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INFORMATION & PRIVACY
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Order F16-04

**MINISTRY OF ABORIGINAL AFFAIRS
AND RECONCILIATION**

Celia Francis,
Adjudicator

January 27, 2016

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Summary: The applicant requested records related to meetings between provincial ministries, a resort and a First Nation regarding a specific property. The Ministry withheld some information under ss. 12(1), 13(1) and 19(1)(a). The adjudicator found that s. 13(1) applies to some information. The adjudicator also found that s. 19(1)(a) does not apply to some information and ordered the Ministry to disclose this information to the applicant. It was not necessary to consider s. 12(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(a), 13(3), 19(1)(a).

Authorities Considered: B.C.: Order F07-17, 2007 CanLII 35478 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F14-22, 2014 BCIPC 25 (CanLII).

Cases Considered: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *John Doe v. Ontario (Finance)*, 2014 SCC 36; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Insurance Corporation of British Columbia v. Automotive Retailers Association (ICBC)*, 2013 BCSC 2025; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

INTRODUCTION

[1] In August 2013, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the Ministry of Aboriginal Affairs and Reconciliation (“Ministry”) for correspondence and records of meetings between a named resort, a named First Nation and/or provincial ministries concerning the purchase or lease of a specified property for the period 1984 to 2013. The Ministry responded to the request by denying access to the records in their entirety under s. 16 (harm to intergovernmental relations) and s. 17 (harm to financial interests) of FIPPA.

[2] The applicant requested a review of this decision by the Office of the Information and Privacy Commissioner (“OIPC”). During mediation by the OIPC, the Ministry decided to apply s. 12(1) (Cabinet confidences) to the records, as well as ss. 16 and 17. Mediation did not resolve the issues and the matter proceeded to inquiry.

[3] After the OIPC issued the Notice of Inquiry, the Ministry reconsidered its decision and disclosed some of the previously withheld information. The Ministry also withdrew its reliance on ss. 16 and 17 and added ss. 13(1) and 19(1) to some of the information.¹ Therefore, the exceptions I need to consider here are ss. 12(1), 13(1) and 19(1).

ISSUES

[4] The issues before me are whether the Ministry is required by s. 12(1) and authorized by ss. 13(1) and 19(1) to withhold information. Under s. 57(1), the Ministry has the burden of proving that the applicant is not entitled to have access to the records in dispute.

DISCUSSION

Records in dispute

[5] The records in dispute consist of emails and what appears to be a draft decision note regarding aspects of the Ministry’s treaty negotiations with the named First Nation. According to the Ministry, among other things, the records identify “specific properties considered for inclusion in a treaty negotiation mandate”.²

¹ In the Ministry’s letter of July 10, 2015, it told the applicant it was applying ss. 12, 13, 17 and 19. The Ministry’s submission addressed ss. 12, 13 and 19. In response to my letter of December 17, 2015 requesting clarification of the exceptions in issue, the Ministry confirmed that it was no longer relying on ss. 16 and 17 of FIPPA (communication with the acting Registrar of Inquiries, December 17, 2015).

² Ministry’s initial submission, paras. 4.18, 4.33.

Advice or recommendations — s. 13(1)

[6] The Ministry argued that s. 13(1) applies to much of the withheld information. The applicant did not expressly address any aspect of s. 13. Section 13(1) is a discretionary exception. It says that 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.”

[7] Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). Numerous orders have considered the application of s. 13 of FIPPA, for example, Order F07-17,³ where Adjudicator Boies Parker stated that:

In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope [of] s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

Standard for interpreting s. 13(1)

[8] Many orders and court decisions have considered the purpose and interpretation of s. 13(1). For example, in Order 01-15,⁴ former Commissioner Loukidelis expressed the view that the purpose of s. 13(1) is 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.

[9] In *John Doe v. Ontario (Finance)*,⁵ the Supreme Court of Canada stated that the term “advice” includes an expression of opinion on policy-related matters and that policy options prepared in the course of the decision-making process fall within the meaning of “advice or recommendations”.⁶

[10] The leading case in BC on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*⁷, which found that

³ Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.

⁴ 2001 CanLII 21569 (BC IPC), at para. 22.

⁵ 2014 SCC 36, at paras. 34, 46, 47.

⁶ The Supreme Court of Canada also approved the lower court’s views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC) [*Telezone*], that there is a distinction between advice and factual “objective information”, at paras. 50-52.

⁷ 2002 BCCA 665.

“advice” includes expert opinion on matters of fact on which a public body must make a decision for future action. The Court of Appeal also recognized that some degree of deliberative secrecy fosters the decision-making process.

[11] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

Application of s. 13(1) to the records

[12] The Ministry argued that the withheld information is advice and recommendations that Ministry staff prepared for the purpose of providing advice to the Minister, other Ministry staff and ultimately Treasury Board.⁸

[13] The withheld portions of the records contain options, proposals and recommendations for proceeding with certain actions. They include associated considerations and implications concerning various aspects of the treaty negotiations underway at the time, such as the potential for the acquisition of the property that was the subject of the request.

[14] In my view, this information consists of advice, recommendations and expert opinions, developed by or for the Ministry, and forming part of its deliberative process on the treaty issues. I also find that it would be possible to accurately infer advice or recommendations from the withheld information, from the way it is presented. It is, in my view, advice and recommendations as previous orders and court cases have interpreted these terms. I find that s. 13(1) applies to the withheld information.

Section 13(2)

[15] The Ministry argued that s. 13(2) does not apply but did not elaborate. In my view, the only potentially relevant provision is s. 13(2)(a), which says that the head of a public body must not refuse to disclose “any factual material” under s. 13(1). Recently, in *Insurance Corporation of British Columbia v. Automotive Retailers Association* the BC Supreme Court said the following about factual material:

Hence, documents created as part of a public body’s deliberative process are protected from disclosure under s. 13(1) regardless of whether they contain or use background facts necessary to the analysis. The background facts in isolation are not protected. Disclosure of them can be requested in the usual way. Section 13(2) expressly requires the disclosure of “factual material”. But where that factual material is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created, the assembly is part of the deliberative process and the resulting

⁸ Ministry initial submission, para. 4.32-4.33; Chandler affidavit, para. 18.

work product is clothed with the same protection as the opinions or advice themselves.⁹

[16] I find that there is “factual material” in the records but that it is intertwined with the advice and recommendations. It was also integral to the advice about the treaty negotiation issues. Its disclosure could also allow for the drawing of accurate inferences about the associated advice and recommendations. I find that s. 13(12)(a) does not apply to the withheld information.

Section 13(3)

[17] This provisions states that s. 13(1) does not apply to information in a record that is more than 10 years old. The Ministry argued that s. 13(3) does not apply because the records in this case are less than 10 years old. I agree.

Exercise of discretion

[18] Having concluded that certain information is “advice or recommendations”, public bodies must nevertheless exercise their discretion in deciding whether or not to disclose requested information, having regard for the relevant factors. The Ministry did not address this issue.

[19] I infer from the material before me that the treaty negotiations in this case are still ongoing and that there are unresolved issues surrounding the property that is the subject of the request. There is no evidence that the Ministry considered improper factors in deciding to withhold the information in issue. I am satisfied that the Ministry exercised its discretion properly in deciding to withhold the information in issue.

Conclusion on s. 13

[20] I find that the withheld information consists of advice or recommendations developed by or for the Ministry. I also find that s. 13(2) and s. 13(3) do not apply and that the Ministry properly exercised its discretion when making its decision. I find that s. 13(1) applies to the information that the Ministry withheld under this exception.

[21] The Ministry applied s. 13(1) to the same information to which it applied s. 12(1).¹⁰ I need not consider s. 12(1), given my finding on s. 13(1).

⁹ 2013 BCSC 2025, at para. 52.

¹⁰ The Ministry confirmed this on January 4, 2016; email to Registrar in response to my letter of January 4, 2016.

Harm to physical safety or health — s. 19(1)(a)

[22] The Ministry submitted that s. 19(1)(a) applies to names and contact information appearing in the records.¹¹ The relevant provision reads as follows:

Disclosure harmful to individual or public safety

19 (1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

- (a) threaten anyone else's safety or mental or physical health,
...

Standard of proof for harms-based exceptions

[23] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* said the following regarding the standard of proof for harms-based provisions:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”.¹²

[24] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,¹³ Bracken J confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to

¹¹ Page 14 of the records indicated that the Ministry applied s. 22 (harm to third-party privacy) to an email address, as well as s. 19(1)(a). The Ministry confirmed on January 4, 2016 that it was no longer relying on s. 22 to withhold this information; email to Registrar in response to my letter of January 4, 2016.

¹² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94.

¹³ 2012 BCSC 875, at para. 43.

result in the identified harm. I have taken the approach set out above and in relevant orders in considering the parties' arguments on s. 19(1)(a).¹⁴

Parties' submissions

[25] The Ministry argued that s. 19(1)(a) applies to the names, contact information and other identifying information of provincial and federal government employees and individuals belonging to a First Nation. It said that it has concerns that the applicant or "an associate" potentially poses a safety risk to these individuals, based on statements the applicant made in his internet blog alleging that "treaty negotiations have contributed to the loss of his property". The Ministry also said that the applicant referred to "the deaths of various officials" who supposedly "died under suspicious circumstances".¹⁵

[26] The applicant disputed the Ministry's arguments. Among other things, he said that the blog the Ministry referred to is not in his "care or control" and he is not responsible for the contents or maintenance of this blog.¹⁶

Analysis

[27] The blog postings contain a number of wide-ranging allegations against named judges, politicians and others. They include allegations about the "corrupt acquisition" of the applicant's property, and a "terror campaign" and "criminal conspiracy" against the applicant's family. While the blog postings mention the applicant by name, they indicate that another individual made the postings.

[28] I accept that the applicant has concerns about various matters, including the property that was the subject of his FIPPA access request. However, the blog postings strike me as expressions of opinion and do not persuade me that the applicant or anyone associated with him might pose a risk to the safety or mental or physical health of others.

[29] The Ministry did not explain the nature of the feared harm to health or safety of others. It also provided no other documentary support of its position on s. 19(1)(a), such as evidence that the applicant or an associate has behaved in an angry or threatening manner to others.

[30] I also note that the disclosed information indicates that BC government employees agreed in 2010 to meet with the owner of the property in question

¹⁴ See, for example, Order 00-28, 2000 CanLII 14393 (BC IPC), p. 2, where former Commissioner Loukidelis discussed the burden on a public body seeking to apply s. 19(1)(a). See also Order F14-22, 2014 BCIPC 25 (CanLII), at para. 22. Footnote 1 of this latter order lists a number of other orders which have considered s. 19(1)(a).

¹⁵ Ministry's initial submission, paras. 4.44-4.45. The Ministry also cited entries from the blog and attached a copy of postings from the blog in support of its position on s. 19(1)(a).

¹⁶ Applicant's submission, p. 1.

(i.e., the applicant) and a First Nations representative.¹⁷ There is no evidence that these individuals had any concerns about meeting with the applicant or that anything untoward happened during that meeting.

[31] In my view, the Ministry's arguments are speculative and do not show "a rational connection between the feared harm and disclosure of the specific information in dispute".¹⁸ The Ministry has not persuaded me that disclosure of this information could reasonably be expected to threaten anyone else's safety or mental or physical health under s. 19(1)(a). I find that s. 19(1)(a) does not apply to the names and contact information in issue.

CONCLUSION

[32] For reasons given above, I make the following orders:

1. Under s. 58(2)(a) of FIPPA, subject to paragraph two below, I require the Ministry to give the applicant access to the information it withheld under s. 19(1)(a).
2. Under s. 58(2)(b) of FIPPA, I confirm that the Ministry is authorized to refuse to disclose to the applicant the information that it withheld under s. 13(1).

[33] I require the Ministry to give the applicant access to the information noted in paragraph one above by March 10, 2016. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

January 27, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F13-55937

¹⁷ See pp. 6-7 and 27 of the records.

¹⁸ See Order 00-28, at p. 2.