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Order F16-26

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Wade Raaflaub, Adjudicator

May 19, 2016

CanLII Cite: 2016 BCIPC 28
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 28

Summary: The applicant asked the Ministry of Transportation and Infrastructure for records relating to an avalanche program. The Ministry withheld some of the information on the basis that it revealed policy advice or recommendations under s. 13, that the information was privileged under s. 14, and that its disclosure would be harmful to the government's financial or economic interests under s. 17 of FIPPA. The adjudicator found that the Ministry was authorized to refuse access to information under ss. 13 and 14, but not under s. 17.

Statutes Considered: B.C.: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 13, 13(1), 13(2), 13(2)(a), 13(3), 14, 17, 17(1), 17(1)(e), 17(1)(f), 21, 22, 56(1), 57(1), 58, 58(2)(a), 58(2)(b) and 59(1). **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.

Authorities Considered: B.C.: Order 00-06, 2000 CanLII 6550 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 04-25, 2004 CanLII 45535 (BC IPC); Order F13-29, 2013 BCIPC 38 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-60, 2015 BCIPC 64 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII).

Cases Considered: *R. v. B.*, 1995 CanLII 2007 (BC SC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII); *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII); *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII).

INTRODUCTION

[1] This inquiry involves an applicant's request to the Ministry of Transportation and Infrastructure ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for records relating to an avalanche program.

ISSUES

[2] The issues in this inquiry are whether the Ministry is authorized to refuse to disclose information under ss. 13, 14 and/or 17 of FIPPA. In accordance with s. 57(1), the Ministry has the burden of proving that the applicant has no right of access.

DISCUSSION

[3] **Background** - The Ministry entered into an agreement with TransPark Highway General Partnership ("TransPark") in relation to the delivery of highway operations, maintenance and rehabilitation works along the Kicking Horse Canyon from Golden to Yoho National Park. TransPark had an arrangement with a company for operations and maintenance services, including the delivery of an avalanche program ("Avalanche Program"). That company, in turn, had an arrangement with Ava Terra Services Inc., the applicant in this inquiry, for the delivery of avalanche services. The applicant began providing those services in 2005.

[4] The Ministry received complaints from members of the public that the highway was being closed more often and for longer periods than previously, so it relayed those concerns to TransPark in 2013. In response, TransPark and the Ministry agreed to return the Avalanche Program to the Ministry. The result was the end of the delivery of avalanche services by the applicant.

[5] The applicant then asked the Ministry for all records relating to the Avalanche Program. It subsequently narrowed its request to information held by Avalanche Programs Headquarters.

[6] The Ministry refused to grant access to some of the requested information under ss. 13 (policy advice or recommendations), 14 (legal advice), 17 (disclosure harmful to the financial or economic interests of a public body), 21 (disclosure harmful to business interests of a third party) and 22 (disclosure harmful to personal privacy) of FIPPA.

[7] The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to review the Ministry's decision. Investigation and mediation did not resolve the matter. The applicant then asked for an inquiry into

the application of ss. 14 and 17 to the requested information, but not ss. 13, 21 and 22. However, after the matter came to inquiry, the Ministry located a particular report. Because the Ministry decided to withhold some of the information in the report under s. 13, and had already applied s. 13 to other information, the application of s. 13 was added as an issue in the inquiry.

[8] **Information at Issue** - The information at issue consists of portions of a report, a briefing note and various email correspondence, as found in a set of 158 pages of records.

Policy advice or recommendations – s. 13

[9] Section 13(1) of FIPPA authorizes a public body to withhold information that reveals policy advice or recommendations, subject to certain exceptions. The relevant parts of s. 13 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)
>
> (a) any factual material,
> …
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[10] The Ministry withheld information under s. 13 on all or part of approximately 40 pages.[1]

Policy advice or recommendations – s. 13(1)

[11] Section 13 is designed 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.[2] The Supreme Court of Canada has explained the rationale behind withholding information as advice or recommendations under freedom of information legislation as follows:

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[1] I do not need to review the application of s. 13 to a small amount of information appearing on pages 55 and 80 of the records, as the Ministry also withheld the information under s. 14, which I find to be authorized later in this Order.
[2] Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 22.

> [...] 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.[3]

[12] As to the types of information that may be withheld as advice, the Supreme Court of Canada has stated that it includes opinions of a public servant as to the range of alternative policy options.[4] The British Columbia Court of Appeal has stated that advice includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[5] Previous OIPC orders have added that a public body is authorized to refuse access to information that would enable an individual to draw accurate inferences about advice or recommendations.[6]

[13] The Ministry submits that the information at issue consists of opinions and analysis, provided by Ministry staff to senior Ministry officials, in relation to the Avalanche Program and compliance with Ministry avalanche standards. It says that there are also opinions and analysis regarding whether terms of the agreement between the Ministry and TransPark have been met, and in relation to the Ministry's negotiation of the return of the Avalanche Program to the Province.

[14] Bearing in mind the types of information that constitute advice or recommendations, as set out above, I find that all of the information at issue here falls within the scope of s. 13(1), for the following reasons.

[15] The Ministry withheld information in a report reviewing the Avalanche Program, its service reliability and its contract management. The information consists of a few sentences expressing the author's opinions as to whether the Avalanche Program has met the Ministry's expectations, and whether contractual relationships have been productive. The withheld information also includes a chart setting out options for moving forward, what each option means for the Ministry, and their respective advantages and disadvantages. Further, the information in the report includes an overall recommendation and strategy for implementation, along with the rationale for them.

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[3] *John Doe v. Ontario (Finance),* [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at para. 45, considering *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13.
[4] *Ibid.* at para. 46.
[5] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner*), 2002 BCCA 665 (CanLII) at para. 113.
[6] See, e.g., Order F15-60, 2015 BCIPC 64 (CanLII) at para. 12.

[16] The Ministry also withheld comments about the report just discussed, which were inserted by an individual who reviewed its contents. The comments, along with an opening summary of this other individual's views, evaluate the conclusions, findings and analysis found in the report, as well as its use of data. This second individual's views and comments constitute advice in that they provide Ministry decision-makers with additional considerations in order to evaluate the Avalanche Program and move forward.

[17] The Ministry withheld information in a briefing note. The information consists of the final recommendation made to a senior Ministry official on how to proceed with the Avalanche Program, and the reasons for that recommendation.

[18] Finally, the Ministry withheld a few sentences in various email correspondence. The information discusses or reveals some of the advice and recommendations that were set out in the other documents just discussed.

Information that may not be withheld under s. 13(1) – s. 13(2)

[19] Section 13(2) states that a public body cannot rely on s. 13(1) to withhold certain information. I find that none of the types of information appear here.

[20] I considered whether the information withheld under s. 13(1) was "factual material" within the terms of s. 13(2)(a). I find that it is not. The Supreme Court of British Columbia has stated that background facts in isolation are not protected from disclosure under s. 13(1); however, where factual material is assembled from other sources and becomes integral to the analysis and views expressed in a record, that assembly is part of the deliberative process and the factual material has the same protection as the opinion or advice itself.[7] The Court explained that, otherwise, disclosure of the assembled facts would allow an accurate inference to be drawn as to advice or recommendations developed by or for the public body.[8]

[21] Here, I find that the facts withheld in the documents discussed above are intertwined with the advice or recommendations in such a manner that their disclosure would reveal the nature of the advice or recommendations.

Information in existence for 10 years or more – s. 13(3)

[22] Section 13(3) precludes a public body from withholding information under s. 13(1) if the information is more than 10 years old. The provision is not applicable in this inquiry, as the information at issue came into existence in 2013.

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[7] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) at para. 52.
[8] *Ibid.*

Exercise of discretion – s. 13(1)

[23] Because s. 13(1) sets out a discretionary exception to disclosure, a public body must properly exercise its discretion when refusing to give access to information under it.

[24] Here, the Ministry says that it considered the following: the general purpose of FIPPA, including that public bodies should make information available to the public; the wording and purpose of s. 13; whether the applicant's request could be satisfied by severing information so as to provide it with as much information as is reasonably practicable; the historical practice of the Ministry with respect to the release of similar types of information; the nature, significance and sensitivity of the information; whether disclosure would increase public confidence in the Ministry; the age of the information; whether there was a sympathetic or compelling need for disclosure; and whether previous OIPC orders have required similar information to be disclosed.

[25] Given this explanation, I am satisfied that the Ministry properly exercised its discretion to withhold information under s. 13.

Conclusion – s. 13(1)

[26] I conclude that the Ministry is authorized to withhold the information at issue under s. 13, as it reveals policy advice or recommendations.

Legal advice – s. 14

[27] Section 14 of FIPPA states:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[28] The Ministry withheld information under s. 14 on all or part of approximately 40 pages, on the basis that the information is subject to solicitor client privilege.

Information subject to solicitor client privilege – s. 14

[29] The test for solicitor client privilege has been articulated as follows:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;

2. the communication must be of a confidential character;

3. the communication must be between a client (or his agent) and a legal advisor; and

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[9]

[30] The above criteria have been consistently applied in OIPC orders,[10] and I will consider the same criteria here.

[31] I find that the criteria are satisfied with respect to all of the information that the Ministry withheld under s. 14. The information consists of written communications between the Ministry and its lawyer, which were intended to be confidential, as indicated by the content and context. The communications also directly relate to the seeking, formulating or giving of legal advice. This includes an attachment to an email, given that solicitor client privilege also covers records given and received as part of the necessary exchange of information between a client and lawyer for the purpose of providing legal advice.[11]

[32] Some of the communications are not between the Ministry and its lawyer, but refer to such communications, revealing the fact that legal advice was sought as well as the substance of the legal advice provided by the Ministry's lawyer. I find that this information also falls within the terms of s. 14. Previous orders have found that internal discussions about legal advice are protected by solicitor client privilege because they are related to the seeking, formulating or giving of the legal advice.[12]

Conclusion – s. 14

[33] I conclude that the Ministry is authorized to refuse the applicant access to the information at issue under s. 14, as it is subject to solicitor client privilege.

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[9] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22, cited with approval in Order 00-06, 2000 CanLII 6550 (BC IPC) at p. 8.

[10] See, e.g., Order F15-52, 2015 BCIPC 55 (CanLII) at para. 10; Order F15-67, 2015 BCIPC 73 (CanLII) at para. 12.

[11] *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII) at para. 42.

[12] Order 04-25, 2004 CanLII 45535 (BC IPC) at para. 104; Order F13-29, 2013 BCIPC 38 (CanLII) at para. 18.

Disclosure harmful to the financial or economic interests of a public body – s. 17

[34] Section 17(1) of FIPPA states:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[35] The information at issue under s. 17 is found in a sentence appearing on both pages 70 and 81 of the records, and in a second sentence appearing on page 81.[13]

[36] The Ministry submits that disclosure of the information will harm its negotiating position in future negotiations with service providers where the negotiations relate to a proposal to remove some of the services from the service agreement or otherwise alter it terms. It explains that, when the Avalanche Program was returned to the Province, the Ministry provided a concession to TransPark. The Ministry fears that, if information about the nature of the concession is released and becomes public knowledge, future service providers will demand the same in similar circumstances, whereas the Ministry does not want to agree to such a concession again. While it acknowledges that it could simply refuse to provide the concession to other service providers, the Ministry submits that it will be under considerable pressure to provide the concession, and that other government departments may also be pressured to do the same. The Ministry included an affidavit sworn by its Assistant Deputy Minister, Highways Department, which repeats many of the foregoing assertions.

[37] The Ministry does not specifically refer to s. 17(1)(f), but it is implicitly doing so by effectively arguing that its negotiating position will be harmed in the future if the information at issue were disclosed. It may also be implicitly referring to s. 17(1)(e), in that the information at issue is about the Ministry's negotiations

[13] It is not necessary for me to review the information that the Ministry withheld under s. 17 on pages 72, 75, 76 and 94, either because I found earlier that the information was properly withheld under s. 13, or because the Ministry also withheld the information under s. 21, the application of which is not an issue in the inquiry.

with TransPark itself. In any event, the harm being alleged by the Ministry in relation to s. 17 is that it or other government departments may feel or be compelled to give a concession similar to the one given to TransPark when dealing with other service providers in the future.

[38] In order for a public body to rely on s. 17, it must establish that disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described the standard of proof as requiring a reasonable expectation of probable harm. The standard is between what is probable and what is possible, and it requires a public body to provide evidence "well beyond" or "considerably above" a mere possibility of harm.[14] A determination of whether the standard of proof is met is contextual, and the necessary quantity and quality of evidence will ultimately depend on the nature of the issue, the inherent probabilities or improbabilities, or the seriousness of the allegations or consequences.[15]

[39] Here, the Ministry argues that other service providers negotiating an amendment to their service agreements or returning a program to the Province will demand a concession similar to the one given to TransPark. The Ministry appears to be saying that it will suffer harm to its negotiation position in the form of pressure, as well as financial harm in cases where it yields to that pressure and gives the same concession again.

[40] However, the Ministry provides no evidence as to the number of service agreements that it has with service providers, how often it amends its service agreements, how often programs are returned to it prior to the end of a service agreement, or any other information that would have given some indication of the likelihood of another service provider demanding the same concession as that provided to TransPark. While the Ministry hypothesizes that release of the information at issue will, in and of itself, result in an increase in requests for contract amendments from service providers, and therefore demands for the concession, this is mere speculation. Further, the circumstances and bargaining that surrounds a contract negotiation or renegotiation are unique to the particular case. It therefore seems unlikely to me that a case similar enough to the one involving the Ministry and TransPark will arise, so as to cause the Ministry to feel obliged to give the same concession simply because it did so in a different matter one time in the past. Finally, I fail to see how one of the sentences that the Ministry withheld under s. 17 has anything to do with the concession given to TransPark.

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[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) [*Ontario*] at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) [*Merck*] at paras. 197 and 199.

[15] *Ontario* at para. 54, citing *Merck* at para. 94, in turn citing *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII) at para. 40.

[41] For these reasons, I find that the Ministry has not established that disclosure of the information at issue could reasonably be expected to harm its or any other government department's negotiating position in the future.

Conclusion – s. 17

[42] I conclude that the Ministry is not authorized to refuse the applicant access to the information at issue under s. 17. The Ministry has not met its burden of proving that disclosure could reasonably be expected to harm the Ministry's or the Province of British Columbia's financial or economic interests.

CONCLUSION

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

1. The Ministry is authorized to refuse the applicant access to the information at issue under s. 13, as it reveals advice or recommendations. Under s. 58(2)(b), I confirm the Ministry's decision to refuse access.

2. The Ministry is authorized to refuse the applicant access to the information at issue under s. 14, as it is subject to solicitor client privilege. Under s. 58(2)(b), I confirm the Ministry's decision to refuse access.

3. The Ministry is not authorized to refuse the applicant access to the information at issue under s. 17, as disclosure could not reasonably be expected to harm the Ministry's or the Province of British Columbia's financial or economic interests. Under s. 58(2)(a), I require the Ministry to give the applicant access to the information that it withheld under s. 17 on pages 70 and 81 of the records.

4. The Ministry must provide the applicant with the information set out in paragraph 3 before July 4, 2016, in accordance with s. 59(1). The Ministry must also concurrently provide the OIPC Registrar of Inquiries with a copy of its letter to the applicant, along with the information to be disclosed.

May 19, 2016

ORIGINAL SIGNED BY

Wade Raaflaub, Adjudicator

OIPC File No.: F14-57154