Commissioner's clarification of the s. 25 burden issue in Order 03-02⁶ and said:

[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.

[8] This brief survey of orders from the last seven years will, I trust, lay to rest the recurring argument in public body submissions that the applicant bears the burden regarding s. 25.

3.0 DISCUSSION

[9] **3.1 Records in Dispute**—There are four records in dispute in this case:⁷

- A draft Business Case of December 1, 2003, ("Business Case"; Exhibit "A" to the Paul affidavit); the Ministry disclosed the cover page and a handful of other pages; it severed the vast majority of this record under s. 12(1); it also applied s. 17(1) to some information
- An Updated Executive Summary of March 31, 2004 ("Summary"; Exhibit "C" to the Paul affidavit); the Ministry disclosed the cover page and withheld the remaining eight pages under s. 12(1); the Ministry applied s. 17(1) to two items on the eighth page

⁴ [2003] B.C.I.P.C.D. No. 28.

⁵ [2007] B.C.I.P.C.D. No. 38.

⁶ [2003] B.C.I.P.C.D. No. 2, at para. 16.

⁷ The Ministry told CUPE that one record did not exist and that it could not find two others.

- “Okanagan Lake Crossing Project Peer Review – Report to Partnerships British Columbia”, a series of slides (“Slides”; Exhibit “B” to the Paul affidavit); the Ministry severed approximately half the slides under s. 12(1), withheld a few items on the same slides under s. 17(1) and disclosed the rest
- “Draft Value for Money Analysis” (“Value Analysis”; Exhibit “D” to the Paul affidavit); the Ministry withheld this record in full under s. 12(1), also severing portions on each page under s. 17(1)

[10] **3.2 Public Interest Override**—I have taken without repetition the approach in previous orders on s. 25(1)(b),⁸ which reads as follows:

Information must be disclosed if in the public interest

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.

[11] CUPE argued that P3s involve contracts worth billions of dollars and have been the subject of hundreds of articles in the media. It suggested that P3 projects are costly,⁹ more expensive in fact than “publicly delivered projects”, and subject to escalating costs. The government is making decisions about delivery of infrastructure and services that, CUPE argued, will be paid for from public revenues and have an enormous impact on British Columbians. In CUPE’s view, there is a lack of transparency and accountability in the denial of access to information about how government has made these decisions and the need for release of the information is urgent.¹⁰

[12] The Ministry argued that s. 25(1)(b) requires that there be an urgent and compelling need for disclosure. There is no such need here, in the Ministry’s view, nor is disclosure clearly necessary in the interests of public debate. The Ministry added that Partnerships BC’s website has many documents about the Bennett Bridge and Sea to Sky Highway projects, including project updates, procurement documents, value for money reports and case studies.¹¹

⁸ See, for example, Order 02-38.

⁹ CUPE said the Value for Money reports indicate that the “net present values” for the Bennett [Okanagan Lake] Bridge and the Sea to Sky Highway projects are, respectively, \$170 million and \$790 million; para. 25, CUPE’s initial submission.

¹⁰ Paras. 19-38, CUPE’s initial submission.

¹¹ Paras. 4.38-4.55, Ministry’s initial submission.

[13] As CUPE itself acknowledged, the records in this case are several years old. While I understand that CUPE believes there is a public interest in their disclosure, and there may well be, this is not the test for s. 25(1)(b). I have examined the records in question and am unable to agree with CUPE that there is an urgent and compelling need for their disclosure. I find that s. 25(1)(b) does not apply to the records in dispute.

[14] **3.3 Cabinet Confidences**—Sections 12(1) and 12(2)(c) have been the subject of several orders and I take the same approach here without repetition.¹² These sections read as follows:

Cabinet and local public body 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

...

(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.

Section 12(1)

[15] In CUPE's view,

... Section 12 was not enacted to shield cabinet from public scrutiny surrounding the procurement of programs that are presently being delivered. To this end, the protection of cabinet secrecy provided by *Aquasource* was not meant to allow the government to cover their tracks if decisions to invest public money in procuring public private partnerships end up more costly and less desirably [*sic*] than undertaking such projects publicly.¹³

¹² See for example, Order 02-01, [2002] B.C.I.P.C.D. No. 1, Order 02-38, [2002] B.C.I.P.C.D. No. 38, and Order 02-50, [2002] B.C.I.P.C.D. No. 51. See also *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

¹³ Para. 51, CUPE's initial submission.

[16] CUPE also questioned the Ministry's argument that s. 12(1) applies to the two records which did not go to Treasury Board: "It appears the Ministry is treating cabinet documents as being virulently infectious."¹⁴

[17] The Ministry said that the information in issue relates to the deliberations of Treasury Board, a Cabinet committee under s. 12(5) of the *Committees of the Executive Council Regulation*.¹⁵ I agree that Treasury Board is a Cabinet committee for the purposes of s. 12(1).

[18] The Ministry said that the Summary (Exhibit "A") was included in the package of materials forwarded to Treasury Board in April 2004 for its consideration and that the Slides (Exhibit "B") were included in the materials presented to Treasury Board in June 2005 for its consideration. The Ministry argued that both items formed part of the body of information Treasury Board considered in making decisions about whether or not to approve funding for the Okanagan Lake Crossing (Bennett Bridge) project.¹⁶

[19] I accept the Ministry's argument and evidence that these records were submitted to Treasury Board and formed part of the information Treasury Board considered in making its decisions on the Bennett Bridge project. It follows that their disclosure would reveal the substance of deliberations of a Cabinet committee. I therefore find that s. 12(1) applies to the Summary and the Slides.

[20] The Ministry said that the Business Case (Exhibit "C") was not included in the package of materials forwarded to Treasury Board for its consideration. However, it said, the Business Case was used as part of the basis for developing the Summary (which was submitted to Treasury Board), a Treasury Board briefing note and Cabinet Decision Documents TB 08/04 and TB 01/06 in which the Ministry requested approvals to proceed with various aspects of the project. The Ministry said Cabinet subsequently ratified Treasury Board's decisions. As such, it argued, disclosure of the information it severed in the Business Case would allow the drawing of accurate inferences as to the contents of the Summary and thus the substance of deliberations of Treasury Board. The Ministry argues that, following *Aquasource*, s. 12(1) applies to the severed information.¹⁷

[21] I have carefully reviewed both the Business Case and the Summary. I accept the Ministry's arguments and evidence that the Business Case was used as a basis for developing the Summary and other documents that were submitted to Treasury Board for its consideration and that formed part of the information Treasury Board considered in making its decisions on the Bennett Bridge project. I find that disclosure of the Business Case would reveal the substance of deliberations of a Cabinet committee and that s. 12(1) applies to this record.

¹⁴ Para. 44, CUPE's reply submission.

¹⁵ B.C. Reg. 229/2005. Para. 4.13, Ministry's initial submission.

¹⁶ Paras. 4.17 & 4.20, Ministry's initial submission; para. 10, Paul affidavit.

¹⁷ Paras. 4.16-4.18, Ministry's initial submission; paras. 11-6, Paul affidavit.

[22] The Ministry said the Value Analysis (Exhibit “D”) describes the “net present cost comparison for the DBFO (Design Build Finance Operate) and the PSC (Public Sector Comparator) in 2005 dollars”. The Ministry said pp. 2-17 of this document show the “detailed calculations that support the aggregate summary” on p. 1. It said that the Value Analysis was not included in material presented to Treasury Board but that it was created so that there would be a document dealing with value for money “that could ensure that the results of such an analysis could be put before Treasury Board to seek approvals to proceed”. The Ministry said that the aggregate amounts on p. 1 of the Value Analysis provided the foundation for figures inputted into a Ministry document (Exhibit “E” to the Paul affidavit) that was submitted to Treasury Board as an attachment to a Treasury Board submission. The numbers on p. 1 of the Value Analysis are the same or substantially similar to figures in Exhibit “E”, the Ministry said, and in its view disclosure of the withheld information would allow the drawing of accurate inferences on information Treasury Board considered in making a decision on the Sea to Sky Highway project.¹⁸

[23] I have carefully reviewed the Value Analysis and Exhibit “E”. I accept the Ministry’s arguments and evidence that the Value Analysis provided the basis for figures in Exhibit “E”, a document submitted to Treasury Board for its consideration. I accept that disclosure of the withheld information would allow the drawing of accurate inferences on information Treasury Board considered in making a decision on the Sea to Sky Highway project and would thus reveal the substance of deliberations of a Cabinet committee. I find that s. 12(1) applies to the Value Analysis.

Section 12(2)(c)

[24] CUPE argued that s. 12(2)(c) applies to the Cabinet decisions in question because the Bennett Bridge is complete and Sea to Sky Highway nearly so. It also submitted that much information on the projects’ costs, size and dates has already been made public through an Open Cabinet Meeting of May 30, 2003, press releases, a September 2005 Value for Money Report about the Bennett Bridge and the March 2006 Concession Agreement on the bridge. Such information should be easy to identify in the disputed records and disclose, it argued.¹⁹ The “raw data” in the Sea to Sky Value analysis is “background explanations or analysis” of the type CUPE said it is seeking. CUPE argued that the Ministry and the Office of the Premier are invoking Cabinet secrecy to “prevent citizens from seeing” financial information about these two projects.²⁰

[25] The Ministry said it took s. 12(2)(c) into account in disclosing some information, such as technological information on the bridge project, information

¹⁸ Paras. 4.19-4.25, Ministry’s initial submission; paras. 15-16, Paul affidavit.

¹⁹ Paras. 39-58, CUPE’s initial submission.

²⁰ Paras. 15-48, CUPE’s reply submission.

on current conditions (e.g., traffic conditions, asset conditions) and information on the Westbank First Nation.²¹

[26] I have considered all of CUPE's arguments carefully. I agree however that the Ministry has disclosed information of the type that s. 12(2)(c) covers and that s. 12(1) applies to the remaining withheld information.

4.0 CONCLUSION

[27] For reasons given above, under s. 58, I require the Ministry to refuse access to the information in dispute under s. 12(1). For reasons given above, no order is necessary regarding s. 25(1)(b).

November 25, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File Nos. F08-35857 & F08-36015

²¹ The Ministry disclosed information of this type in the Business Case.