



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-39

MINISTRY OF FINANCE

Jay Fedorak
Adjudicator

May 25, 2023

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Summary: An applicant requested copies of records regarding polling relating to the Covid-19 pandemic that a contracted service provider had created for the Ministry of Finance. The Ministry disclosed records but withheld some information under s. 13(1) (advice and recommendations). The adjudicator found that the Ministry correctly applied s. 13(1) to the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 13(1), 13(2)(b), 13(3).

INTRODUCTION

[1] A journalist (applicant) requested from the Government Communications and Public Engagement division of the Ministry of Finance (Ministry), under the *Freedom of Information and Protection of Privacy Act* (FIPPA), copies of records regarding polling relating to the Covid-19 pandemic that a contracted service provider had created for the Ministry. The Ministry responded by providing the applicant with records, while withholding information under s. 12(1) (Cabinet confidences).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the response. As a result of mediation, the Ministry released additional records, but continued to withhold some information under s. 12(1). It also applied s. 13(1) (advice and recommendations) to some of the information.

[3] Mediation failed to resolve the remaining issues and the applicant requested that the matter proceed to an inquiry. At the inquiry, the Ministry released additional information and ceased to rely on s. 12(1).

ISSUE

[4] The issue to be decided in this inquiry is whether s. 13(1) authorizes the City to withhold the information at issue.

[5] Under s. 57(1), the City has the burden of proving that the applicant has no right of access to the information it withheld under s. 13(1).

DISCUSSION

[6] **Background** – Government Communications and Public Engagement is a division of the Ministry that provides strategic communication advice and direction across the government of British Columbia. The Ministry works with third-party public opinion research agencies to conduct polling, marketing and advertising with the public. The Ministry engaged the contracted service provider through an established government procurement process.

[7] **Records at issue** – The Records at issue relate to a daily tracking poll regarding the impacts of the Covid-19 pandemic between April 23 and May 29, 2020. They include draft opinion poll questions, the Ministry's comments on the drafted questions, and analysis of the results of the opinion polls.

[8] There are 5751 pages of records in total. The Ministry withheld information on three pages. This information consists of proposed poll questions and a comment in a marginal note regarding the proposed wording of a poll question.

Section 13(1) – advice or recommendations

[9] Section 13(1) allows 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 to protect its deliberative processes.¹ The parts of the provision that are relevant in this case read 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)
 - (b) a public opinion poll ...
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

¹ *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025, para 52.

[11] The first step in the analysis is to determine whether disclosing the information at issue would reveal advice or recommendations under s. 13(1). If it would, the next step is to decide whether the information falls into any of the provisions in s. 13(2) or whether it has been in existence for more than 10 years in accordance with s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, it cannot be withheld under s. 13(1).

Advice or Recommendations

[12] The term “advice” is broader than “recommendations” and includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact” and “expert opinion on matters of fact on which a public body must make a decision for future action”.² “Recommendations” include suggested courses of action that will ultimately be accepted or rejected by the person being advised.³ Section 13(1) would also apply when disclosure would allow an individual to make accurate inferences about any advice or recommendations.

[13] The Ministry submits that the information to which it has applied s. 13(1) consists of draft poll questions, and comments about those questions, that officials of the Ministry and the contracted service provider had formulated for the consideration of the executive who had the authority to decide whether to include those questions in the poll. The Ministry has released all of the poll questions that it eventually used in any polls. It withheld only those questions or lines of questioning that the decision maker considered but decided not to include in any polls.⁴

[14] The Ministry submits that s. 13(1) applies to this information because the officials created the proposed questions for the purpose of providing advice to the Ministry and to assist in deciding which questions should be included in the polls. The comment in the margin on page 283, according to the Ministry, was a recommendation from an official as to changes to the proposed wording of the question at issue.⁵

[15] The Ministry relies on affidavit evidence from the executive lead in the Government Communications and Public Engagement division to support its application of s. 13(1).

[16] The applicant submits that the Government of the day used polling information at issue to assist its re-election campaign and that disclosure of the information is necessary to understand the ruling party’s ambition to increase its

² *John Doe v Ontario (Finance)* 2014 SCC 36 [John Doe], para 24. *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 113.

³ John Doe, para 23.

⁴ The Ministry’s initial submission, paras. 25-26.

⁵ The Ministry’s initial submission, paras. 32-33.

power. With respect to the application of s. 13(1), the applicant summarizes the findings of adjudicators in orders where they found that s. 13(1) applies.⁶ The applicant does not draw a direct connection between those orders and the information at issue in this inquiry.

Analysis

[17] To meet its burden of proof, the Ministry must go further than merely claiming that s. 13(1) applies. It must demonstrate how the exception applies to the specific information at issue. It must explain why the information at issue meets the definition of advice or recommendations.

[18] I have reviewed the information at issue. I note that the information at issue includes two pages in which three proposed poll questions have been deleted through the use of the Track Changes function in a word processing program. This information appears to me to be consistent with the Ministry's description of recommended wording for poll questions for the consideration of the executive who made the final decision as to the questions to be included in a poll and the wording of those questions. I find that this information meets the definition of recommendations for the purpose of s. 13(1).

[19] I note that the information at issue on the third page is a marginal note that offers two possible options for addressing concerns about the wording of a poll question. I find that text of the comments in the marginal note meets the definitions of advice and recommendations for the purposes of s. 13(1).

[20] Therefore, I find that the information at issue constitutes advice or recommendations in accordance with s. 13(1).

Section 13(2)

[21] The Ministry submits that while the records subject to the request relate to opinion polls, the information at issue does not constitute an opinion poll for the purposes of s. 13(2)(b). The proposed questions constituted advice that the authorized executive rejected. Consequently, the proposed questions were never included in any opinion polls. The Ministry also notes that it has disclosed to the applicant the contents of all of the opinion polls that it implemented. The Ministry provides affidavit evidence in support of these submissions.⁷

[22] The applicant submits that during the processing of the request the Ministry realized that s. 13(2)(b) applied to some of the information that it had

⁶ Applicant's response submission, paras. 2-3, 14-18.

⁷ Ministry's initial submission, paras. 61-62; Affidavit #1.

originally withheld.⁸ He does not make any reference to the application of s. 13(2)(b) to the information remaining at issue.

[23] The Ministry has persuaded me that the proposed poll questions at issue do not constitute a public opinion poll for the purposes of s. 13(2). The affidavit testifies that the Ministry never included these questions in any polls. It is also clear from the fact of the record that the marginal note at issue is not a public opinion poll.

[24] Therefore, I find that s. 13(2)(b) does not apply to the information that I found reveals advice or recommendations. I see no other provisions within s. 13(2) that might apply. Consequently, I find that s. 13(2) does not apply to any of the information that I found reveals advice or recommendations.

Section 13(3) Information in existence for more than 10 years

[25] Finally, it is clear from the face of the records that none of the information has been in existence for more than 10 years, so I find that s. 13(3) does not apply.

Conclusion, s. 13

[26] In conclusion, I confirm the decision of the Ministry to withhold the information at issue under s. 13(1).

CONCLUSION

[27] For the reasons given above, I make the following order under s. 58 of FIPPA, I confirm the decision of the Ministry to withhold information under s. 13(1).

May 25, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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⁸ Applicant's response submission, para. 12.