



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F22-53

DISTRICT OF NORTH VANCOUVER

Elizabeth Vranjkovic
Adjudicator

October 31, 2022

CanLII Cite: 2022 BCIPC 60
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 60

Summary: The applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to certain records relating to its preliminary application to subdivide a property. The District of North Vancouver (District) provided the responsive records to the applicant but withheld some information under a number of FIPPA exceptions. The adjudicator found that the District was authorized to refuse to disclose the information in dispute under s. 14 (solicitor client privilege) and some of the information in dispute under s. 13(1) (advice or recommendations).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 13(1), 13(2), 13(2)(a), 13(2)(i), 13(2)(j), 13(2)(m), 13(2)(n) and 14.

INTRODUCTION

[1] The applicant, a corporation, submitted a request to the District of North Vancouver (District) for certain records relating to its application to subdivide a property that it owns in the District.

[2] The District provided the responsive records to the applicant but withheld some information in the records under ss. 12 (cabinet confidences), 13(1) (advice or recommendations), 14 (solicitor client privilege), 17 (harm to financial or economic interests), 21 (harm to a third party's business interests) and 22 (unreasonable invasion of a third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the District's decision. During mediation, the District released some of the information previously withheld under s. 13(1).¹

¹ When I refer to section numbers throughout this order, I am referring to sections of FIPPA.

[4] Mediation by the OIPC did not resolve the remaining issues and the matter proceeded to inquiry. Between mediation and the inquiry, the public body released most of the information previously withheld under s. 22 and withdrew its reliance on s. 12 to withhold information. The applicant also confirmed that it is not seeking access to the information withheld under ss. 21 and 22.

[5] During the inquiry, the District reconsidered its application of s. 14 to the information at issue on pages 283, 312 and 419 of the records. The District has since disclosed this information to the applicant and it is, therefore, no longer in dispute in this inquiry.

ISSUES

[6] The issues to be decided in this inquiry are as follows:

1. Is the District authorized to refuse to disclose the information at issue under s. 13(1)?
2. Is the District authorized to refuse to disclose the information at issue under s. 14?
3. Is the District authorized to refuse to disclose the information at issue under s. 17(1)?

[7] Section 57(1) places the burden on the District, as the public body, to prove the applicant has no right of access to all or part of the information in dispute under ss. 13(1), 14 and 17(1).

DISCUSSION

Background

[8] The applicant, a corporation, submitted a preliminary subdivision application (subdivision application) to the District in relation to a property that it owns in the District.² District staff compiled information and advice on the subdivision application for consideration by the District's Approving Officer, who ultimately determined that if the applicant submitted a detailed subdivision application, he would refuse it.

² The information in this paragraph is from information already disclosed in the records and the City's initial submission at page 2.

Information at issue

[9] The responsive records total 1109 pages, with approximately 20 pages containing the information in dispute. The information in dispute is in emails, memoranda and a text message about the subdivision application.

[10] The District provided the responsive records in two packages and numbered the pages sequentially across both packages.³ The submissions of both parties reflect this approach to numbering, and I adopt it as well for ease of reference.

Solicitor client privilege, s. 14

[11] Section 14 says that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. Section 14 encompasses both legal advice privilege and litigation privilege. Only legal advice privilege is at issue in this inquiry.

[12] Legal advice privilege applies to communications that:

- (i) are between solicitor and client;
- (ii) entail the seeking or giving of legal advice; and
- (iii) are intended to be confidential by the parties.⁴

[13] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that discuss legal advice and its implications.⁵

[14] The District is withholding information from four records under s. 14. Each record involves different circumstances and parties. I make the following findings about the information in dispute in each record.

*Email to the District's General Counsel (lawyer)*⁶

[15] The District is withholding most of this email under s. 14. The District says that the email clearly contains a request to its lawyer for legal advice.⁷ The applicant submits that the email, or part of it, does not involve the seeking or

³ For example, there are 405 pages in the first package of records, so the first page of the second package of records is numbered page 406.

⁴ *Solosky v The Queen*, 1979 CanLII 9 (SCC) at page 837.

⁵ *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para 12; *Bilfinger Berger (Canada) Inc v Greater Vancouver Water District*, 2013 BCSC 1893 at paras 22-24.

⁶ Information located on page 178 of the records.

⁷ District's initial submission at page 3.

giving of legal advice to or from the lawyer and is therefore of a non-legal nature.⁸

[16] I can see that the email is a communication between the District and its lawyer in which the District is seeking legal advice from the lawyer. Based on the contents of the email, and the fact that the email was only sent to District employees, I accept that it was intended to be a confidential communication. Therefore, I find that s. 14 applies to the information at issue in this email.

Email between District employees cc'ed to the lawyer⁹

[17] The District is withholding most of this email under s. 14. The applicant submits that s. 14 does not apply because the email does not involve the seeking or giving of legal advice to or from the lawyer in his capacity as legal counsel.¹⁰

[18] Solicitor client privilege extends to in-house counsel provided they are acting in a legal capacity and not a business or management capacity. The Supreme Court of Canada in *Pritchard v Ontario (Human Rights Commission)* said that “owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case base to determine if the circumstances were such that the privileges arose.”¹¹

[19] The District described the lawyer’s role in relation to the subdivision application as:

*...providing legal advice to District staff with respect to the legal and policy considerations applicable to the Applicant’s Subdivision Application... This legal work included reviewing and revising the reports of other District staff providing input and advice to District staff with respect to the Subdivision Application, to ensure that all relevant matters under the Land Title Act were being considered and addressed.*¹²

[20] Based on the District’s description of the lawyer’s role and my review of the records, I am satisfied on a balance of probabilities that the lawyer was acting in a legal capacity in the circumstances related to this email.

[21] The information at issue in this email reveals the subject matter of work undertaken by the lawyer and a timeline for the completion of that work. Together with the information already disclosed from this email, which includes the date and subject line of the email, I am satisfied that disclosing the information at

⁸ Applicant’s response submission at page 3.

⁹ Information located on page 478 of the records.

¹⁰ Applicant’s response submission at page 3.

¹¹ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20.

¹² District’s initial submission at pages 2-3.

issue would allow an accurate inference to be made about confidential legal advice given from the lawyer to the District. Therefore, I find that s. 14 applies to the information at issue in this email.

Email between District employees¹³

[22] The District is withholding most of this email. The District says that solicitor client privilege extends to internal discussion about legal advice which could reveal the advice that was sought or received.¹⁴ The applicant says that s. 14 does not apply because the lawyer is not a party to the email and no other lawyer is party to the email.¹⁵

[23] I can see that the information at issue in this email reveals, at a minimum, the subject matter of work undertaken by the lawyer and the amount of time spent by the lawyer on a matter. Together with the information already disclosed from this email, I am satisfied that disclosing the information at issue would allow an accurate inference to be made about confidential legal advice given from the lawyer to the District. Therefore, I find that s. 14 applies to the information at issue in this email.

Text message between District employees¹⁶

[24] The District is withholding part of this text message. The District says that solicitor client privilege extends to internal discussion about legal advice which could reveal the advice that was sought or received.¹⁷ The applicant says that s. 14 does not apply because the lawyer is not a party to the text message and no other lawyer is party to the text message.¹⁸

[25] I can see that the information at issue in the text message reveals legal advice provided by the lawyer in relation to the subdivision application. Therefore, I find that legal advice privilege applies to the information at issue in the text message because it would reveal privileged communications between the District and its lawyer.

Summary, s. 14

[26] To summarize, I find that the District is authorized by s. 14 to withhold all the information at issue under s. 14.

¹³ Information located on pages 290 and 468 (duplicate of 290) of the records.

¹⁴ District's reply submission at page 2.

¹⁵ Applicant's response submission at page 3.

¹⁶ Information located on page 191 of the records.

¹⁷ District's reply submission at page 2.

¹⁸ Applicant's response submission at page 3.

Advice or recommendations, s. 13(1)

[27] There is some overlap between the District's application of ss. 13(1) and 14 to the records. I will only consider below the information that I have not already found may be withheld under s. 14.

[28] Section 13 authorizes the head of a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister, subject to certain exceptions.

[29] The purpose of s. 13 is to allow 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 decision and policy-making were subject to excessive scrutiny.¹⁹

[30] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1):

- Section 13(1) applies to information that *would reveal* advice or recommendations and not only to information that *is* advice or recommendations.²⁰
- The terms “advice” and “recommendations” are distinct, so they must have distinct meanings.²¹
- “Recommendations” relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.²²
- “Advice” has a broader meaning than “recommendations.”²³ It includes setting out relevant considerations and options, and providing analysis and opinions, excluding expert opinions on matters of fact.²⁴ Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.²⁵
- “Advice” also includes factual information “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.”²⁶ This is because the compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

¹⁹ *John Doe v Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at paras 45-51.

²⁰ Order 02-38, 2002 CanLII 42472 (BC IPC) at para 134.

²¹ *John Doe*, *supra* note 19 at para 24.

²² *Ibid* at paras 23-24.

²³ *Ibid* at para 24.

²⁴ *Ibid* at paras 26-27 and 46-47; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at paras 103 and 113.

²⁵ *College*, *supra* note 24 at para 103.

²⁶ *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para 94.

[31] The first step in the s. 13 analysis is to determine whether the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must decide whether the information falls into any of the categories listed in s. 13(2) which a public body must not refuse to disclose under s. 13(1).

[32] Finally, if the records have been in existence for more than ten years, s. 13(3) says that they may not be withheld under s. 13(1). In this case, the records are not that old, so s. 13(3) does not apply.

Would the disputed information reveal advice or recommendations?

[33] The first step in the s. 13 analysis is to determine whether the disputed information reveals advice or recommendations developed by or for the District. The disputed information is in emails between District employees, a memorandum (memo) and a draft memorandum (draft memo).

[34] The District says that all of the information withheld under s. 13(1) would reveal advice or recommendations developed by or for the District.²⁷ The applicant says that s. 13(1) has been either incorrectly or too broadly applied to the records.²⁸

[35] For the reasons that follow, I find that most of the information withheld under s. 13(1) would reveal advice or recommendations developed by or for the District during its deliberations about the subdivision application.

Memo and draft memo²⁹

[36] I find that most of the memo and draft memo would reveal advice or recommendations. I can see that the authors of these records have used their expertise and professional judgment to comment on aspects of the subdivision application and set out suggested courses of action. I am satisfied that most of the information in these records would reveal advice and recommendations within the meaning of s. 13(1).

[37] However, I find that the following information in the memo and draft memo would not reveal advice or recommendations:

- Non-substantive information, such as document numbers, page numbers, dates, and the names of the authors.

²⁷ District's initial submission at page 4.

²⁸ Applicant's response submission at pages 4-5.

²⁹ Information located on pages 212-217 and 442-445 of the records.

- Subject lines, the first paragraph of the memo and draft memo, and the heading “conclusion” in the draft memo. In my view, these are so general that they would not reveal any advice or recommendations.
- The figure of the proposed subdivision in the memo. I do not see how disclosing an image of the proposed subdivision would reveal advice or recommendations and the District has not explained how it would.

Emails between District employees

[38] I find that most of the information at issue in the emails would reveal advice or recommendations, in particular, the following information:

- Part of an email in which the author inserted an excerpt from the memo.³⁰ As I have already found in my discussion of the memo, I am satisfied that this information would reveal advice or recommendations.
- A suggested course of action.³¹ I find that this is a recommendation within the meaning of s. 13(1).
- A suggested revision to the wording of an email.³² I find that this qualifies as advice under s. 13(1). This is consistent with previous orders which have found that public bodies can withhold editorial advice about the content and wording of draft documents under s. 13(1).³³
- Analysis and opinion on issues pertaining to the subdivision application. I find that this is advice within the meaning of s. 13(1).³⁴
- Recommended messaging in response to a media request.³⁵ In my view, this is clearly advice within the meaning of s. 13(1). This is consistent with previous orders which have found that s. 13(1) applies to advice and recommendations about communication matters.³⁶

[39] However, I find that the following information in the emails would not reveal advice or recommendations:

- Process related information, descriptive information, and information about who is available to answer questions.³⁷

³⁰ Information located on pages 228-229 of the records.

³¹ Information located on page 227 of the records.

³² Information located on pages 227-228 of the records.

³³ For example, see Order F19-28, 2019 BCIPC 30 at para 39; Order F19-17, 2019 BCIPC 29 at para 37; and Order F15-26, 2015 BCIPC 28 at para 29.

³⁴ Information located on page 697 of the records.

³⁵ Information located on page 906 of the records.

³⁶ For example, see Order F19-28, 2019 BCIPC 30 at para 41; Order F17-34, 2017 BCIPC 36 at para 10; Order 04-37, 2004 CanLII 49200 (BC IPC) at para 17; and Order F09-01, 2009 CanLII 3225 (BC IPC) at para 17.

³⁷ Information located on pages 227-228 of the records.

- Information about when an employee will undertake future actions related to the subdivision application.³⁸

[40] For the reasons outlined above, I find that most of the information in dispute under s. 13(1) would reveal advice or recommendations.

Do any of the exceptions in s. 13(2) apply?

[41] Next, I will consider if s. 13(2) applies to the information that I found above would reveal advice or recommendations.

[42] The District says that none of the exceptions in s. 13(2) apply to the information in dispute under s. 13(1).³⁹ The applicant says that ss. 13(2)(a), (i), (j), (m) and (n) apply to the disputed information in an email from the Communications Coordinator, but it does not explain how they apply.⁴⁰ In relation to the other records containing information in dispute under s. 13(1), the applicant says that it cannot specify whether any of the exceptions in s. 13(2) apply as substantially all of the records have been withheld.⁴¹

[43] I will consider whether the subsections raised by the applicant apply to any of the information that I have found would reveal advice or recommendations, including the information in the email from the Communications Coordinator.

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

[44] Section 13(2)(a) says that the head of a public body must not refuse to disclose under s. 13(1) any factual material.

[45] The term “factual material” in s. 13(2)(a) has a distinct meaning from factual “information.” The compilation of factual information and weighing the significance of matters of fact is an integral component of advice and informs the decision-making process. If facts are compiled and selected, using expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of the public body, then the facts are not “factual material” under s. 13(1).⁴²

[46] In my view, none of the information that I have found would reveal advice or recommendations is factual material under s. 13(2)(a). The facts are

³⁸ Information located on page 697 of the records.

³⁹ District’s reply submission at page 2.

⁴⁰ Applicant’s response submission at page 4.

⁴¹ Applicant’s response submission at pages 4-5.

⁴² *PHSA*, supra note 26 at paras 91-94.

intermingled, with, and an integral part of, the advice and recommendations. I find that s. 13(2)(a) does not apply.

Feasibility or technical study, s. 13(2)(i)

[47] Section 13(2)(i) says that the head of a public body must not refuse to disclose under s. 13(1) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body.

[48] In my view, the information that I have found would reveal advice or recommendations is clearly not a feasibility or technical study nor does it relate to a policy or project of the public body. I find that s. 13(2)(i) does not apply.

Report on the results of field research, s. 13(2)(j)

[49] Section 13(2)(j) says that s. 13(1) does not apply to a report on the results of field research undertaken before a policy proposal is formulated.

[50] In my view, the information that I have found would reveal advice or recommendations is clearly not a report on the results of field research undertaken before a policy proposal is formulated. I find that s. 13(2)(j) does not apply.

Information cited publicly, s. 13(2)(m)

[51] Section 13(2)(m) says that the head of a public body must not refuse to disclose under s. 13(1) “information that the head of the public body has cited publicly as the reason for making a decision or formulating a policy.”

[52] The applicant identifies nothing that establishes that the District ever publicly cited any of the information that I have found would reveal advice or recommendations. Even if the information was cited publicly, I am not satisfied that any of that information is the reason for the Approving Officer’s decision on the subdivision application or any other matter. For these reasons, I find that s. 13(2)(m) does not apply.

Decision, including reasons, s. 13(2)(n)

[53] Section 13(2)(n) says that the head of a public body must not refuse to disclose under s. 13(1) “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.”

[54] The information that I have found would reveal advice or recommendations is not a decision of the public body made in the exercise of a discretionary power or adjudicative function and that affects the rights of the

applicant, nor does it contain reasons for any such decision. For this reason, I find that s. 13(2)(n) does not apply.

Any other circumstances

[55] I have also considered whether the information that I have found would reveal advice and recommendations falls within any of the other circumstances described in s. 13(2). I find that it does not.

Summary, s. 13(1)

[56] In conclusion, I find that most of the information withheld under s. 13(1) would reveal advice or recommendations developed by or for the District. I also find that ss. 13(2) and 13(3) do not apply to that information. There is, however, some information that may not be withheld under s. 13(1) because it would not reveal any advice or recommendations developed by or for the District.

Harm to financial or economic interests, s. 17(1)

[57] All of the information the District withheld under s. 17(1) was also withheld under s. 14. I found that s. 14 applies to all of that information, so it is not necessary to consider if s. 17(1) applies as well.

CONCLUSION

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

1. I confirm the District's decision that it is authorized to refuse to disclose the disputed information under s. 14 of FIPPA.
2. I confirm, in part the District's decision to refuse to disclose the disputed information under s. 13(1) of FIPPA, subject to item 3 below.
3. I require the District to give the applicant access to the parts of the information in dispute that I have highlighted in grey on pages 212-217, 227, 228, 442-445 and 697 in the copy of the records provided to the public body with this order.
4. The District must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant

[59] Pursuant to s. 59(1) of FIPPA, the District is required to comply with this order by **December 13, 2022**.

October 31, 2022

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

OIPC File No.: F20-83229