



August 15, 2011

David Eby
Executive Director
BC Civil Liberties Association
Suite 550 - 1188 West Georgia Street
VANCOUVER BC V6E 4A2

Dear David Eby:

Re: Request for Review - Deny; Ministry of Finance File 2010-00170; OIPC File F11-46353

On July 27, 2011,, you submitted a written request to the Office of the Information and Privacy Commissioner (OIPC) to review a decision by the Ministry of Finance (the Ministry) to withhold information under s. 12(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) from records you requested.

FIPPA provides a person with the right to access records, in the custody or under the control of public bodies. It also provides exceptions to a person's right of access by authorizing or requiring public bodies to withhold certain information. Section 12(1) is an example of such an exception.

BACKGROUND

On October 7 2010, you requested information from the Ministry related to a financial audit of the RCMP contract policing operations.

On November 24, 2010, the Ministry assessed a fee to process your request.

On December 22, 2010, you wrote to the Office of the Information and Privacy Commissioner (OIPC) complaining that the Ministry of Citizens' Services Information Access Operations department (IAO) refused to waive its estimated fee for access to records you requested.

On July 12, 2011, the Ministry reconsidered its decision and waived the fee. At the same time, the Ministry advised you that it would not release the record under s. 12 of FIPPA since it would reveal the substance of Cabinet deliberations.

On August 10, 2011, we discussed the Ministry's decision to withhold the record under s. 12 of FIPPA. In our conversation, I informed you that the record is in draft form. The record is being prepared for submission to Treasury Board or Cabinet. Treasury Board or Cabinet have not yet received the record.

ISSUE

1. Is the Ministry required to withhold the record under s. 12 of FIPPA?

RECORD

The record at issue in this matter is an audit report.

ANALYSIS

The Ministry states that all audit reports, other than ad hoc and forensic ones, are presented to both Treasury Board and Cabinet for deliberation. The Ministry tells me that the record is currently in draft format. It has been prepared for Treasury Board or Cabinet. I understand that neither body has yet had the opportunity to review the record or deliberate on its contents.

SECTION 12(1) OF FIPPA

Section 12(1) of FIPPA is a mandatory section that requires the Ministry to withhold records, which would reveal the substance of deliberations of the Executive Council or its committees. It reads:

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.

In Order 01-02¹, former Commissioner Loukidelis reviewed the meaning of *substance of deliberations*; he wrote:

[9] Section 12(1) requires public bodies to withhold information that would reveal the "substance of deliberations" of Cabinet or of a Cabinet committee. My predecessor interpreted the term "substance of deliberations" as follows, at p. 9 of Order No. 48-1995:

...recorded information that reveals the oral arguments, pro and con, for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.

[10] He went on to say the following, at p. 10:

I do not automatically assume that Cabinet submissions in all cases reflect the "substance of Cabinet deliberations" without some at least inferential evidence. I agree that disclosure of a record would "reveal" the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substance of those deliberations.

[11] The Court of Appeal decision in *Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)* (1998), 8 Admin. L.R. (3d) 236, also provides useful guidance on the meaning of "substance of deliberations". At para. 39, Donald J.A. said the following:

Standing alone, "substance of deliberations" is capable of a range of meanings. However the phrase becomes clear when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations

¹ [2001] B.C.I.P.C.D. No. 2

submitted" That list makes it plain 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. An exception to this is found in s. 12(2)(c) relating to background explanations or analysis which I will discuss later.

[12] At para. 41, Donald J.A. also said the following:

It is my view that 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. I arrive at this conclusion with the assistance of several authorities.

[13] In the next several paragraphs Donald J.A. discussed how, in his view, the word "including", in s. 12(1), enlarges the scope of the words preceding it. The test that emerges from, *Aquasource* is whether information in dispute under s. 12(1) formed the basis for Cabinet deliberations.

The record at issue is a draft document prepared for submission to Treasury Board or Cabinet. Neither Treasury Board nor Cabinet have had the opportunity to deliberate on the record. It is apparent² that s.12 of FIPPA applies to records which are prepared for Cabinet but not yet presented to Cabinet or its committees.

If a record enables the reader, to make an accurate inference about the substance of deliberations³ it is still protected by s. 12(1) of FIPPA. In this case, the record is prepared for Treasury Board or Cabinet for the purpose of discussing the information presented in the document. Disclosing the record, at minimum, would enable the recipient to make an accurate inference about any future deliberations of the record by Treasury Board or Cabinet.

For the reasons mentioned above, it is my opinion the Ministry is required to withhold the record under s. 12(1) of FIPPA.

I note that none of the circumstances in s. 12(2) exists in this case.

CONCLUSION

It is my opinion that you have received all the information you are entitled to under FIPPA. If you do not agree with my interpretation of FIPPA, you have the right to request a formal inquiry by the Commissioner. This is a process whereby an independent adjudicator, after considering written submissions, would make a binding order on the release of the redacted information.

Access to FIPPA, the orders of this office, information about the inquiry process and other useful information is available on our website at "<http://www.oipc.bc.ca>".

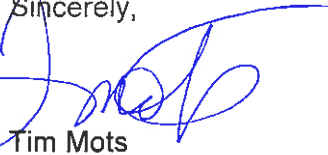
However, in my opinion, an inquiry would not produce substantially different results than my review and you would not receive any additional information.

² Ibid at paragraph 11

³ Ibid, at paragraph 10

If you have any questions about this letter, please call me at (250) 356-0791 or contact me by email at tmots@oipc.bc.ca. If I have not heard from you by August 29, 2011, I will assume that you do not wish to request a formal inquiry by the Commissioner and will close this file.

Sincerely,



Tim Mots
Investigator

cc. Marion Ashton, Analyst, IAO, Shared Services BC, Ministry of Citizens' Services