



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F17-22

WORKSAFEBC

Caitlin Lemiski
Adjudicator

May 2, 2017

CanLII Cite: 2017 BCIPC 23
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 23

Summary: An applicant requested records about a crane investigation. WorkSafeBC disclosed some information, but it withheld other information on the basis that it was exempt from disclosure under s. 13 (policy advice or recommendations) and s. 14 (solicitor client privilege) of FIPPA. The adjudicator determined that ss. 13 and 14 apply to some of the withheld information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 2(1), 13, 14 and 57(1); *Workers' Compensation Act*, RSBC 1996, c. 492, s. 111; *Occupational Health and Safety Regulation*, BC Reg 296/97.

Authorities Considered: B.C. Order F14-57, 2014 BCIPC No. 61 (CanLII); Order F16-09 2016 BCIPC 11 (CanLII); Order F16-11, 2016 BCIPC 13 (CanLII); Order F16-20, 2016 BCIPC 22 (CanLII); Order F16-30 2016 BCIPC 33 (CanLII); Order F16-35, 2016 BCIPC 39 (CanLII); Order F16-38, 2016 BCIPC 42 (CanLII); Order F16-43 2016 BCIPC 47 (CanLII).

Cases Considered: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Kranz v. Attorney General of Canada*, 1999 CanLII 5793 (BC SC), [1999] 4 C.T.C. 93 (BC SC); *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322.

INTRODUCTION

[1] This inquiry relates to an applicant's request to WorkSafeBC¹ for information about a crane incident investigation that resulted in a penalty against the applicant, an employer.

[2] WorkSafeBC responded to the applicant's request by disclosing several email chains and a few meeting notes, and by withholding other information under s. 13 (policy advice and recommendations), s. 14 (solicitor client privilege), and s. 22 (disclosure harmful to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review WorkSafeBC's decision to deny access to the information. Mediation did not resolve the matter, and the applicant requested that it proceed to an inquiry under Part 5 of FIPPA. WorkSafeBC advised in its initial submissions that it was no longer relying on s. 22 of FIPPA, so only ss. 13 and 14 of FIPPA remain in issue.²

ISSUES

[4] The issues in this inquiry are as follows:

1. Is WorkSafeBC authorized to refuse access to information because disclosure would reveal advice or recommendations under s. 13 of FIPPA?
2. Is WorkSafeBC authorized to refuse access to information because it is subject to solicitor client privilege under s. 14 of FIPPA?

[5] WorkSafeBC has the burden of proof in this inquiry pursuant to s. 57(1) of FIPPA.

DISCUSSION

Background

[6] A fatal workplace incident occurred involving a crane maintained by the applicant.³ Under the *Workers Compensation Act* (WCA) and the *Occupational Health and Safety Regulation* (OHSR) WorkSafeBC has the authority to investigate workplace incidents and issue administrative penalties.⁴ A team

¹ Formerly called the Workers' Compensation Board of British Columbia.

² WorkSafeBC's initial submission at para. 4.

³ WorkSafeBC's initial submission at para. 8.

⁴ *Workers Compensation Act*, RSBC 1996, c 492; *Occupational Health and Safety Regulation*, BC Reg 296/97. See WorkSafeBC's initial submission at para. 5, citing s. 111 of the WCA.

of WorkSafeBC employees investigated the crane incident. As a result of the investigation, WorkSafeBC issued orders and a penalty against the applicant.⁵

Information in dispute

[7] There are 313 pages of emails, email attachments, and meeting notes containing the information in dispute.⁶ Most of the information in dispute has been withheld on the basis that solicitor client privilege applies (s. 14). This includes several pages that WorkSafeBC has withheld in their entirety. To a lesser extent, WorkSafeBC has withheld information on the basis that disclosing it would reveal advice or recommendations (s. 13).

[8] As WorkSafeBC withheld most of the information in dispute under s. 14, I will first consider whether it applies, then I will consider s. 13.

Solicitor Client Privilege – s. 14

[9] Section 14 of FIPPA is a discretionary exception to the general right of access to information under FIPPA. Section 14 provides that a public body may refuse to disclose information that is subject to solicitor client privilege.

[10] Solicitor client privilege is fundamental to the proper functioning of the legal system and a cornerstone of access to justice.⁷ Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.⁸ WorkSafeBC is claiming legal advice privilege over the information it has withheld under s. 14.⁹

[11] The test for whether legal advice privilege applies is as follows:

1. There must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

⁵ WorkSafeBC's initial submission at para. 15.

⁶ The records in dispute do not include a copy of an investigation report. The public body has already provided the applicant with copies of records respecting the investigation (public body's submission at para. 17).

⁷ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.

⁸ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.

⁹ WorkSafeBC's submission at para. 42.

[12] If these four criteria are satisfied then the communications (and papers relating to them) are privileged.¹⁰

[13] The information WorkSafeBC withheld under s. 14 are communications between:

- A. WorkSafeBC and its lawyers (in house and external legal counsel) and their paralegals and administrative staff;
- B. WorkSafeBC employees;
- C. WorkSafeBC employees and a consultant; and
- D. WorkSafeBC's lawyer and a consultant.

[14] I will address whether each type of communication meets the test for legal advice privilege below:

A. WorkSafeBC and its lawyers and their paralegals and administrative staff

[15] These records consist of emails and meeting notes between WorkSafeBC employees and its lawyers (in house and external legal counsel) and their paralegals and administrative staff about the crane investigation.¹¹ WorkSafeBC submits that these are communications between WorkSafeBC and their legal advisers that are directly related to “ensuring that the [crane] investigation and any subsequent enforcement activity met the legal standards required under the WCA and the OHSR.”¹²

[16] The context in which they took place, and the information on these emails showing who they were sent to, readily establish that they are confidential communications between a lawyer and a client. The content of these emails are directly related to the seeking, formulating, or giving of legal advice. I therefore find that the required elements of the test for solicitor client privilege are met. Section 14 authorizes WorkSafeBC to refuse to disclose this information.

B. WorkSafeBC employees

[17] WorkSafeBC also withheld emails and some meeting notes between WorkSafeBC employees under s. 14 that contain summaries of advice received

¹⁰ *Kranz v. Attorney General of Canada*, 1999 CanLII 5793 (BC SC), [1999] 4 C.T.C. 93 (B.C.S.C.); *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22, cited in, e.g., Order F16-20, 2016 BCIPC 22 (CanLII) at para. 20.

¹¹ Pages 35, 164, 275, and 187 for example

¹² WorkSafeBC's submission at paras. 47 and 50. The applicant declined to make fulsome submissions about s. 14.

from legal counsel or plans to seek advice from legal counsel.¹³ As with the first category of records WorkSafeBC withheld under s. 14, it is plain from my review of these emails and meeting notes that they reveal confidential communications between a lawyer and a client that relate to the seeking or giving of legal advice. Section 14 clearly authorizes WorkSafeBC to refuse to disclose the information it has withheld under that section.

C. WorkSafeBC employees and a consultant

[18] WorkSafeBC withheld an email from a WorkSafeBC employee to a consultant. The email is copied to WorkSafeBC's lawyer and two other WorkSafeBC employees.¹⁴

[19] While WorkSafeBC has proffered evidence with respect to s. 14 as it concerns communications between WorkSafeBC's lawyers and WorkSafeBC, it does not address the issues concerning the communications with a consultant. Third party communications are protected by legal advice privilege where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client.¹⁵

[20] In this case, I am not satisfied that the email between WorkSafeBC and the consultant is subject to legal advice privilege. There is no evidence here that persuades me that the consultant was performing a function on behalf of WorkSafeBC that was integral to the relationship between WorkSafeBC and its lawyer. The consultant in these communications is clearly not standing in the place of WorkSafeBC for the purpose of seeking or receiving legal advice from WorkSafeBC's lawyer. The consultant's work, as reflected in these communications, was incidental to WorkSafeBC's seeking and obtaining legal advice.¹⁶ I therefore find that WorkSafeBC has not established that the email from a WorkSafeBC employee to a consultant is a communication between a client (or agent) and a legal advisor that is directly related to the seeking, formulating, or giving of legal advice.

D. WorkSafeBC's lawyer and a consultant

[21] WorkSafeBC also withheld an email forwarding a copy of a letter from WorkSafeBC's lawyer to the consultant.¹⁷ It is being forwarded to three other

¹³ For example, pp. 188, 190, 194, and 313.

¹⁴ At p. 156 of the records.

¹⁵ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* supra at para. 49.

¹⁶ This is similar to *College of Physicians*, supra, wherein Levine J.A., held that the services of experts retained by legal counsel for the College were incidental to the seeking and obtaining of legal advice by the College from its legal counsel, therefore reports and letters written by the experts did not contain legal advice and were not protected by legal advice privilege (see paras. 51 and 59).

¹⁷ At pp. 179-181.

employees, and the content of the email contains no discussion of the content of the attached letter. WorkSafeBC is also withholding an email from WorkSafeBC's lawyer to the consultant, and the consultant's reply to him.¹⁸

[22] I am not satisfied that these emails meet the test for solicitor client privilege. WorkSafeBC has not established that the consultant was performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client. Therefore, I am not persuaded that these communications with the consultant are between a client (or agent) and a legal advisor that is directly related to the seeking, formulating, or giving of legal advice. WorkSafeBC is therefore not authorized to withhold these communications under s. 14.

Summary of findings, s. 14

[23] I find that, with the exception of the communications between WorkSafeBC and a consultant, WorkSafeBC is authorized to continue to withhold the information it has severed under s. 14 because it is protected by legal advice privilege.

[24] I will now consider s. 13 where it has been applied to withhold information that I have not already found may be withheld under s. 14.¹⁹

Policy Advice or Recommendations – s. 13(1)

[25] Section 13(1) of FIPPA authorizes public bodies to refuse to disclose policy advice or recommendations developed by or for a public body subject to exceptions in s. 13(2).²⁰ The process for determining whether s. 13(1) applies to information has two stages. The first stage is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, it is then necessary to consider if the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).²¹

[26] The Supreme Court of Canada stated in *John Doe v. Ontario (Finance)*,²² that the purpose of withholding advice or recommendations from applicants in response to access requests "is to preserve an effective and neutral public

¹⁸ At pp. 268-269.

¹⁹ The three emails that I have determined are not protected by legal advice privilege were only severed under s. 14 of FIPPA and not under any other section of FIPPA, including s. 13.

²⁰ Section 13(3) states that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. Section 13(3) has no application to this inquiry.

²¹ See Order F16-30 2016 BCIPC 33 (CanLII) at para. 18.

²² 2014 SCC 36 (CanLII).

service so as to permit public servants to provide full, free and frank advice.”²³ Previous orders have stated that s. 13(1) applies to information that would directly reveal advice or recommendations if disclosed, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.²⁴

[27] The information WorkSafeBC withheld under s. 13 that I have not already determined may be withheld under s. 14 is contained in two email strings. The first email string is between a small group of WorkSafeBC employees discussing internal communications processes related to the crane investigation. The second email string is between another small group of WorkSafeBC employees revising a draft of a hazard alert bulletin.²⁵ WorkSafeBC submits that the information is either advice or recommendations or is information that, if disclosed, would reveal advice or recommendations.²⁶

Does the information contain or reveal policy advice or recommendations?

[28] Part of the information severed from the first email string is an investigator asking for advice from her manager. WorkSafeBC withheld part of the information leading up to the investigator’s request for advice, parts of the manager’s reply, as well as reply comments to the investigator from one of the employees the investigator copied. Some of this information is properly withheld under s. 13(1) because it directly reveals advice or recommendations. For example, this includes the part of the email where the investigator summarizes advice she has given to someone else related to what she is emailing her manager about.²⁷ Section 13(1) expressly includes “advice” and so this information clearly falls within s. 13(1). Part of the second email string about the draft hazard alert bulletin includes employees making recommendations to each other about revising it.²⁸ Again, s. 13(1) expressly includes “recommendations”, so s. 13(1) clearly applies to this information.²⁹

[29] Some of the information in the first email string, however, is not advice or recommendations and disclosing this information would not reveal advice or recommendations, therefore s. 13(1) does not apply. This information includes

²³ *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at para. 43. This decision was with respect to Ontario’s legislative equivalent to s. 13(1) of BC’s FIPPA. Also see Order F16-38, 2016 BCIPC 42 (CanLII), at para. 42.

²⁴ Order F16-11, 2016 BCIPC 13 (CanLII) at para. 21. Order F14-57, 2014 BCIPC No. 61 (CanLII) at para. 14.

²⁵ Pages 6-18 of the records and pp. 136-150. WorkSafeBC has already disclosed the existence of the hazard alert to the applicant in information already disclosed on pp. 136-150.

²⁶ WorkSafeBC’s initial submissions at paras. 32-33. The applicant declined to make fulsome submissions on s. 13.

²⁷ Page 12 of the records.

²⁸ See information already disclosed to the applicant on p. 138 of the records. The emails discussing the draft hazard alert begin at p. 136 of the records.

²⁹ See pp. 136-150.

facts about what an employee said or did, a program description, and the part of the email string where the investigator asks for advice in such a way that it does not reveal, either directly or by inference any advice or recommendations.³⁰

Summary of s. 13(1) information

[30] The information to which I have determined s. 13(1) applies are parts of the information severed from the first email string that contain advice in relation to an internal communications issue and all of the information severed from the second email string that contain express recommendations in relation to a draft hazard alert. There are other parts of both email strings that also contain advice or recommendations, or would allow someone to accurately infer what advice or recommendations were given if this information were disclosed. For example, some of the information severed about the draft hazard alert is not itself advice or recommendations but would, if disclosed, allow an individual to accurately infer advice.³¹

Is the s. 13(1) information “factual material” under s. 13(2)(a)?

[31] Section s. 13(1) information cannot be withheld if it is factual material under s. 13(2)(a). Neither the applicant nor WorkSafeBC argued that s. 13(2) applies. I have determined that the only provision of s. 13(2) that might apply to the s. 13(1) information in this case is s. 13(2)(a), which excludes “factual material” from information that would otherwise fall within s. 13(1).

[32] “Factual material” has been interpreted narrowly. It includes discrete factual material that is not included for the purposes of providing advice or recommendations or background material. It does not include factual information that is an integral component of the advice or recommendations. Nor is it the factual information selected by an expert who uses their judgement to include that factual information for the purpose of providing the explanations necessary to a public body’s deliberative process.³²

[33] In this case, some of the s. 13(1) information in both email strings contains facts. For example, in one severed part of an email an investigator lists facts about the crane incident that lead him to formulate his advice about how the hazard alert should be worded in the context of those facts.³³ The facts he lists are integral to the advice he provides, therefore it is not “factual material” within the meaning of s. 13(2)(a). I reviewed all of the other s. 13(1) information and also determined that none of it is “factual material” that is discrete from the

³⁰ See for example, p. 7 of the records.

³¹ At p. 144 of the records.

³² *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 91-94. See also: Order F16-43 2016 BCIPC 47 (CanLII) at paras. 25-26 and Order F16-30 2016 BCIPC 33 (CanLII) at paras. 30-31.

³³ At p. 147 of the records.

advice and recommendations given. Therefore s. 13(2)(a) does not apply and WorkSafeBC is authorized to withhold it under s. 13(1).

Summary of findings for s. 13

[34] WorkSafeBC may withhold much of the information it severed under s. 13(1) because it is advice or recommendations, or information that would reveal advice or recommendations, and none of the s. 13(2) provisions apply. Some parts of the first email string, however, do not contain or reveal advice or recommendations; therefore s. 13(1) does not apply. I have marked the information that may not be withheld under s. 13(1) on the records that are being provided to WorkSafeBC along with a copy of this order.³⁴

Exercise of discretion

[35] The applicant submits that WorkSafeBC must show that it has properly exercised its discretion to apply ss. 13 and 14 because the disputed information was used to impose penalties against it.³⁵

[36] Sections 13 and 14 are discretionary exceptions to disclosure. Therefore, WorkSafeBC has the discretion to decide whether to disclose records that reveal advice or recommendations or records that are protected by solicitor client privilege. My role is to determine whether WorkSafeBC properly exercised its discretion, not to substitute my own decision. I can order WorkSafeBC to reconsider its exercise of discretion if I believe that it exercised it in bad faith or took into account irrelevant or extraneous grounds.³⁶

[37] I have considered WorkSafeBC's submissions and affidavit evidence about what it considered and why it is concerned about the disclosure of this information.³⁷ I am satisfied that WorkSafeBC turned its mind to whether to disclose the information in dispute and that it did not rely on irrelevant factors or act in bad faith when doing so. For these reasons, I find that WorkSafeBC properly exercised its discretion to withhold some of the information the applicant requested.

CONCLUSION

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

³⁴ I have not marked information where I have determined that s. 13 does not apply but that s. 14 applies, as WorkSafeBC may still withhold it under s. 14 as I explain in the s. 14 analysis part of this order.

³⁵ Applicant's submission of June 24, 2016 at p. 1.

³⁶ Order F16-35 2016 BCIPC 39 (CanLII), at para. 21.

³⁷ WorkSafeBC's initial submissions at paras. 34 & 36 and at para. 52.

-
- a. authorized to refuse to disclose the information it has withheld under ss. 13 and 14 of FIPPA subject to paragraph b; and
 - b. required to give the applicant access to the information I have highlighted in the excerpted pages of the records that will be sent to WorkSafeBC along with this decision; and
 - c. pursuant to s. 59 of FIPPA, WorkSafeBC must comply with this Order by June 14, 2017. It must also concurrently copy the OIPC's Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

May 2, 2017

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F15-60197