



OFFICE OF THE
INFORMATION & PRIVACY
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Order F12-15

CITY OF VANCOUVER

Hamish Flanagan, Adjudicator

October 25, 2012

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Summary: An architect requested documents created by the City of Vancouver relating to the address of a potential laneway house development in the City. The City withheld portions of seven emails under s. 13(1) of FIPPA. The adjudicator ordered disclosure of one email because it had already been disclosed, and portions of the other six emails to which s. 13(1) did not apply. The City was authorized to withhold the remaining portions of the six emails under s. 13(1) because they contained advice and recommendations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1) and 13(2).

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F12-02, [2012] B.C.I.P.C.D. No. 2; Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order F05-06, [2005] B.C.I.P.C.D. No. 7.

Cases Considered: *The College of Physicians and Surgeons of British Columbia v. British Columbia (The Information and Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2779; *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

INTRODUCTION

[1] This inquiry concerns a request by an architect to the City of Vancouver (“City”) for information related to the architect’s plans for a laneway house development. The architect specifically asked for:

...all internal correspondence and notes which reference our address, originating in these three referenced Departments, for which we have not been sent copies. This would include particularly correspondence to and/or from [certain named employees of the City]... .

[2] After exchanging correspondence with the architect clarifying the scope of the request, the City released some information and withheld the rest under ss. 13(1) and 22(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The architect asked the Office of the Information and Privacy Commissioner (“OIPC”) to review the City’s decision. Mediation resulted in the release of some additional information. The City continued to withhold information under ss. 13(1) and 22(1) of FIPPA.

[4] The architect then requested an inquiry into this matter only in relation to the information withheld under s. 13(1) and a written inquiry was held under Part 5 of FIPPA.

[5] I note that in the architect’s initial and reply submission he raised a question about the adequacy of the City’s search for relevant records. I am advised by OIPC staff that the adequacy of the search had been the subject of a separate complaint in the OIPC and therefore is not a matter before me.

ISSUE

[6] Does s. 13(1) of FIPPA authorize the City to refuse access to the requested information?

DISCUSSION

[7] **Information at Issue**—The information at issue concerns the architect’s plans for a laneway house development. The information is found in seven separate pages of records that contain emails between City staff. The seven pages are part of 339 pages of records supplied by the City to the architect in response to his request. The City withheld the information at issue on the grounds that it constitutes advice and recommendations under s. 13 of FIPPA.

[8] **Does s. 13 Apply to the Information at Issue?**—The City submits that the withheld portions of the seven emails in dispute are subject to s. 13(1). The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether, in accordance with s. 13(1), the disclosure of the information “would reveal advice or

recommendations developed by or for a public body or a minister.” If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA. This subsection states that “the head of a public body must not refuse to disclose under subsection (1)” any of the listed information.

[9] **The Purpose and Scope of s. 13(1)**—The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action within a public body, preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. For example, in Order 01-15,¹ then 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. ...

[10] Previous orders have also found that a public body is authorized to refuse access to information which would allow an individual to draw accurate inferences about advice or recommendations. This includes policy issues, possible options for changes to the policy and considerations for these various options, including a discussion of implications and possible impacts of the options.²

ANALYSIS

[11] As noted, the seven emails in dispute are part of 339 pages numbered by the City. For ease of reference, I will refer to the page numbers used by the City in numbering their records.

Emails at pages 30 and 279

[12] These emails are duplicates. Some of the withheld information comprises internal advice and recommendations. In particular, portions of these emails contain information about the compliance of the architect’s proposed laneway house with the City’s policies, which forms part of the internal deliberative process that would lead to a final decision on the architect’s application for approval of the laneway house development. I find therefore that the City has

¹ [2001] B.C.I.P.C.D. No. 16.

² See Order F12-02, [2012] B.C.I.P.C.D. No. 1; Order F10-15, [2010] B.C.I.P.C.D. No. 24, at para. 23; Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 102-127; Order F06-16, [2006] B.C.I.P.C.D. No. 23, para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

the discretion to withhold these portions, which I have highlighted in yellow for the City, under s. 13(1).

[13] With respect to the rest of the information I find that the City cannot withhold the information under s. 13 because it has already been revealed to the architect, who included it as an appendix to his reply submissions.

Emails at pages 168, 175 and 290

[14] These emails are duplicates. The first withheld sentence contains a personal opinion expressed by a City staff member. In Order F05-06,³ then Adjudicator Fedorak noted that a key passage in the Court of Appeal decision in *The College of Physicians and Surgeons of British Columbia v. British Columbia (The Information and Privacy Commissioner)*⁴ that considered the application of s. 13(1), is that “advice includes expert opinion on matters of fact on which a public body must make a decision for future action.” The Adjudicator also noted that “the communication of an opinion merely for purposes of information, or “giving a heads up”, does not constitute advice, because it is not connected to a deliberative process.” For the information to constitute advice, it must be offered to inform a specific decision. The opinion expressed by the staff member does not relate to the decision in issue, which was ultimately whether to approve the architect’s application. Moreover, the opinion does not disclose, or enable anyone to infer, any recommendations, advice, options or expert opinions on matters of fact on which the City must make a decision. It is best characterized in my view, as the giving of a “heads up” to the recipient.

[15] The balance of the sentence containing the opinion comprises a statement of fact that does not include advice or recommendations. Therefore, I find that s. 13(1) does not apply to the first sentence of the paragraph described in the above paragraph.

[16] With respect to the last sentence of this email I find that the City cannot withhold the information under s. 13 because it has already been revealed to the architect and was included as an appendix to his reply submission.

[17] The remainder of the withheld information in the emails consists of advice and recommendations that form part of the City’s internal decision-making processes. In particular, the information contains advice about how to deal with the application, the compliance of the architect’s proposed laneway house with the City’s policies, and the position the City has, and is recommended to take, regarding the application. This all forms part of the internal deliberative process that would lead to a final decision on the architect’s application for approval of the laneway house development. I therefore conclude the City is authorized to

³ [2005] B.C.I.P.C.D. No. 7.

⁴ 2002 BCCA 665, [2002] B.C.J. No. 2779, at para 113.

withhold it under s. 13(1). I have highlighted this information in yellow for the City.

Email at page 190

[18] The withheld portions of this email consist for the most part of advice and recommendations relating to City policies and possible changes to policies. However, the last sentence of each of the two withheld paragraphs are statements about future actions by a staff member related to the application. These statements do not disclose, or enable anyone to infer, any recommendations, advice, options or expert opinions on matters of fact on which the City must make a decision. Therefore, I find that s. 13(1) does not apply to these statements. I have highlighted in yellow for the City the information to which s. 13(1) applies.

Email at page 264

[19] The City withheld a portion of this email. However, the evidence before me is that a duplicate of the email has already been disclosed in full at p. 257 of the record. Therefore, the City cannot withhold the information under s. 13 because it has already been revealed.

[20] **Does s. 13(2) Apply?**—None of the parties raised in submissions any of the exceptions in s. 13(2). My review of the information in the responsive records does not indicate that any of them apply. Therefore, I find that s. 13(2) does not apply to any of the information that the City withheld.

[21] **Exercise of Discretion Under s. 13(1)**—The architect submits that the City's ability to withhold information under s. 13(1) is discretionary. I would add that while the decision whether to exercise the discretion under s. 13(1) is a matter for the City, the City is required to appropriately exercise this discretion. I am satisfied that the City appropriately exercised its discretion in deciding to withhold some of the information in this case.

CONCLUSION

[22] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I confirm the City is authorized by s. 13(1) to withhold the information in the six emails that I have highlighted in yellow for the City. These highlighted passages appear on pp. 30, 168, 175, 190, 279 and 290 of the record.

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2. That the City must give the architect a copy of the seven emails that were withheld, except any yellow highlighted passages, within 30 days of the date of this Order, as FIPPA defines “day,” that is, on or before December 7, 2012. The City must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

October 25, 2012

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

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