



OFFICE OF THE
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Order F14-57

OFFICE OF THE POLICE COMPLAINT COMMISSIONER

Ross Alexander
Adjudicator

December 23, 2014

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Summary: A journalist requested administrative records about himself that were generated or received by the Office of the Police Complaint Commissioner within a specified time period. The OPCC withheld some information in a responsive record that was related to the processing of a previous access request the journalist had made to the OPCC, on the basis that disclosure of the information would reveal policy advice or recommendations (s. 13 of FIPPA). The adjudicator determined that the OPCC was authorized to refuse to disclose all of the information withheld under s. 13.

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

Authorities Considered: B.C.: Order F14-11, 2014 BCIPC No. 13 (CanLII); Order F07-17, 2007 CanLII 35478 (BC IPC).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39.

INTRODUCTION

[1] This inquiry relates to a journalist's request to the Office of the Police Complaint Commissioner ("OPCC") for records related to the journalist. His request is as follows:

This is a new request for records related to me, personally, that have been generated or received by the Office of the Police Complaint Commissioner and

its staff or officers between August 1st, 2012 and the current date. I am seeking administrative records, including but not limited to email, that refer to me or my interactions with the OPCC, whether it is by name or by reputation as a journalist...

[2] The OPCC responded to the applicant's request by releasing most of the responsive records, but withholding some information in those records under ss. 13 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Section 13 relates to policy advice or recommendations, while s. 22 relates to disclosure that would be an unreasonable invasion of a third party's personal privacy.

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the OPCC's decision to withhold information.

[4] During OIPC mediation, the applicant withdrew his objection to the OPCC's decision to withhold information under s. 22. Therefore, the sole remaining issue is the OPCC's decision to withhold information under s. 13.

ISSUE

[5] The issue in this inquiry is whether the OPCC is authorized to refuse to disclose information because disclosure would reveal policy advice or recommendations within the meaning of s. 13 of FIPPA.

DISCUSSION

Information in Dispute

[6] The disputed information in this case is portions of an email from an OPCC investigator to the OPCC Deputy Commissioner about how to process a request for records the applicant had made to the OPCC. The information is about the applicability of statutory provisions in FIPPA and the *Police Act* in relation to this request.¹

[7] Based on the applicant's submissions, it appears that the applicant believes there is an entire email before me that is withheld under s. 13. However, this is not the case. The only information before me that is withheld under s. 13 is portions of one email, most of which has already been disclosed to the applicant.

¹ This information is already disclosed to the applicant in the OPCC's submissions. It is also apparent based on the portions of this email that have already been disclosed to the applicant.

Policy advice or recommendations – s. 13

[8] Section 13 of FIPPA authorizes public bodies to refuse to disclose policy advice or recommendations, subject to specified exceptions in s. 13(2). Section 13 states in part that:

- (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,
 - ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[9] In determining whether s. 13 applies, it is first necessary to establish whether disclosing the information “would reveal advice or recommendations developed by or for a public body or a minister”. If so, it is then necessary to consider whether the information at issue is excluded from s. 13(1) because it falls within any of the categories of information listed in s. 13(2) of FIPPA.

[10] As the Supreme Court of Canada stated in *John Doe v. Ontario (Finance)*, the purpose of exempting advice or recommendations from disclosure “is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.”² The British Columbia Court of Appeal similarly stated in the *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 of FIPPA “recognizes that some degree of deliberative secrecy fosters the decision-making process.”³

Positions of the Parties

[11] The applicant submits that the OPCC is improperly withholding information because it is not entirely “advice or recommendations”, it relates to a “decision”, and withholding the information is inconsistent with the public interest and the purpose of s. 13. The applicant refers to s. 13(2)(a), which states that s. 13(1) does not apply to factual material. He also states that the information appears to fall squarely with the exception under s. 13(2)(n) because it sets out the reasoning behind the OPCC’s decision to grant him or deny him access to information that he requested.

² *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

³ *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 105.

[12] The OPCC submits that the email at issue contains advice about whether the provisions of FIPPA and the *Police Act* apply to records requested by the applicant. It states that it is necessary to withhold the redacted information to protect the OPCC's internal decision-making processes. It submits that the withheld information is not factual material under s. 13(2)(a), and that the withheld portions of the email are not a decision or reasons within the meaning of s. 13(2)(n).

Analysis

Section 13(1)

[13] I will first consider whether disclosing the withheld information “would reveal advice or recommendations developed by or for a public body or a minister” within the meaning of s. 13(1).

[14] Section 13(1) applies to information that would directly reveal advice or recommendations if disclosed. Further, previous orders have also stated that a public body is authorized to refuse access to information that would enable an individual to draw accurate inferences about advice or recommendations.⁴

[15] The applicant suggests that information must be about government policy to be “advice or recommendations” under s. 13 of FIPPA. He states that some of the withheld information must be about how to respond to the applicant's specific access request, which would not fall under the meaning of the word “advice”. I disagree. In my view, there is no requirement that information must relate to a general policy to be “advice or recommendations” under s. 13(1). Information may be “advice or recommendations” under s. 13(1) even if it relates to a specific decision – including how to respond to a singular access request for records.

[16] The information in dispute in this case is internal OPCC correspondence, in which an OPCC employee provided the OPCC Deputy Commissioner with a recommendation about how to respond to an access request for records based on his interpretation of the statutory authority. Based on my review of the materials before me, including the withheld information, I find that this information is advice or recommendations developed by or for the public body within the meaning of s. 13(1) of FIPPA. Therefore, I find that disclosing this information would directly reveal advice or recommendations pursuant to s. 13(1).

⁴ For example, see Order F14-11, 2014 BCIPC No. 13 (CanLII) at para. 28.

Section 13(2)

[17] Section 13(2) of FIPPA specifies a number of different types of information public bodies must not refuse to disclose under s. 13(1) of FIPPA. It states in part:

- (2) The head of a public body must not refuse to disclose under subsection (1)
 - (a) any factual material,
 - ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[18] The applicant refers to s. 13(2)(a), and submits that the email is not entirely “advice or recommendations”. However, he does not elaborate on this point, and, as previously stated, his submissions appear to be based on the belief that an entire record has been withheld under s. 13, when in fact only relatively small portions of one record is before me.

[19] Based on my review of the withheld information, I find that none of the withheld information is factual material. All of the withheld information in this case forms part of the advice or recommendations.

[20] The applicant also submits that the withheld information falls under s. 13(2)(n) because it outlines the reasons for why he was granted access to, or sets out the reasoning behind why he should be denied access to, a particular record. The applicant does not know the content of the withheld information, and he urges me to analyze it in order to see whether it properly falls under s. 13(2)(n).

[21] Based on my review of the withheld information, I find that it does not fall under s. 13(2)(n). Section 13(2)(n) relates to decisions. The record at issue is an OPCC employee’s opinion and recommendation to the OPCC Deputy Commissioner as to how to correctly respond to the applicant’s request for records. This information is not a decision.

[22] In summary, I find that all of the information withheld under s. 13 is advice or recommendations as set out in s. 13(1), and that none of it falls under s. 13(2).

Discretion

[23] Section 13 of FIPPA authorizes, but does not require, public bodies to withhold advice or recommendations under s. 13. Therefore, public bodies must exercise their discretion in deciding whether to withhold information under this section.

[24] The applicant submits that the proper analysis of a public body's decision to withhold information under s. 13 requires asking whether withholding the record is consistent with the purpose of s. 13, as well as whether it is in the public interest to withhold the information.⁵ He submits that withholding the information in this case is inconsistent with the purpose of s. 13, and that it is not in the public interest. The applicant submits that, as a result of this, the information should be disclosed to him.

[25] The OPCC submits that withholding the information at issue is necessary to protect its internal decision-making processes. It submits that the applicant's submissions ignore the purpose of s. 13(1), which is to protect public bodies' internal decision-making and policy-making processes by encouraging the free and frank flow of advice recommendations. It submits that acceding to the applicant's submissions would frustrate the purpose of s. 13 and render it meaningless.

[26] In my view, the appropriate scope of my scrutiny of the OPCC's exercise of its discretion is narrower than the applicant suggests. The legislative scheme of FIPPA is a balance of access to information rights and exceptions to access, which accord with the intention of the Legislature. In this case, I have determined that the information at issue properly falls under one of those exceptions to disclosure (s. 13). However, it is not for me to conclude whether the OPCC should withhold this information that falls under s. 13(1).⁶ As former Commissioner Loukidelis stated in Order 02-38 with respect to a public body's exercise of discretion:

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.

[27] The issue in relation to OPCC's exercise of its discretion relates to whether it has adequately considered whether to disclose the information. Previous orders have stated that in exercising their discretion to refuse access under s. 13(1), public bodies should consider relevant factors such as: the age of the record, its past practice in releasing similar records, the nature and sensitivity of the record, the purpose of the legislation, and the applicant's right to have access to his own personal information.⁷

⁵ In support of this position, the applicant cites Order F14-11, 2014 BCIPC No. 13 at para 27 and *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 52.

⁶ I note that s. 25 of FIPPA overrides s. 13 for matters that are clearly in the public interest. However, I am not in any way suggesting that s. 25 applies in this case.

⁷ For example, see Order F07-17, 2007 CanLII 35478 at paras. 41 to 43.

[28] I am satisfied that the OPCC considered whether to withhold the information. The OPCC states that it was necessary to withhold the information to protect its internal decision-making processes. This reasoning is consistent with the purpose of s. 13. Further, I have considered the materials before me, including the OPCC's submissions and the withheld information, and there is nothing to suggest that the OPCC has not properly exercised its discretion in this case. I therefore find that the OPCC has properly exercised its discretion to withhold the information it is withholding under s. 13.

CONCLUSION

[29] For the reasons given, under s. 58 of the Act, I order that the OPCC is authorized to refuse to disclose the information withheld under s. 13 of FIPPA.

December 23, 2014

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F13-55112