



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

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Order F13-24

## CITY OF POWELL RIVER

Hamish Flanagan  
Adjudicator

November 14, 2013

CanLII Cite: 2013 BCIPC No. 31

Quicklaw Cite: [2013] B.C.I.P.C.D. No. 31

**Summary:** The applicant requested copies of communications between the City of Powell River and its auditor related to a complaint the applicant made to the City about a barge facility. The adjudicator found that the City was permitted to withhold two legal opinions under s. 14, and parts of an email by the City's auditor that contains expert opinion and advice under s. 13 of FIPPA. The adjudicator required the City to disclose a draft letter by the City's auditor containing information already released by the City, three emails from a Councillor and parts of an email from the City's auditor.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13 and 14.

**Authorities Considered: B.C.:** Order 01-53, 2001 CanLII 21607; Order 01-15, 2001 CanLII 21569; Order F12-02, 2012 BCIPC 2; Order F10-15, 2010 BCIPC 24; Order F06-16, 2006 CanLII 25576; Order 02-38, 2002 CanLII 42472.

**Cases Considered:** *B v Canada*, [1995] 5 WWR 374 (BCSC); *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, [2003] WWR 279.

## INTRODUCTION

[1] The applicant made a complaint to the City of Powell River ("City") under the *Community Charter* about issues relating to the construction of a new barge facility in the City. The City appointed its auditor to investigate the complaint, and

made available two reports from the auditor's investigation of the complaint to the applicant. The applicant requested copies of communications between the City and the auditor related to his complaint. The City disclosed to the applicant some emails about a draft of the auditor's report. The City withheld a letter and four other emails under s. 13 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and two documents it says are subject to solicitor-client privilege under s. 14 of FIPPA.

[2] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the City's decision. Mediation did not resolve the matter, and a written inquiry was held.

## ISSUES

[3] The issues in this inquiry are:

1. Can the City withhold two documents it claims are subject to solicitor-client privilege under s. 14 of FIPPA?
2. Can the City withhold a letter and four emails because they comprise advice or recommendations under s. 13 of FIPPA?

## DISCUSSION

[4] **Records in Issue**—The information in issue comprises:

- two documents the City describe as legal opinions; and
- a four page letter and four emails the City is withholding under s. 13 of FIPPA.

### ***Legal Advice - s. 14***

[5] Section 14 of FIPPA states:

The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[6] This provision encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.<sup>1</sup> The City argues legal advice privilege applies here.

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<sup>1</sup> See for example, Order 01-53, 2001 CanLII 21607.

[7] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:<sup>2</sup>

[T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communication (and papers relating to it) are privileged.

[8] The City submits that s. 14 applies to two documents they say were prepared by lawyers and comprise legal advice provided to the City. These documents were not included in the inquiry materials, but were described in sufficient detail in the City's materials to enable me to assess the applicability of s. 14.

[9] The City's evidence satisfies me that the four requirements for legal advice privilege are present in both documents. The documents contain legal advice the city received on two matters related to the applicant's request. The City may withhold these documents under s. 14 of FIPPA.

### ***Policy advice or recommendations – s. 13***

[10] The relevant parts of s. 13 for this inquiry are:

#### **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, ... .

[11] The City says disclosure of the records it has withheld under s. 13 would reveal advice or recommendations developed for the City. It also says to the extent that the records withheld under s. 13 contain background information or factual material, the information discloses or enables a third party to infer

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<sup>2</sup> *B v Canada*, [1995] 5 WWR 374 (BCSC).

recommendations, advice, options or expert opinions on matters of fact which may be withheld under s. 13(1), so the exception in s. 13(2) for factual material does not apply.

[12] Section 13 has been the subject of many orders, for example Order 01-15 where former Commissioner Loukidelis said, “[t]his 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.”<sup>3</sup>

[13] Previous orders have found that a public body is authorized to refuse access to information that would reveal advice and recommendations, or allow an individual to draw accurate inferences about advice or recommendations.<sup>4</sup> Further, the BC Court of Appeal in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* clarified that the term “advice” includes an expert opinion on matters of fact that is obtained to provide the background explanations or analysis necessary to the deliberative process of a public body.<sup>5</sup>

[14] 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.” 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 which a public body must not refuse to disclose. One of these listed categories is factual materials.<sup>6</sup> As Adjudicator Fedorak noted in Order F12-02, the Legislature has expressly excluded information that falls within the ambit of s. 13(2) from the effect of s. 13(1).<sup>7</sup> As Adjudicator Fedorak said in that Order:

The effect of s. 13(2) is that 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 [public body] may not withhold the information.<sup>8</sup>

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<sup>3</sup> Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>4</sup> Order F10-15, 2010 BCIPC 24; Order 02-38, 2002 CanLII 42472; Order F06-16, 2006 CanLII 25576; *College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

<sup>5</sup> *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 111, [2003] 2 WWR 279.

<sup>6</sup> Section 13(2)(a) of FIPPA.

<sup>7</sup> 2012 BCIPC 2 at para. 27.

<sup>8</sup> 2012 BCIPC 2 at para. 27.

[15] I will now consider the application of s. 13 to the information in issue.

### **The Letter**

[16] The City describes the four page letter dated June 21, 2012, as the auditor's initial response to Council regarding the (applicant's *Community Charter*) complaint.

[17] The letter contains a combination of factual information and advice and recommendations. With the exception of one fact,<sup>9</sup> the content of this letter is the same as that contained in the two letters written by the auditor that the City has made public.<sup>10</sup>

[18] The factual material in the letter does not allow accurate inferences to be made about the content of the auditor's expert opinion. The factual information is just that, a set of facts, and do not disclose or allow anyone to infer the (previously released) auditor's opinions contained in the letter and therefore s. 13(1) does not apply to it. Even if the factual information was within the scope of s. 13(1), the exception in s. 13(2) of FIPPA for factual material would apply so it could not be withheld.

[19] As to the advice and recommendations contained in the letter, it would ordinarily fall within s. 13(1) but because the advice and recommendations have already been revealed to the applicant by the release of the other letters, releasing the letter will not "reveal" advice or recommendations for the purposes of s. 13(1).

[20] In summary, the June 21, 2012 letter can be released.

### **Emails**

[21] Three of the four emails<sup>11</sup> are from a councillor. Two of the councillor's emails contain quotes from the auditor's June 21, 2012 letter, which I earlier found cannot be withheld because the information in it has already been released, so s. 13(1) does not apply to the quoted material.

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<sup>9</sup> The public and withheld documents also have different addressees and slightly different formatting but these differences are inconsequential.

<sup>10</sup> The Auditor's letters titled "RE: Complaint Received from Taxpayer Pursuant to Section 172(2) of the Community Charter in Respect of Barge Facilities" and "RE: Confidential Accounting Recommendations," both dated July 10, 2012. The latter letter the City released in November 2012 – see affidavit of M. Claxton at para. 10.

<sup>11</sup> Emails on pp. 7-9 of the records.

[22] The original material in the emails contains both opinions and facts. The City states that the councillor has particular knowledge of the subject matter. However, I find the City's evidence insufficient to establish that the councillor's opinions qualify as an expert opinion involving the exercise of judgment and skill to weigh the significance of matters of fact<sup>12</sup> for the purposes of s. 13. In addition, the emails do not contain any advice or recommendations and the factual information does not reveal, or permit accurate inferences about, any advice or recommendations so s. 13(1) does not apply to them.

[23] The remaining email is from the City's auditor. It comprises a combination of recommendations, opinions and background information. The recommendations, as well as the opinions that allow an accurate inference about the recommendations, all fall within s. 13(1). However there is one statement of opinion in the email that does not allow an accurate inference about any advice or recommendations so it cannot be withheld on that basis. It does not qualify as an expert opinion for the purposes of s. 13(1) because it does not relate to the auditor's field of expertise.

[24] The email header, which lists the sender, recipient and other related information, is background information which also does not reveal or permit accurate inferences about any advice or recommendations so s. 13(1) does not apply to it.

[25] None of the exceptions in s. 13(2) apply to the information in the email to which s. 13(1) applies. Therefore, except for the one opinion discussed above and the background material in the email header, the email can be withheld.

## CONCLUSION

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

1. Subject to paras. 2 and 3 below, the City is required to disclose the requested information on or before **December 24, 2013**, pursuant to s. 59 of FIPPA. The City must concurrently copy me on its cover letter to the applicant, together with a copy of the records.
2. I require the City to continue to withhold under s. 14 of FIPPA the two legal opinions.

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<sup>12</sup> *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113, [2003] 2 WWR 279.

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3. The City may withhold under s. 13 of FIPPA the portions of the auditor's email (at p. 12 of the records), that are highlighted in the copy of the email which accompanies the City's copy of this Order.

November 14, 2013

**ORIGINAL SIGNED BY**

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Hamish Flanagan

OIPC File No.: F12-50568