



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F15-33

CITY OF VANCOUVER

Hamish Flanagan
Adjudicator

August 12, 2015

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Summary: A former City of Vancouver employee requested all correspondence containing his name that was authored in certain time periods by any of eleven City employees. The City disclosed most of the correspondence but withheld some responsive information under ss. 13 (advice or recommendations) and 22 (unreasonable invasion of personal privacy) of FIPPA. The adjudicator authorized the City to withhold some information under s. 13 while finding that other information must be disclosed. The adjudicator also determined that the City was required to refuse most of the information withheld under s. 22, but that some of the information was contact information so must be disclosed.

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

Authorities Considered: Order F15-23, 2015 BCIPC 25 (CanLII); Order F13-09, 2013 BCIPC 10 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F07-17, 2007 CanLII 35478 (BC IPC); Order F08-05, 2008 CanLII 41153 (BC IPC); Order F15-13, 2015 BCIPC 13 (CanLII); Order F13-08, 2013 BCIPC 9 (CanLII); Order F14-45, 2014 BCIPC 48 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia* 2002 BCCA 665 (CanLII); *John Doe v. Ministry of Finance* 2014 SCC 36 (CanLII).

INTRODUCTION

[1] The applicant is a former City of Vancouver (“City”) employee who requested all correspondence containing his name authored by eleven City employees in certain specified years. In a series of releases of information the City disclosed most of the responsive records to the applicant, but continued to withhold some information under ss. 13 and 22 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the City’s decision. OIPC mediation did not resolve the dispute to the applicant’s satisfaction and he requested that it proceed to an inquiry.

ISSUES

[3] The issues in this inquiry are:

1. Is the City authorized to refuse access to information because it discloses policy advice or recommendations under s. 13 of FIPPA?
2. Is the City required to refuse access to information because disclosure of the information would be harmful to personal privacy under s. 22 of FIPPA?

DISCUSSION

[4] **Background**—The applicant is a former City employee seeking information relating to disciplinary actions taken against him by the City and the City’s response to grievances filed on behalf of the applicant by his Union.

Preliminary Issues

Out of scope records

[5] The City is withholding some records it originally identified as responsive to the applicant’s request on the basis that the records are not within the scope of the request. The City states that it should never have identified these records as responsive and that it included these emails in the responsive records in error.

[6] I have reviewed the records withheld as non-responsive, and am satisfied they are outside the scope of the applicants request because they are not written by employees named by the applicant in his request, they were written in years the applicant did not request records for, or both.

[7] Recent orders have clarified that FIPPA does not permit a public body to withhold parts of a record on the basis that it is outside the scope of an applicant's request.¹ However the City is withholding entire records, not parts of records, as non-responsive in this case. These records are outside the scope of the applicant's request for records and were included in the responsive records in error by the City. I find that the records can be withheld because they do not respond to the applicant's request.

Duplicate records

[8] The City is withholding some records on the basis that they are duplicate copies of emails that are already contained in the responsive records. It has clearly identified in its submission those responsive records which duplicate other responsive records. I have reviewed all the instances of duplicate records withheld by the City. I am satisfied that they are identical copies of other records in issue in this inquiry. There is no utility to the applicant in these duplicate records being considered separately in this inquiry. Therefore, I will not consider the duplicate records further.

Overlapping records

[9] The City submits that a prior information request by the applicant to the City that resulted in Order F13-09² dealt with some of the same records responsive to this request. The thrust of the City's submissions is that the information ordered withheld in Order F13-09 should also be withheld in this inquiry. It cites one specific instance of this overlap in the records which contains information withheld under s. 13,³ and says that Order F13-09 found that some information in that same record could be withheld under s. 13.

[10] The City does not identify the page number of the record from Order F13-09 to enable me to locate and compare the information withheld in the present inquiry at pages 243-4 and the equivalent record in Order F13-09. Also, in the present inquiry the City has also withheld information in the record at pages 243-4 under s. 22, but it does not address whether this information was also withheld under s. 22 in Order F13-09. In sum, the lack of precise information about the location and treatment of the allegedly overlapping record means that I can only consider whether the information in the allegedly overlapping record can be withheld when I consider the application of ss. 13 and 22 to the records in issue in this inquiry. If the withheld information is subject to one of these exceptions it can be withheld.

¹ Order F15-23, 2015 BCIPC 25.

² Order F13-09, 2013 BCIPC 10.

³ At pp. 243-244 of the records. The City does not provide the reference for the record considered in Order F13-09.

[11] **Records in Dispute**—The records in dispute consist of correspondence, including emails and draft letters. The correspondence relates to the City’s disciplinary actions against the applicant, and grievances filed by the applicant’s Union against the City.

[12] The City has disclosed most of the responsive records to the applicant. The withheld information comprises entire emails or letters, or portions of emails. More specifically, the information withheld under s. 13 comprises:

- a) a series of email exchanges between City employees relating to the discipline and grievance processes involving the applicant; and
- b) draft letters relating to the discipline and grievance process involving the applicant (“draft letters”).

[13] The information withheld under s. 22 comprises:

- a) email addresses of third parties,⁴ mostly belonging to Union representatives;
- b) a phone number of a City employee;⁵ and
- c) information in correspondence about third parties, including third parties’ names, that are unrelated to the applicants’ request. Most of this information relates to grievances brought against the City by third parties’ Union representatives (“Unrelated Third Party Information”).⁶

[14] **Policy Advice or Recommendations**—Section 13(1) states:

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.

Purpose of s. 13(1)

[15] The purpose of s. 13(1) is to allow for the full and frank discussion of advice or recommendations on a proposed course of action by a public body. This helps to protect public bodies from the harm that would occur if the deliberative process of government decision and policy-making were subject to

⁴ At pp. 5, 48-9, 101, 102-4, 111, 132, 160, 231 and 308.

⁵ At p. 146.

⁶ At pp. 14, 15, 19, 99-100, 107-8, 152, 164 and 244. Some information at pp. 101, 103, 104, 111 and 112-3.

excessive scrutiny. The principle underlying this exception has been discussed in many orders, including Order 01-15 where former Commissioner Loukidelis said:

This 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.

[16] The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether the disclosure of the information “would reveal advice or recommendations developed by or for a public body or a minister” in accordance with s. 13(1). 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, as a public body must not refuse to disclose information under s. 13(1) if a provision in s. 13(2) applies.

Scope of s. 13(1)

[17] Section 13(1) relates to “advice or recommendations”. The British Columbia Court of Appeal stated in *College of Physicians of B.C. v. British Columbia* that “advice” is not necessarily limited to words offered as a recommendation about future action. As Levine J.A. states in *College of Physicians*, “advice” includes “expert opinion on matters of fact on which a public body must make a decision for future action.”⁷

[18] Previous orders have also found that a public body is authorized to refuse access to information that would allow an individual to draw accurate inferences about advice or recommendations.⁸ Section 13(1) can encompass information about policy issues, possible options for changes to policies and considerations for these various options, and discussions about implications and possible impacts of different options.⁹ Further, in *John Doe v. Ministry of Finance*¹⁰ the Supreme Court of Canada determined that the word “advice” in Ontario’s FIPPA,¹¹ that is equivalent to s. 13(1) of BC’s FIPPA, includes policy options, whether or not the advice is communicated to anyone.

⁷ 2002 BCCA 665 (CanLII) at para. 113.

⁸ This was also at the heart of the concern in the decision in *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) – see paras. 52 and 66.

⁹ See Order F12-02, 2012 BCIPC 2 (CanLII), Order F10-15, 2010 BCIPC 24 (CanLII) at para. 23, Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 102-127, Order F06-16, 2006 CanLII 25576 (BC IPC) at para. 48, *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

¹⁰ 2014 SCC 36 (CanLII).

¹¹ Section 13(1) of Ontario’s FIPPA.

Position of the Parties

[19] The City submits that the emails and draft letters it is withholding under s. 13 contain advice and recommendations passed between City employees relating to the disciplinary and grievance actions taken involving the applicant, and that the information does not fall within any of the exceptions listed in s. 13(2).

[20] The applicant cites Order F13-07,¹² which was a decision where information withheld under s. 13 was found to not comprise advice or recommendations, in support of his view that s. 13 does not apply to the withheld information. The applicant also submits that several of the exceptions in s. 13(2) apply to require disclosure of the information withheld under s. 13(1). Specifically, the applicant cites:

- a) s. 13(2)(a) (factual information);
- b) s. 13(2)(d) (appraisals);
- c) s. 13(2)(g) (final reports or final audits on the performance or efficiency of a public body or on any of its policies, programs or activities); and
- d) s. 13(2)(n) (decisions, including reasons).

[21] The City's reply submission denies that s. 13(2) applies to any of the information withheld under s. 13(1).

Application of s. 13(1) to the records

[22] Based on my review of the records, I find that much of the information withheld under s. 13 discloses advice or recommendations provided by City employees in the course of the City's participation in the disciplinary and grievance processes involving the applicant,¹³ or would allow accurate inferences about advice or recommendations.¹⁴

[23] Some of the withheld information comprises draft letters attached to an email, where the email author is seeking comment on the draft from fellow employees. In one case the author of the draft is the decision maker, as his name appears as the author of the letter.¹⁵ In this context, the request and the draft letter do not contain advice or recommendations because the decision maker is *requesting* advice or recommendations, not providing the draft letter as

¹² 2013 BCIPC 8.

¹³ This includes the information at pp. 243-4 of the records withheld under s. 13 the City identified as a record that was considered in Order F13-09.

¹⁴ An example of the latter being the information withheld at p. 66 of the records and some information at p. 117 of the records.

¹⁵ At pp. 35-38 of the records.

advice or recommendations. However, despite this, disclosing the draft letter would enable it to be compared with the final version of the letter that was disclosed to the applicant. This would enable the applicant to draw accurate inferences about advice or recommendations based on changes to the letters from the draft to the final version. Therefore s. 13(1) applies to this information.

[24] A small amount of information withheld under s. 13 does not comprise advice or recommendations. Some of this information does not fall within the scope of s. 13(1) because it is a request for advice or recommendations.¹⁶ Section 13(1) does not typically apply to information that merely discloses that a public body is soliciting advice and information, even when the request for advice discloses the scope of advice or recommendations requested.¹⁷ The request would need to reveal or allow an accurate inference about advice or recommendations to fall within the scope of s. 13,¹⁸ and there is no evidence that the information in issue does this. Therefore, the withheld information comprising requests for advice falls outside the scope of s. 13.

[25] Other information withheld under s. 13 that falls outside the scope of s. 13(1) is instructions from one employee to another,¹⁹ and comments or statements that communicate a decision that has been made.²⁰ In context, these types of information do not comprise advice or recommendations, or allow an accurate inference about advice or recommendations.

[26] I will now consider whether s. 13(2) applies to any of the information that comprises advice or recommendations under s. 13(1). In particular the applicant has raised the relevance or application of ss. 13(2)(a), (d), (g) and (n) to the information. He says these provisions apply because he is seeking “factual material that involves an appraisal of his performance, a final report or audit on the performance of the public body, and a decision, including reasons, that affect [sic] the rights of the applicant.”²¹ The applicant cites Order F13-08,²² where s. 13(2)(g) was found to apply to a record, in support of the application of that provision to the records.²³

[27] I am satisfied from my review of the records that the City has not withheld any factual information (s. 13(2)(a)), appraisals (s. 13(2)(d)), final audits or

¹⁶ Some information at pp. 63 (duplicate at pp. 65 and 143), 74 (duplicate at p. 79), 76-77 and 112 of the records.

¹⁷ See for example Order F15-13, 2015 BCIPC 13 (CanLII) at para 28.

¹⁸ As the draft letter at pp. 35-38 discussed above does. See Order F07-17 2007 CanLII 35478 (BC IPC) at para. 29; Order F08-05, 2008 CanLII 41153 (BC IPC) at para. 21.

¹⁹ Page 68 of the records, some information at pp. 74 (duplicate at p. 79) and 76-77 of the records.

²⁰ Page 62 (duplicate at pp. 64 and 142) and some information at pp. 112-3 of the records.

²¹ Applicant's submission at para 28.

²² 2013 BCIPC 9 (CanLII)

²³ Applicant's submission at para. 27.

reports on the performance or efficiency of a public body or any of its policies, programs or activities (s. 13(2)(g)) or final decisions (s. 13 (2)(n)). None of the records contain withheld information of this type.

[28] **Disclosure Harmful to Personal Privacy**— Section 22(1) states:

The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[29] The City relies on s. 22 of FIPPA to withhold email addresses and the Unrelated Third Party Information. The Applicant did not make a submission regarding s. 22.

[30] Section 22 of FIPPA only applies to “personal information”, which is 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”.²⁴

[31] The City is withholding a series of email addresses under s. 22.²⁵ These email addresses occur in a context where they are clearly being used to conduct business activities related to the grievances of the applicant and others.²⁶ The email addresses are not in a format that uses a business' name in the email address. However, in my view, the use of the address, rather than its form, is the basis for determining whether an address is contact information for the purposes of FIPPA. The records demonstrate the addresses repeated use for sending and receiving email messages in the ordinary course of conducting the third party's business affairs. Thus, the email addresses comprise information that enables the third party to be contacted in their business capacity. Therefore, the email addresses comprise contact information as defined in FIPPA and not personal information. I note also that the email addresses are likely already known by the applicant because they are for the applicant's Union representatives.

[32] One piece of information withheld under s. 22 is a cell phone number provided in an email between City employees to enable an employee to be contacted to discuss the applicant's disciplinary and grievance process.²⁷ Based on my review of the materials, it may be the case that this is the employee's personal cell phone.²⁸ The applicant did not express any desire for the

²⁴ Schedule 1 of FIPPA.

²⁵ At pp. 5, 48-9, 101, 102-4, 111, 132, 160, 231, 308.

²⁶ See also Order F14-45, 2014 BCIPC 48 (CanLII) at para. 41.

²⁷ At p. 146 of the records.

²⁸ If this cell-phone is the employee's City-issued cell phone number, it is contact information and should be disclosed.

information and there are no factors or evidence that suggest that it should be disclosed. Given these circumstances and that the purpose of s. 22 is to prevent disclosure of information that would be an unreasonable invasion of third party personal privacy, I find that s. 22 applies to this information.

[33] The remaining information withheld under s. 22 is the Unrelated Third Party Information. It comprises personal information, including names of various third parties in relation to grievances brought against the City.²⁹ No factors in s. 22(4) apply to the information. Further, disclosure of the personal information is presumed to be unreasonable under s. 22(3)(d) because the information occurs in the context of workplace disputes and therefore relates to employment history. The information has no relevance or connection to the applicant's request as it is completely unrelated to his interactions with the City. It appears in the records only because it is contained in email correspondence between the City and Union representatives that deal with several City employees' grievances, including the applicant's grievance. There are therefore no factors that rebut the presumption that disclosure of the information would unreasonably invade third party personal privacy. Consequently, the presumption that disclosure of the Unrelated Third Party Information would be an unreasonable invasion of privacy has not been rebutted, and s. 22 applies.

[34] In one instance at page 112 of the records, the City appears to have omitted to withhold under s. 22 a name in an email subject line³⁰ of a third party who had a grievance with the City that is unrelated to the applicant. As information subject to s. 22 must be withheld by a public body, this name should be withheld under s. 22 for the same reasons as the Unrelated Third Party Information should be withheld.

[35] In conclusion, I require the City to disclose the email addresses. However, it is required to refuse to disclose the cell phone number, the Unrelated Third Party Information and the third party's name on page 112 of the records.

CONCLUSION

[36] For the reasons given above, under s. 58 of FIPPA, I order that the City is:

- a) authorized to refuse to disclose the information withheld under s.13 of FIPPA, except for the information highlighted in yellow in the copy of the records that will be provided to the City accompanying this Order;

²⁹ This includes information withheld under s. 22 in the record the City identified as a record that was previously considered in Order F13-09.

³⁰ Third Party name that appears in the email subject line of I Buric on p. 112 of the records.

- b) required to disclose the email addresses at pages 5, 48-9, 101, 102-4, 111, 132, 160, 231, 308 withheld under s. 22; and
- c) subject to (b), required to refuse to disclose the information it is withholding under s. 22, plus the information highlighted in pink at p. 112 of the records.

[37] Under s. 58 of FIPPA, I order that the City is required to disclose the email addresses by September 24, 2015, pursuant to s. 59 of FIPPA. The City must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the information it provides to the applicant.

August 12, 2015

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No: F14-56922