Office of the Information & Privacy Commissioner for British Columbia

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Order F16-30

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Elizabeth Barker
Senior Adjudicator

June 27, 2016

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Summary: The applicant requested records related to Ministry permits for work on a road on the Sunshine Coast. The Ministry disclosed the requested records to the applicant, but it withheld some information under s. 13 (policy advice or recommendations) and s. 22 (disclosure harmful to personal privacy). The adjudicator confirmed the Ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13 and 22.

Authorities Considered: B.C.: Order 00-08, 2000 CanLII 9491 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BCIPC); Order F07-17, 2007 CanLII 35478 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F11-17, 2011 BCIPC 23 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance),* 2014 SCC 36; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner* ("*College*"), 2002 BCCA 665; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner,* 2103 BCSC 2322.

INTRODUCTION

[1] This inquiry involves Ministry of Transportation and Infrastructure ("Ministry") records related to the applicant and her immediate neighbour's requests for permits to alter their respective driveways. The alterations impacted each other's rights within the public right of way. Specifically, the applicant

requested all plans dated January 2010 or later, all permits and pending permits, and any related correspondence involving the portion of the road within 50 meters of her neighbour's address.

[2] The Ministry gave the applicant access to the responsive records but it withheld some information in them under s. 13 (policy advice or recommendations), s. 16 (harm to intergovernmental relations), s. 21 (harm to third party business interests) and s. 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The applicant disagreed with the Ministry's decision and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). Mediation did not resolve the issues in dispute, and the applicant requested that they proceed to inquiry.

[4] During the inquiry, the Ministry reconsidered its decision, and disclosed additional information to the applicant, including the information that was being withheld under ss. 16 and s. 21. Therefore, ss. 16 and 21 are no longer at issue.

ISSUES

[5] The issues to be decided in this inquiry are whether the Ministry is authorized under s. 13 of FIPPA, and required under s. 22 of FIPPA, to refuse the applicant access to the requested information.

[6] Section 57(1) of FIPPA places the onus on the Ministry to prove that the applicant has no right of access to the information it is withholding under s. 13. However, the applicant has the burden of proving that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy under s. 22 of FIPPA.

DISCUSSION

[7] **Background –** The Ministry is responsible for administering the use of provincial public highway right of ways. This responsibility includes issuing or denying permits for work that encroaches on the public highway right of way.

[8] The applicant's neighbour received a Ministry permit to construct a retaining wall at the base of his driveway in order to create a safe vehicle turnaround. The applicant applied for, but was not given, a Ministry permit to construct a retaining wall at the base of her driveway.

[9] The applicant says that she is seeking the information in dispute to determine how the Ministry's monitoring of the neighbour's construction "came to be neglected and if there are safety issues remaining in the road."[1] She says:

> The documents I received were intrinsically related to the discretionary power the Ministry employed in denying a permit to me and in granting a permit to a neighbour that compromised my family's safety. We called the Ministry office in Sechelt and were categorically told the denial of our permit was based on our neighbor's permit. Therefore, it is our right to see the details of the policies that affected the decision on that permit.[2]

[10] **Information in dispute -** There are 67 pages of responsive records and most of them have been disclosed to the applicant. The Ministry is withholding a small amount of information from three emails between Ministry staff under s. 13. In addition, the Ministry is relying on s. 22 to withhold short excerpts on 12 pages of permit applications, permits, letters and email.

[11] In her inquiry submissions the applicant says that she no longer wants to see all of the information being withheld under s. 22. She says that she only wants access to the short excerpt being withheld under s. 22 on page 17, so I will only consider the Ministry's application of s. 22 to that one excerpt.

[12] **Preliminary matter -** In her initial submissions, the applicant raises a new issue that was not in the Notice of Inquiry. She submits that disclosure of the information in dispute is in the public interest in accordance with s. 25 of FIPPA. The Ministry objects to the applicant raising a new issue at this late date.[3]

[13] Past orders have said parties may introduce new issues at the inquiry stage, only if they request and receive permission from the OIPC to do so. In this case, the applicant did not request permission to add s. 25, and she does not explain why she did not raise the issue at an earlier stage, for instance in her request for review or during investigation and mediation. Therefore, I have decided not to permit her to add s. 25 as an issue in this inquiry.

[14] Furthermore, in a preliminary way, I do not see how the facts of this case would even call s. 25 into play. Section 25 overrides all of FIPPA's exceptions to disclosure, and consequently there is a high threshold before it applies. Section 25(1)(a) requires a public body to disclose information when it is about "significant harm" to the environment or to human health or safety. The information in dispute in this case is about permit requirements for the construction of driveway retaining walls, and it is plainly not about the harm described in s. 25(1)(a). Moreover, s. 25(1)(b) only applies in the clearest and

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[1] Applicant's submissions, para. 2.03.
[2] Applicant's request for review.
[3] It also provided brief submissions disputing the applicability of s. 25 to the information in dispute, but given my findings regarding s. 25, it is unnecessary to outline them in these reasons.

most serious of situations when disclosure is "clearly in the public interest."[4] There is nothing to suggest that the information in dispute here approaches that level of magnitude or broader public significance.

[15] **Policy Advice or Recommendations (s. 13) -** The Ministry is withholding information from three emails under s. 13. Section 13(1) states, in part, as follows:

> 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,
> …
> (d) an appraisal,
> …
> (f) an environmental impact statement or similar information,
> …
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> (j) a report on the results of field research undertaken before a policy proposal is formulated,
> …
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[16] Section 13(1) has been the subject of many orders that have consistently held that the purpose of s. 13(1) is to allow for full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decisions and policy-making were subject to excessive scrutiny.[5] BC orders have also found that s. 13(1) applies not only when disclosure of the information would directly reveal advice and recommendations but also when it would allow accurate inferences about the advice or recommendations.[6]

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[4] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45 citing Order No. 165-1997, 1997 CanLII 754 (BC IPC).
[5] For example, Order 01-15, 2001 CanLII 21569 (BC IPC) and Order F11-17, 2011 BCIPC 23 (CanLII).
[6] Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC).

[17] Further, in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner* [*College*][7] the British Columbia Court of Appeal said that "advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.

[18] The process for determining whether s. 13(1) applies to information involves two stages. The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, it is then necessary to consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).

Parties' Submissions

[19] The Ministry submits that the information withheld under s. 13 consists of advice and recommendations provided to the Ministry by two geotechnical engineers. The Ministry says that the first provided advice about what steps the Ministry should take based on her review and assessment of a geotechnical report regarding the neighbour's work permit. The second provided the Ministry with advice regarding the construction that was being done under the neighbour's permit. The Ministry says that the geotechnical engineers exercised their expert skill and judgement when providing the information being withheld under s. 13.

[20] The Ministry submits that "any information that may be considered background information necessarily formed the fabric of the advice or recommendations and was necessary to the deliberative process,"[8] and that its disclosure would allow the applicant to draw accurate inferences about advice or recommendations developed for the Ministry.

[21] The Ministry also submits that the information it is withholding under s. 13 does not fall into any of the types of information listed in s. 13(2).

[22] The applicant disputes that the information being withheld under s. 13 is advice or recommendations. However, she says that if any of the information is advice, it has already been acted upon, so it no longer warrants protection from scrutiny under s. 13.[9]

[23] The applicant specifically disputes that the information provided by the geotechnical engineers is advice or recommendations, and she cites Order 00-08 in support.[10] However, that order does not advance her argument because the

[7] 2002 BCCA 665, at para. 113.
[8] Ministry's initial submissions, para. 5.41.
[9] Applicant's submissions, at para. 4.10.
[10] Applicant's submissions, paras. 5.06-5.07. Order 00-08, 2000 CanLII 9491 (BC IPC).

BC Court of Appeal in *College* overturned Order 00-08 on the very issue that the applicant references in that case.

Analysis and findings

[24] I find that the information withheld under s. 13 is clearly the professional opinions of two geotechnical engineers who are responding to the Ministry's request for advice. Their expert opinions are intermingled with their recounting of the pertinent facts they considered when forming their opinions and recommendations for the Ministry. In my view, all of the information being withheld under s. 13 is advice and recommendations as those terms have been interpreted in previous orders and *College*.

[25] The applicant argues that s. 13 ceases to apply once the advice and recommendations have been acted upon. I disagree with this suggested interpretation of s. 13, and the applicant does not cite any supporting case law. In the following quote from *John Doe v. Ontario (Finance*),[11] the Supreme Court of Canada clearly indicates that protection afforded by exceptions to disclosure for advice and recommendations is available even after the decision to which the advice pertains has been made:

> Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

[26] Additionally, many BC Orders have found that s. 13 applies to information in circumstances where the advice and recommendations have already been acted upon.[12]

[27] Having determined that the information withheld under s. 13(1) is advice or recommendations, I must consider the applicant's argument that it is also covered by one or more of the categories in s. 13(2), so it cannot be withheld under s. 13(1). She submits that the information being withheld under s. 13 is factual material (s. 13(2)(a)), an appraisal (s. 13(2)(d)), an environmental impact statement (s. 13(2)(f)), a feasibility or technical study (s. 13(2)(i)), and a report on

[11] 2014 SCC 36, at para. 45.
[12] See for example, Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 23.

the results of field research undertaken before a policy proposal is formulated (s. 13(2)(j)).[13]

Factual material - s. 13(2)(a)

[28] The Ministry submits that none of the information is "factual material" under s. 13(2)(a). It says that any factual information there may be in the records is "inextricably interwoven with and integral to the analytical and evaluative information."[14] The Ministry says that the geotechnical engineers' expertise was required to weigh and determine what factual information to use and include when providing their advice, and it cannot be reasonably severed from the deliberative information.

[29] The applicant submits that the records contain factual material under s. 13(2)(a), and she disputes the Ministry's assertion that any facts that are part of the information in dispute are so inextricably woven into analytical and evaluative information that they cannot be disclosed. She says, "…no case of word weaving can tie fact so firmly to opinion, analysis, or evaluation that it cannot be extracted."[15]

[30] In my view, the information withheld under s. 13 is not "factual material" under s. 13(2)(a). To the extent the information contains facts, they are not a body of distinct facts separate and independent from the opinions and advice. Instead, they are background facts that are intermingled with - and clearly an integral part of - the geotechnical engineers' analysis, opinion and recommendations. They convey the factual matters the geotechnical engineers considered significant for analyzing the situation, forming their views, and providing explanations necessary for the Ministry's deliberative process.

[31] In *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner*, Dardi, J. said, "The structure and wording of s. 13 mandate an interpretation whereby 'factual material' is distinct from factual 'information'. Section 13(2)(a) is a narrow exemption from what is included in s. 13(1)."[16] She also said that "if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body" it is not *factual material* under s. 13(2)(a).[17] This is exactly the type of factual information in this case, and I find that s. 13(2)(a) does not apply to it.

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[13] Applicant's submissions, paras. 5.05 and 5.09-5.15.
[14] Ministry's initial submissions, para. 5.45.
[15] Applicant's submissions, at para. 5.03.
[16] 2013 BCSC 2322 at para 91.
[17] *Ibid* at para 94.

An appraisal – s. 13(2)(d)

[32] The applicant says that the information in dispute is an appraisal, which must be disclosed under s. 13(2)(d). The Ministry disputes that the information is an appraisal.

[33] Only a handful of BC orders have considered the meaning of the term "an appraisal" in s. 13(2)(d). The facts of those cases are not similar, so they are of limited assistance. However, in Order F11-19[18] Adjudicator Fedorak relied on *Black's Law Dictionary,* which defines "appraisal" as "the determination of what constitutes a fair price; valuation; estimation of worth". I note that *Webster's New World College Dictionary* defines "appraisal" as "an appraised value or price; esp., an expert valuation for taxation."[19] In addition, I have considered freedom of information legislation in other Canadian jurisdictions where "an appraisal" is excluded from the exemption for advice and recommendations.[20] Only Nova Scotia defines "appraisal": *i.e.,* "a report prepared by a qualified appraiser that estimates the value of property or sets a price on an asset or liability".[21]

[34] In the present case, the information being withheld under s. 13 is not about prices, value or worth, so it does not relate in any sense to the matters mentioned in the above quoted definitions. In my view, the information at issue here is not "an appraisal" in accordance with s. 13(2)(d).

Environmental impact statement or similar information – s. 13(2)(f)

[35] The applicant submits that the information in dispute is an environmental impact statement or similar information, so s. 13(2)(f) applies. The Ministry disagrees.

[36] Previous BC orders have provided little guidance on how to interpret s. 13(2)(f).[22] However, orders considering Ontario's equivalent to s. 13(2)(f) have relied on the following definition of "environmental impact statement" from the *Dictionary of Environmental Law and Science*, edited by William A. Tilleman:

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[18] Order F11-19, 2011 BCIPC 25 at para. 17.
[19] *Webster's New World College Dictionary*, 5th ed., s.v. "appraisal".
[20] *Freedom of Information and Protection of Privacy Act,* SNS 1993, c. 5, s. 14(2); *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1, s. 29(2)(d); *Access to Information and Protection of Privacy Act*, RSY 2001, c 1, s. 16(2)(d).
[21] *Freedom of Information and Protection of Privacy Regulations,* NS Reg 105/94, s. 24(2).
[22] Four BC orders have considered s. 13(2)(f): Order No. 250-1998 and Order No. 251-1998, involved a list of property to be sold by the Whistler Land Corporation; Order No. 215-1998, involved a draft discussion paper entitled "Protecting Wildlife, Fish and Their Habitats: The Need for Legislation"; Order No. 231-1998, involved a draft report entitled "Moose Conservation and Harvest Management in Central and Northern British Columbia".

> 1. A document required of federal agencies by the National Environmental Policy Act for major projects or legislative proposals significantly affecting the environment. A tool for decision making, it describes the positive and negative effects of the undertaking and cites alternative actions. 2. A documented assessment of the environmental consequences and recommended mitigation actions of any proposal expected to have significant environmental consequences, that is prepared or procured by the proponent in accordance with guidelines established by a panel. 3. An environmental impact assessment report required to be prepared under [Alberta's *Environmental Protection and Enhancement*] *Act*. 4. A detailed written statement of environmental effects as required by law.[23]

[37] Although this definition relates to Alberta legislation, like the Ontario Commission, I also find that it is appropriate and I adopt it for the purpose of interpreting s. 13(2)(f). In light of that definition, I find that the information in dispute is not an environmental impact statement or a similar record. The disputed information is contained in emails between Ministry staff about what engineering and construction requirements must be met in order for the Ministry to issue a work permit. It is not information about the impact of the work on the environment in the sense expressed in the definition above. In my view, the information in dispute is not an environmental impact statement or a similar record, so I find that s. 13(2)(f) does not apply.

Feasibility or technical study, including a cost estimate, relating to a policy or project of the public body (s. 13(2)(i) - Report on the results of field research undertaken before a policy proposal is formulated (s. 13(2)(j))

[38] The applicant also submits that ss. 13(2)(i) and (j) apply to the information in dispute. The Ministry disagrees.

[39] Based on my review, the information in dispute is clearly not a "feasibility or technical study, including a cost estimate, relating to a policy or project of the public body", or a "report on the results of field research undertaken before a policy proposal is formulated". Therefore, I find that ss. 13(2)(i) and (j) do not apply.

Summary - s. 13

[40] I find that the information being withheld under s. 13 consists of advice or recommendations developed by or for the Ministry, and that s. 13(2) does not

[23] *Dictionary of Environmental Law and Science*, edited by William A. Tilleman, Environmental Law Centre, 2005. For example, see Order PO-3240, 2013 CanLII 53698 (ON I PC) at para. 38. This definition has also been adopted by the Newfoundland and Labrador Commission in Report A-2000-001, 1010 CanLII 13609 (NL IPC) at para. 36.

apply. Therefore, I find that the Ministry is authorized to refuse the applicant access to the information in dispute under s. 13(1).

[41] **Disclosure Harmful to Personal Privacy (s. 22) -** The applicant is seeking access to the one excerpt the Ministry is withholding under s. 22 on page 17. The Ministry submits that this excerpt is information about the employment history of an identifiable individual, and disclosure is presumed to be an unreasonable invasion of that individual's personal privacy.[24] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[25]

Personal information

[42] The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined as **"**recorded information about an identifiable individual other than contact information". Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".[26]

[43] I find that the information the Ministry is withholding under s. 22 on page 17 is personal information because it is about an identifiable individual and it is not contact information.

Section 22(4)

[44] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4) because if it does, disclosure would not be an unreasonable invasion of personal privacy.

[45] Section 22(4)(e) is relevant in this case. It says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if "the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff."

[46] Although she does not directly say so, I understand the applicant to be arguing that s. 22(4)(e) applies in this case. She says that she suspects that the information being withheld under s. 22 is the name, the job title and the duties of a government employee or contractor, and because that person is in the public service she is entitled to that information.

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[24] Ministry's reply submissions, para. 4.
[25] See for example, Order 01-53, supra note 22, p. 7.
[26] See Schedule 1 of FIPPA for these definitions.

[47] While the withheld information does include the name of an individual, it is not about that individual's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. Therefore, I find that s. 22(4)(e) does not apply. I also find that the personal information on page 17 does not fall into any of the other categories of information listed in s. 22(4).

Presumptions

[48] The third step is to determine whether any of the presumptions in s. 22(3) apply, in which case disclosure is presumed to be an unreasonable invasion of third party privacy. The Ministry submits that s. 22(3)(d) applies. Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information "relates to employment, occupational or educational history."

[49] I find that s. 22(3)(d) applies to the personal information because it is about a named individual and it reveals human resources or personnel information about the status of that individual's employment.

[50] The applicant responds to the Ministry's submission that the redacted material contains personal information about an employee's employment history by saying: "If the redaction refers to previous employment, we have no interest in the information".[27] In my view, the personal information is the type of information the applicant says she has no interest in. However, given that in her submissions she specifically said that she wants access to the withheld information on page 17, I will consider the last component of the s. 22 analysis for the sake of completeness.

Relevant circumstances

[51] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step that the ss. 22(3)(d) presumption may be rebutted.

[52] The Ministry's submits that disclosure is not desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny (s. 22(2)(a)), unlikely to promote public health and safety or to promote the protection of the environment (s. 22(2)(b)) and not relevant to a fair determination of the applicant's rights (s. 22(2)(c)). The applicant makes no submission regarding relevant circumstances.

[27] Applicant's submissions, para. 3.06.

[53] I have considered all relevant circumstances including those listed in s. 22(2), as well as the Ministry's submissions. I find that there are no circumstances that weigh in favour of disclosure of the personal information in dispute, so the s. 22(3)(d) presumption has not been rebutted. Therefore, disclosure of the personal information on page 17 would be an unreasonable invasion of personal privacy under s. 22(1).

Summary - s. 22

[54] In summary, I find that the information being withheld on page 17 is personal information and that the presumption in s. 22(3)(d) applies and has not been rebutted. As a result, I find that disclosure of that personal information would be an unreasonable invasion of personal privacy under s. 22.

CONCLUSION

[55] For the reasons above, I make the following order under s. 58(2) of FIPPA:

1. I confirm the Ministry's decision to refuse to give the applicant access to the information withheld under s. 13 of FIPPA.

2. The Ministry is required to refuse to give the applicant access to the information on page 17 that is being withheld under s. 22 of FIPPA.

June 27, 2016

ORIGINAL SIGNEND BY

Elizabeth Barker, Senior, Adjudicator

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