



July 15, 2016

File: 44200-00 GOVERNANCE

DELIVERED BY EMAIL

Derek Janzen, Chair
Council of Marketing Boards
36376 Stephen Leacock Drive
Abbotsford, B.C. V3G 0C2

Dear Mr. Janzen:

BC FARM INDUSTRY REVIEW BOARD AND INFORMATION MANAGEMENT

Thank you for your letter dated June 29, 2016 seeking clarification on “FIRB’s handling of Board and Commission documents”. You asked:

With respect to reporting and the submission of documents to FIRB such as meeting minutes or confidential documents, a question around Freedom of Information has been raised. How would FIRB manage an FOI request that may require the release of one of our organization’s materials? It is expected, by all Boards and Commissions, that if there were such a request to FIRB the original author of the document(s) would be provided opportunity to contest the release of any information that would pose a risk to business of privacy, including the opportunity to redact private information or provide clarification on decisions or discussions before it is released.

This is a timely question given the important role of transparency and accountability in good governance. Good governance is a strategic priority for the regulated marketing boards and commissions (commodity boards) and the BC Farm Industry Review Board (BCFIRB).¹

In response to your question, this letter:

- reviews BCFIRB’s statutory rights and powers as they apply to information in the custody or control of the commodity boards, in any physical or electronic form;

¹ [BC Farm Industry Review Board 2016/17-2018/19 Service Plan](#)

- discusses BCFIRB's management and disclosure of commodity board information in the context of:
 - Freedom of Information (FOI) requests made under the *Freedom of Information and Privacy Act (FIPPA)*,
 - BCFIRB's appeal and supervisory mandates under the *Natural Products Marketing (BC) Act (NPMA)*; and,
- Considerations for commodity boards when balancing transparency and accountability in light of potentially sensitive information.

BCFIRB rights and powers to obtain information

BCFIRB, as the supervisory and appellate board under the *NPMA*, has extensive and ongoing statutory rights and powers to obtain information in the custody or control of commodity boards. These rights and powers flow from both the *NPMA* and from the Natural Products Marketing Act Regulations (*NPMA Regulations*). These disclosure obligations of the commodity boards to BCFIRB were summarized in the December 16, 2015 letter (attached) from Jim Collins (former BCFIRB Executive Director) to the Executive Directors of the commodity boards. Mr. Collins' letter is clear that an information request from BCFIRB cannot be treated in the same way as a request by a member of the public. BCFIRB has specific statutory rights to information, which the commodity boards and commissions have the legal duty to provide.

Commensurate with BCFIRB's right to information held by the commodity boards, BCFIRB is responsible for managing that information in accordance with the law -- both in general and when a request for information is made by members of the public.

FIPPA requests by members of the public

One key statute governing public access to information is *FIPPA*. *FIPPA* applies to all "public bodies", including both the commodity boards and BCFIRB. Hence, if a member of the public seeks access to a particular record, the same *FIPPA* applies to that record regardless of whether it is held by BCFIRB or one of the commodity boards.

FIPPA contains specific provisions that authorize BCFIRB, upon receipt of an FOI request, to consult with a third party or other public body before deciding on whether to provide access to a record.² *FIPPA* also includes a provision that allows one public body (such as BCFIRB) to formally transfer the FOI request to another public body (such as a commodity board or commission) where, among other things:

² *FIPPA*, s. 10(1)(c). This provision would also authorize the commodity board to consult with another public body or third party if the commodity board receives the request.

- (a) the record was produced by or for the other public body;
- (b) the other public body was the first to obtain the record;
- (c) the record is in the custody or under the control of the other public body.³

BCFIRB is aware that some regulated marketing information can be highly sensitive. To that end, BCFIRB can consult with the commodity boards and the boards are often best positioned to directly respond to *FIPPA* requests for documents that originated with them. BCFIRB has, in the past, consulted with commodity boards upon receiving an FOI request for documents originating with the boards. BCFIRB has also formally transferred FOI requests to commodity boards when appropriate.

BCFIRB, unlike the commodity boards, is also subject to a special provision of the *Administrative Tribunals Act* (*ATA* s. 61). This provision removes the public's right to make a *FIPPA* request for certain kinds of documents. These include BCFIRB's deliberative documents, settlement discussion documents, transcripts, documents that are already public and information that BCFIRB has already deemed confidential in a hearing. Section 61 of the *ATA* thus creates additional protections that preclude BCFIRB from responding to an "FOI" request for those classes of documents.

Disclosure of information in relation to hearings and appeals

As an administrative tribunal, BCFIRB conducts hearings in its appellate and supervisory roles under the *NPMA*. Hearings may involve disclosure of regulated marketing related information. When conducting a hearing, BCFIRB may be subject to legal rules in addition to *FIPPA*.

BCFIRB has a duty to ensure procedural fairness. This may involve disclosure of information between parties as part of the hearing process. *FIPPA* provides allowance for procedural fairness in s. 3(2) where it states that "this Act does not limit the information available by law to a party to a proceeding."

In an oral appeal hearing, BCFIRB is also subject to s. 41 of the *ATA*. Section 41 allows BCFIRB to make an order that balances public disclosure with the protection of information:

- 41 (1) An oral hearing must be open to the public.
- (2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

³ *FIPPA* s. 11

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

In a supervisory hearing, BCFIRB has the same powers to control public disclosure of information. These powers are derived from its ability to control its processes.

As you know, BCFIRB has posted public information as part of some of its supervisory hearings. This is consistent with BCFIRB's position that commodity board information should be publicly available unless there is a sound reason otherwise.

In some cases, the special sensitivity of particular documents will be self-evident. However, BCFIRB's power to control the public disclosure of information in appeal and supervisory hearings necessarily places a responsibility on the commodity boards submitting that information to promptly advise BCFIRB if they believe that a particular record is especially sensitive and should not be publicly disclosed.

Information provided in the ordinary course of business

BCFIRB is aware that commodity boards regularly submit information to BCFIRB in the ordinary course of business, outside of formal appeals and supervisory hearings.

The duty to submit information may come from the NPMA Regulations. For example, the requirement that "copies of all minutes, orders, reports, rules and regulations of every marketing board or commission shall be forwarded forthwith, as they are made or amended". Information may also be provided to BCFIRB as a result of day to day supervision-based requests or orders outside of a formal supervisory hearing.

As the nature or timing of FOI requests cannot be anticipated, it is always helpful to BCFIRB if the commodity boards identify any particularly sensitive documents at the time they are provided to BCFIRB. This includes situations where BCFIRB later consults with, or transfers a subsequent FOI request, to a commodity board(s). When identifying potentially sensitive information, commodity boards are advised to refer to the *FIPPA* sections on exceptions.

Lastly, it is important to understand that noting a document as “confidential” is not necessarily sufficient to exclude it from public disclosure under *FIPPA* by BCFIRB or the commodity board.

Transparency, accountability and sensitive information

As noted earlier, BCFIRB is committed to transparency and accountability as part of good governance. It has a similar expectation of the commodity boards. BCFIRB appreciates there can be tension between transparency, accountability and public disclosure of information in some circumstances. Commodity boards may wish to consider using *FIPPA* as a guide when evaluating what information should or should not be shared with its stakeholders (e.g., when posting information on web sites).

In closing, BCFIRB is pleased to see COMB’s plans for further commodity board training on roles and responsibilities under *FIPPA*. If BCFIRB can be of any assistance regarding this training, or any other matter in the future, please let me know.

Yours truly,



John Les
Chair

Encl. J. Collins letter (December 15, 2015)

Cc: Kirsten Pedersen, BC Farm Industry Review Board
Kathleen Zimmerman, BC Council of Marketing Boards

Stephanie Nelson, BC Broiler Hatching Egg Commission
Bill Vanderspek, BC Chicken Marketing Board
Heather Carriere, BC Cranberry Marketing Commission
Dwight Yochim, BC Egg Marketing Board
Geraldine Auston, BC Hog Marketing Commission
Bob Ingratta, BC Milk Marketing Board
Michel Benoit, BC Turkey Marketing Board
Andre Solymosi, BC Vegetable Marketing Commission

BCFIRB Website

**British Columbia
Farm Industry Review Board**

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
1st Floor, 780 Blanshard Street
Victoria BC V8W 2H1
Email: firb@gov.bc.ca
Web site: www.gov.bc.ca/BCFarmIndustryReviewBoard