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Order F11-17

MINISTRY OF ATTORNEY GENERAL

Michael McEvoy, Adjudicator

June 9, 2011

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Summary: The applicant was a lawyer involved in a class action lawsuit against UBC over parking fees. She requested a letter and memo that UBC sent to the Ministry concerning the lawsuit. The Ministry refused on the basis that the information consisted of recommendations and advice under s. 13 of FIPPA and because it was protected by solicitor-client privilege. The applicant argued the disputed information constituted lobbying rather than advice. The adjudicator found that lobbying is a matter strictly regulated by the *Lobbyists Registration Act* and that is not what occurred in this case. This finding is consistent with the scheme of s. 13 that protects advice developed by one public body for another. The adjudicator also rejected the applicant's argument for release of the letter and memo because they were a "proposal" concerning a change to a program about which the Ministry had made a decision. The adjudicator concluded that if the disputed records were a "proposal" it concerned a change to legislation, not a program.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13 and 14; *Lobbyists Registration Act,* s. 1

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F09-02, [2009] B.C.I.P.C.D. No. 3; Order No. 175-1997, [1997] B.C.I.P.C.D. No. 36; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

Cases Considered: *Barbour v. The University of British Columbia*, 2009 BCSC 425; *Barbour v. The University of British Columbia*, 2009 BCCA 334; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665; *BC Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner)* 2010 BCSC 1162.

1.0 INTRODUCTION

[1] The applicant is a lawyer representing more than 300 people in a class action lawsuit against the University of British Columbia ("UBC") over parking fees. The applicant requested the following information from the Ministry of the Attorney General ("Ministry") on July 10, 2009:[1]

> All documents which are or described correspondence between the University of British Columbia and the Government of British Columbia pertaining to:
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> (a) Parking at the University of British Columbia;
>
> (b) University of British Columbia Parking Regulations;
>
> (c) The decision of the Newfoundland Supreme Court in *Keough v. Memorial University of Newfoundland*, [1980] N.J. No. 185 (SC) (QL); and
>
> (d) Section 27 (t) of the *University Act* RSBC 1996, c. 468 from 1980 to the present.

[2] The Ministry identified two records responsive to the request. One was a 19-page memo of May 28, 2009 ("memo") to the Ministry and the Ministry of Advanced Education and Labour Market Development from the Research Universities Council of British Columbia ("RUCBC"). The memo was entitled "Barbour Decision and Proposed Bill to Amend the University Act."[2] The second was a covering letter to the memo dated June 25, 2009 from UBC's counsel Hubert Lai to then Deputy Attorney General Allan Seckel ("letter").[3]

[3] Prior to responding to the applicant, the Ministry consulted UBC, which told the Ministry it believed the memo and letter should be withheld under ss. 13 and 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").[4] After considering the matter, the Ministry responded to the applicant's request on December 15, 2009, withholding most of the contents of both records under s. 13.[5]

[4] On January 28, 2010, the applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision. When mediation proved unsuccessful, the Ministry asked, under s. 56 of FIPPA, that the matter not proceed to inquiry. The Ministry cancelled that request on February 1, 2011, but then asked the Investigator's permission to add s. 14 to the list of exceptions it intended to apply to the records.[6] The Investigator gave permission. UBC requested that it be

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[1] Ministry's initial submission.
[2] The Ministry has disclosed this information to the applicant.
[3] Ministry's initial submission, paras. 1.02 and 1.03. See para. 13 below concerning a further description of the memo.
[4] Ministry's initial submission, para. 1.05.
[5] Ministry's initial submission, para. 1.06.
[6] Investigator's Fact Report, paras. 7-9.

added as an Appropriate Person at this inquiry and the OIPC agreed. The RUCBC told the OIPC that it did not want to participate as an Appropriate Person.

[5] The OIPC then issued the Notice of Inquiry under Part 5 of FIPPA, with final submissions received May 10, 2011.

2.0 ISSUES

[6] The issues in this inquiry are whether:

1. Section 13(1) of FIPPA authorizes the Ministry to refuse to disclose the records.

2. Section 14 of FIPPA authorizes the Ministry to refuse to disclose the records.

[7] Section 57(1) of FIPPA provides that with respect to both issues the Ministry must prove that the applicant has no right of access.

3.0 DISCUSSION

[8] **3.1 Background—**The applicant commenced a class action lawsuit in 2005 on behalf of over 300 persons for the reimbursement of parking fines UBC had levied. The suit alleged that the UBC Parking Regulations ("Parking Regulations") authorizing the collection of the parking fines were beyond the scope of UBC's powers. On March 30, 2009, the British Columbia Supreme Court[7] concluded that UBC had no authority to collect the parking fines and found that the members of the class action were entitled to restitution. The judgement left UBC liable for a claim of restitution of more than $4 million that, including interest, could have reached $7,000,000.[8]

[9] On May 22, 2009, the applicant launched a similar class action lawsuit against the University of Victoria ("UVic"). It followed up with yet another against Simon Fraser University ("SFU") on June 22, 2009.

[10] UBC's counsel Hubert Lai wrote to Deputy Attorney General Allan Seckel on June 25, 2009. The letter and attached memo related to the implications of the Supreme Court decision.[9]

[11] The applicant wrote to the Ministry on July 9, 2009, expressing concern that UBC might be discussing the *Barbour* decision with government and requested that, if government was considering any change to the *University Act*, the applicant be included in those discussions.[10] UBC appealed the Supreme Court ruling ("*Barbour* case") and on

[7] *Barbour v. The University of British Columbia*, 2009 BCSC 425.
[8] UBC's initial submission, para. 71.
[9] Ministry's initial submission, para. 3.06.
[10] Applicant's initial submission, para. 11, Roach affidavit, Exhibit "L".

July 10, 2009, the British Columbia Court of Appeal granted a stay of the order in the *Barbour* case, pending disposition of its appeal.[11]

[12] Prior to the hearing of the appeal, the Legislature amended the *University Act* to, among other things, authorize, retroactively, the collection of the parking fines.[12] The Legislature passed similar amendments to statutes governing other post secondary educational institutions. All became law on October 29, 2009.[13] The Court of Appeal finally did hear UBC's appeal and concluded that the amended legislation meant that UBC properly collected the fines.[14] The Supreme Court of Canada denied leave to hear the case.

[13] **3.2 The Records at Issue**—UBC counsel Hubert Lai authored the letter. The disclosed portion of the memo indicates it is from RUCBC. The Ministry says RUCBC, representing the interests of BC's "research-intensive universities," prepared the memo.[15] UBC provides further details of the memo's genesis. It says it retained the law firm of Richards Buell Sutton LP ("RBS") to prepare the memo.[16] UBC then circulated a draft to SFU, UVic and the University of Northern British Columbia ("UNBC") for comment. UBC states that the "draft memorandum received from RBS, once it was finalized, was the memorandum that was attached to UBC's letter."[17]

[14] **3.3 Advice or Recommendations**—The relevant parts of s. 13 read as follows:

> **Policy advice, recommendations or draft regulations**
>
> 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,
>
> …
>
> (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

[11] *Barbour v. The University of British Columbia*, 2009 BCCA 334.
[12] *Miscellaneous Statutes Amendment Act, 2009*, S.B.C. 2009, c. 22, ss. 12 and 16.
[13] Ministry's initial submission, para. 3.05.
[14] *Barbour v. University of British Columbia*, 2009 BCCA 334.
[15] Ministry's initial submission, para. 3.07.
[16] UBC's initial submission para. 20.
[17] UBC's initial submission, paras. 23 and 25.

[15] The principle underlying this exception has been the subject of many orders, including for example, Order 01-15,[18] where former Commissioner Loukidelis said this:

> [22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. …

[16] I adopt this approach in assessing the facts of this case.[19]

[17] **3.4 Do the Letter and Memo Contain Advice or Recommendations?—**The Ministry argues the severed information consists of advice, recommendations or information that would reveal advice or recommendations. The Ministry submits that significant portions of the letter and memo constitute advice as the British Columbia Court of Appeal defined the term in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner).*[20] The Ministry notes, among other aspects of the *College of Physicians* decision, the statement of Levine, J.A. that "advice" should be interpreted to include "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact." The Ministry says this is precisely what the Memo contains.

[18] UBC relies on the Ministry's submissions.

[19] The applicant submits that "the timing and the content of the letter and memo establish that they are not 'advice or recommendations' as contemplated by s. 13(1)."[21] The applicant says that both were a reaction to the *Barbour* case. Their purpose, the applicant argues, was to lobby the Ministry to take legislative action to avoid the consequences of the ruling rather than to advise government. It says the disclosed subject heading of the memo, "*Barbour* Decision and Proposed Bill to Amend the *University Act*", substantiates this.[22] The applicant argues that "advice or recommendations" as contemplated by s. 13 do not extend to lobbying by a defendant in an ongoing litigation for a retroactive change in legislation to allow it to avoid the consequences of a judgment of the BC Supreme Court. It argues that "advice and recommendations" have a quality of neutrality or at least an absence of self-interest on the part of the advisor."[23] Lobbying, the applicant contends, is advocacy for an outcome the lobbyist seeks regardless of the interest of the Ministry.

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[18] [2001] B.C.I.P.C.D. No. 16.
[19] See also Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 101-127.
[20] 2002 BCCA 665.
[21] Applicant's initial submission, para. 24.
[22] Applicant's initial submission, para. 26.
[23] Applicant's reply submission, para. 23.

[20] The applicant also argues that previous decisions suggest that "advice" usually involves a communication by an individual whose advice the public body seeks out. In this case, the applicant submits, the public body did not seek out the advice nor was there an element of necessity around the decision making process itself.[24]

[21] I have carefully considered the Ministry and applicant's submissions, as well as the records at issue. I cannot disclose portions of the Ministry's submission that I received *in camera* because they describe the information at issue. What I conclude from all of the material before me however is that disclosure of the memo and letter would reveal both advice and recommendations developed by a public body—UBC, and for public bodies—in this case, the Ministry and the Ministry of Advanced Education.

[22] Most of the disputed information clearly falls within the parameters of "advice" as previous orders[25] define the term and as Levine, J.A. characterized it in the *College of Physicians*:[26]

> In my view, it [s.13] should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.

[23] The matters of fact about which the public body made a decision concerned the *Barbour* case. Those with expertise in relation to the case, UBC's counsel and that of RBS who drafted the memo on RUCBC's behalf, expressed opinions about it. This kind of free and frank advice flowing between the public bodies directly connected with the Ministry's deliberations is the kind of information s. 13 was designed to protect. The government subsequently deliberated on the issues the *Barbour* case raised and then acted by amending the *University Act*. There can be no doubt that in the circumstances most of the letter and memo constitutes advice captured by s. 13 of FIPPA.

[24] The applicant argues the purpose of the communication was not to advise but to "lobby" and that s. 13 does not extend to "lobbying". I do not accept the premise of the applicant's contention.

[25] Lobbying is an activity strictly regulated under the *Lobbyists Registration Act* ("LRA"). It is not what occurred here. Lobbying involves communicating with a public office holder to influence him or her in respect of a range of matters identified in the LRA.[27] There are two kinds of lobbyists, a consultant lobbyist and an in-house lobbyist. A person or organization contracts the former while the latter is an employee, director or officer of an organization. In this case, the advice offered by UBC to the Ministry was

[24] Applicant's reply submission, paras. 19 and 20.
[25] See for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8.
[26] At para. 113.
[27] See s. 1, *Lobbyists Registration Act* definition of "lobby."

through UBC's employee, Hubert Lai. The LRA does not consider persons employed by a "Provincial entity" to be an in-house lobbyist and UBC is a "Provincial entity."[28] Thus, under the terms of the LRA, UBC did not "lobby" the Ministry.

[26] This finding is consistent with the scheme of s. 13 that protects advice developed by one public body for another. Section 13 permits the head of a public body to refuse to disclose information "that would reveal advice or recommendations developed by…*a* public body." Thus, the advice and recommendations do not have to emanate from the same public body that is making the decision. Otherwise, s. 13(1) would say that the head of the public body could refuse to disclose information that would reveal advice or recommendations developed by *the* public body.

[27] As noted above, the applicant also argues the Ministry did not seek out the advice and recommendations at issue and therefore s. 13 does not apply. It is my conclusion that the *in camera* evidence does not support the applicant's presumption that the information at issue was unsolicited. I reach this conclusion having particular regard to the letter at issue. I am constrained from elucidating further because doing so would reveal information in dispute.

[28] Finally the applicant contends that there was "no element of necessity around the decision-making" itself that warrants the application of s. 13.

[29] The applicant points to the word "must" in the *College of Physicians* decision:

> In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.

[30] I do not take Justice Levine to be saying that an expert's opinion will be considered advice only where a public body faces a decision it cannot avoid. This would have the absurd consequence of placing a wide array of advice or recommendations outside of s. 13's purview whenever a public body's decision-making process is deemed, by a standard the applicant fails to define, unnecessary. In my view, what matters is that the government did make a decision for future action, in this case to amend legislation to negate the result of the class action lawsuit. Again, my review of the records indicates the expert opinions concern matters of fact on which the public body deliberated before making its decision. Beyond this, I cannot say more without disclosing the contents of the records themselves.

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[28] Lobbyists Registration Act Regulation defines a "Provincial entity" to include "…those entities that make up the government reporting entity within the meaning of the *Budget Transparency and Accountability Act*…". The *Budget Transparency and Accountability Act* applies to universities through the definition of **"**education and health sector organization" under that *Act*.

[31] The remaining information, that I have not found to be advice, I find to be recommendations in the sense that they lay out a suggested course of action. Again, I am constrained from offering a further description of the relevant material without disclosing the disputed information.

[32] **3.4 Does s. 13(2) Apply?**—Even in cases where information would reveal advice or recommendations developed by or for a public body, as contemplated by s. 13(1), if the information falls within the ambit of any part of s. 13(2), the Ministry may not withhold the information under s. 13(1).

[33] In this case, the applicant argues that two provisions apply: ss. 13(2)(a) and (l). The applicant contends the disclosed portion of the letter suggests that the memo "contains considerable information about [the *Barbour*] decision".[29] The applicant does not say so explicitly but I take her to equate "information" with "factual material" as set out in s. 13(2)(a). What I can say about the memo without disclosing its specific contents is that the "information" within it is an opinion about an existing set of facts clearly captured by the definition of advice.

[34] The applicant also argues that under s. 13(2)(l) the letter and memo represent a "proposal" to change a "program". She submits that Commissioner Loukidelis previously defined a "program" as "an operational or administrative program that involves the delivery of services under a specific statutory or other authority."[30] The applicant contends that the regulation of parking at UBC is such a "program". She argues that the Ministry responded to UBC's proposal by approving a legislative amendment to the *University Act*. I cannot accept the applicant's argument that UBC's "proposal"[31] concerns a change to a program. The changes UBC sought, as the already disclosed title of the memo notes, relate to the *University Act*, not a program. The *University Act* does not set out, before or after the amendments, an operational or administrative program for the delivery of parking services. The statute only enables the universities to establish such programs if they so choose.

[35] **3.5 The Ministry's Exercise of Discretion**—The applicant argues the reasons the Ministry gives for exercising its discretion are "opaque and vague".[32] She contends the Ministry fails to establish a causal connection between the disclosure of information and heightened "sensitivities" about such a disclosure.

[36] Commissioner Loukidelis discussed the matter of a public body's exercise of its discretion in Order 02-38[33] and stated:

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[29] Applicant's initial submission, para. 45.
[30] Applicant initial submission, para. 49 referring to Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, in defining "program".
[31] For the purposes of argument only here, I accept the letter and memo to be a proposal.
[32] Applicant's reply
[33] [2002] B.C.I.P.C.D. No. 38.

> As I have said before, the Act does not contemplate my substituting the decision I might have reached for the head's decision. I can require a public body's head to consider the exercise of discretion where that has not been done, but I will not myself exercise that discretion. ... Moreover, it is open to me to require a head to re-consider the exercise of discretion if she or he has exercised the discretion in bad faith or has considered irrelevant or extraneous grounds in doing so. ...

[37] Commissioner Loukidelis then set out a non-exhaustive list of factors that a public body should consider in exercising its discretion.[34]

[38] I have carefully considered the submissions and evidence on this point. I find the Ministry has properly exercised its discretion in this case. The applicant argues for disclosure of the records because the Ministry had already made a decision about the issues raised in them. The evidence before me is that the Ministry considered this factor but still decided to withhold the records.[35] The applicant disputes the Ministry's reasons for doing so. However, it is not for me to second-guess those reasons and remit the matter back to Ministry unless I find they were irrelevant or extraneous or advanced in bad faith. There is no basis to make such a finding here.

[39] **3.6 Solicitor-Client Privilege**—It is not necessary that I consider the parties' submissions on s. 14 of FIPPA because my above findings concerning s. 13 deal with all information in dispute here.

4.0 CONCLUSION

[40] For all of the above reasons I confirm that, under s. 13(1) of FIPPA, the Ministry is authorized to withhold the letter and memo at issue in this inquiry.

June 9, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No.: F10-41096

[34] I will not repeat the list here. It can be found at para. 149 of Order 02-38.
[35] Ministry's initial submission, para. 6.52.