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Order F17-30

MINISTRY OF JUSTICE

Elizabeth Barker
Senior Adjudicator

June 6, 2017

CanLII Cite: 2017 BCIPC 32
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 32

Summary: The applicant requested a list describing the subject matters of briefing notes. The Ministry refused to disclose some descriptions under ss. 3(1)(h) (outside scope of Act), 12 (cabinet confidences), 13 (policy advice or recommendations), 14 (solicitor client privilege), 16(1)(b) (harm to intergovernmental relations), and s. 22 (harm to personal privacy) of FIPPA. The adjudicator confirmed the Ministry's decision regarding ss. 3(1)(h) and 14. She also confirmed its decision regarding s. 13(1), with the exception of eight of the descriptions. She found that s. 16(1)(b) applied to only five of the eight, and the other three must be disclosed to the applicant. There was no need to consider ss. 12 or 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(h), 13(1), 14, 16(1)(b) and Schedule 1 definition of "prosecution".

Authorities Considered: B.C.: Order No. 20-1994, 1994 CanLII 606 (BC IPC); Order 170-1997, 1997 CanLII 1485 (BC IPC); Order No 256-1998, 1998 CanLII 2682 (BCIPC); Order 331-1999, 1999 CanLII 4253 (BCIPC); Order 02-19, 2002 CanLII 42444 (BC IPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order 05-26, 2005 CanLII 30676 (BC IPC); Order F07-17, 2007 CanLII 35478 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F16-15, 2016 BCIPC 17 (CanLII).

Cases Considered: *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 53; *John Doe v. Ontario (Finance*), 2014 SCC 36; *Canada v. Solosky*, 1979 CanLII 9 (SCC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII);*R. v. B.,* 1995 CanLII 2007 (BCSC).

INTRODUCTION

[1] The applicant in this case is a journalist who made an access request to the Ministry of Justice (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). He asked for a list of the subject matters of all briefing notes provided to the Minister and Deputy Minister from April 1 to July 1, 2015.[1]

[2] The Ministry disclosed the dates for each briefing note and the description of the subject matter of some. However, it withheld the descriptions of the rest of the briefing notes under ss. 3(1)(h) (outside scope of Act),12 (cabinet confidences), 13 (policy advice or recommendations), 14 (solicitor client privilege), 15 (harm to law enforcement), 16 (harm to intergovernmental relations),17 (harm to financial or economic interests) and 22 (harm to personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Although the Ministry released additional information, mediation did not resolve all of the issues in dispute and the applicant requested that they proceed to inquiry.

[4] After the OIPC fact report and notice of inquiry were issued, the Ministry disclosed additional information and said that it was no longer relying on ss. 15 and 17 to withhold information. Further, in its submissions, the Ministry provided more specificity regarding s. 16 and clarified that it was applying s. 16(1)(b).

[5] The applicant was provided with an opportunity to provide a submission in response to the Ministry's submission but he did not do so.

ISSUES

[6] The issues to be decided in this inquiry are:

1. Is the Ministry authorized to refuse to disclose a record because it is outside the scope of FIPPA pursuant to s. 3(1)(h)?

2. Is the Ministry authorized to refuse to disclose information to the applicant under ss. 13, 14 and 16(1)(b)?

3. Is the Ministry required to refuse to disclose information to the applicant under ss. 12 and 22(1)?

[7] Section 57(1) of FIPPA states that the public body has the burden of proving that the applicant has no right of access to records or parts of records under ss. 12, 13, 14 and 16(1)(b). However, s. 57(2) places the burden on the

[1] The applicant requested this information for all such briefing notes that were "not publicly available."

applicant to prove that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy pursuant to s. 22(1). Although s. 57 is silent regarding s. 3(1), previous orders have established that the public body bears the burden of proving that the records are excluded from the scope of FIPPA.[2]

DISCUSSION

Records

[8] The information at issue in this case is the description of the subject matter of each of the briefing notes.[3] The descriptions are in four tables prepared by the Ministry. The dates of the briefing notes, and who they were sent to, have already been disclosed.

Scope of FIPPA, s. 3(1)(h)

[9] The Ministry has relied on s. 3(1)(h) to withhold the description of briefing note 68. Section 3(1)(h) states as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> …
> (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;
> …

[10] The following definition in Schedule 1 of FIPPA is also relevant to this issue:

> "prosecution" means the prosecution of an offence under an enactment of British Columbia or Canada;

[11] The purpose of s. 3(1)(h) is to allow prosecutions to proceed without interference by insulating Crown counsel from FIPPA access requests until such time as the prosecution is complete.[4] In Order 05-26, former Commissioner Loukidelis said the following about the application of s. 3(1)(h):

> Section 3(1)(h) will apply to records only if there is a "prosecution" as defined in the Act, the records in question are records "relating to" the prosecution, and "all proceedings in respect of the prosecution have not

[2] For example: Order 170-1997, 1997 CanLII 1485 (BC IPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F16-15, 2016 BCIPC 17 (CanLII).
[3] By my count of the descriptions in the Ministry's *Briefing Note Reference Table* at tab 11 of its submissions, 62 subject matters were withheld and 81 disclosed.
[4] Order No. 20-1994, 1994 CanLII 606 (BC IPC); Order No 256-1998, 1998 CanLII 2682 (BCIPC).

> been completed". This last element of s. 3(1)(h) effectively places a time limit on that provision's exclusion of records from the right of access under the Act. Once all proceedings "in respect of" the prosecution are over—for example, where all appeal periods have expired—the Act will apply. The Act's application does not mean, of course, that an access applicant will receive all records, since one or more of the Act's exceptions to the right of access may apply to some or even all of the information in the records.[5]

[12] A Ministry crown counsel who is also the information access and privacy coordinator for the Ministry's Criminal Justice Branch provides evidence regarding the content of briefing note 68 and how the matters to which it refers are not yet completed. Some of the affidavit was previously authorized by the OIPC to be submitted *in camera*, so I cannot describe in detail what it says.

[13] However, based on her evidence and my review of the disputed information, I am satisfied that the description of this briefing note reveals information about the prosecution of an offence under an enactment of British Columbia or Canada and that all proceedings in respect of that prosecution have not been completed. Therefore, I find that the description of briefing note 68 is the type of record listed in s. 3(1)(h), so FIPPA does not apply to it. In conclusion, the Ministry may refuse to disclose the description of briefing note 68 to the applicant.

Solicitor client privilege, s. 14

[14] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s.14 encompasses both legal advice privilege and litigation privilege.[6] The Ministry submits that legal advice privilege applies to the information it is withholding under s. 14.

[15] When deciding if legal advice privilege applies, BC Orders have consistently used the following criteria:

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.

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[5] Order 05-26, 2005 CanLII 30676 (BC IPC), at para. 54.
[6] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), at para 26 [*College*].

[16] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[7]

Information not provided to OIPC

[17] The Ministry has not provided the OIPC with access to the descriptions withheld under s. 14, and it cites the Supreme Court of Canada's *Alberta (Information and Privacy Commissioner) v. University of Calgary*[8] [*University of Calgary]* as support. That decision was a judicial review of an order under s. 56(3) of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPP) that the University provide the Alberta Commissioner with the records for which solicitor-client privilege was claimed so the Commissioner could verify that the privilege was properly asserted.[9] The Court said that s. 56(3) of FOIPP, which requires a public body to produce required records to the Commissioner "[d]espite… any privilege of the law of evidence," fails to evince sufficiently clear and unambiguous legislative intent to set aside solicitor-client privilege. It added that even if s. 56(3) could be construed as authorizing the Alberta Commissioner to review documents over which privilege is claimed, this was not an appropriate case in which to order production of the documents for review. That was because the University was following the prevailing practice in Alberta civil litigation at the time, and there was no evidence or argument that solicitor-client privilege had been falsely claimed. Given those circumstances, the Court concluded there was no need for the Alberta Commissioner to review the records to fairly decide the issue.

[18] While s. 56(3) of FOIPP uses the same language as s. 44(3) of FIPPA, there are fundamental differences between the two laws. Unlike the Alberta law, BC's law specifically contemplates solicitor client privilege in s. 44(2.1), which states:

> If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

[7] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.
[8] 2016 SCC 53.
[9] The University had refused to let the Commissioner see the records, instead providing a list of documents identified by page number and a sworn affidavit from its Access and Privacy Coordinator and a letter from its Provost and Vice-President (Academic) asserting privilege.

[19] Justice Cromwell, writing partially concurring reasons in *University of Calgary*,[10] says the following about s. 44(2.1) (which he also refers to as the "amendment"):

> The premise of the amendment — and this is the important point — is that records subject to solicitor-client privilege fall within the Commissioner's powers under s. 44(1) and (3) to order production notwithstanding "any privilege of the law of evidence". Otherwise, the amendment dealing with waiver of solicitor-client privilege would be meaningless in relation to records ordered produced by the Commissioner under s. 44(1). The amendment (s. 44(2.1)) refers specifically to solicitor-client privileged records that a person "discloses… at the request of the commissioner, or under subsection (1)". The legislature must have assumed that s. 44(1) permits the Commissioner to require production of solicitor-client privileged records. Otherwise, there could be no record subject to solicitor-client privilege disclosed to the Commissioner under s. 44(1) to which the amendment could refer.

[20] Having considered *University of Calgary*, it is clear that FIPPA gives British Columbia's Commissioner the power to order production of records over which solicitor client privilege is claimed. That said, I do not find it necessary to exercise that authority in this case.

[21] The Ministry has provided me affidavits from three of its employees about the s. 14 information: the Ministry's Executive Director, Civil Policy and Legislation Office, Justice Services Branch; the Supervising Counsel for the Civil Litigation Group of the Ministry's Legal Services Branch; and a paralegal with the Ministry's Legal Services Branch. These three affidavits provide sufficient information to allow me to make a determination about whether the descriptions at issue under s. 14 are protected by privilege.

Analysis and findings, s. 14

[22] The Supervising Counsel says that he wrote briefing note 1, and it contains confidential written communication he provided to the Deputy Attorney General. He says that the description of the briefing note would reveal the subject of his legal advice.

[23] The Executive Director explains that she reviewed briefing notes 43 and 85 before they were sent as she is the supervisor of the lawyer who wrote them.[11] She says that they contain confidential legal advice to the Deputy Attorney General about potential legislation. She says that she believes that

[10] *University of Calgary* at para. 117. What Justice Cromwell says about s. 44(2.1) does not contradict what the majority says generally about s. 44 of FIPPA.

[11] She also says that the descriptions for 43 and 85 are listed separately but they are about the same briefing note.

disclosure of the subject of these briefing notes would reveal confidential legal advice and she understands that the lawyer who wrote them also believes this.[12]

[24] The paralegal's affidavit lists the balance of the briefing notes relevant to the s. 14 issue. Her list has essentially the same comment for each: "Briefing Note submitted to the DAG containing legal advice written by [lawyer(s)], Legal Service Branch legal counsel."[13]

[25] Based on the Ministry's evidence, I am satisfied that the briefing notes, whose descriptions are being withheld under s. 14, are themselves confidential communications between the Ministry and its solicitors about legal advice so are protected by legal advice privilege. Thus, it is plain to me that any description of the subject matter of these briefing notes reveals the subject matter of the legal advice contained in those briefing notes. To my mind, if the Ministry discloses the subject matter of the legal advice it would be disclosing its confidential communications with its solicitors. Therefore, I find that the descriptions of these briefing notes are protected by legal advice privilege. The Ministry has established that it may withhold that information under s. 14.

[26] I will now consider the remaining eight descriptions that I have not already found the Ministry may refuse to disclose because ss. 3(1)(h) and 14 apply.[14] The Ministry is refusing to disclose all eight under s. 13, so I will address that exemption next.

Advice or Recommendations, s. 13

[27] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[15]

[28] Section 13(1) has been the subject of many orders, which have held that it applies not only when disclosure of the information would directly reveal advice and recommendations, but also when it would allow accurate inferences about the advice or recommendations.[16] Further, the British Columbia Court of Appeal has said that "advice" includes an opinion that involves exercising judgment and

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[12] She explains that the lawyer who wrote the briefing notes is away, but she told the Executive Director what she thought about them.
[13] Paralegal's affidavit, para. 6.
[14] They are descriptions 21, 61, 94, 102, 108, 110, 114 and 118.
[15] *John Doe v. Ontario (Finance*), 2014 SCC 36 at para. 45; *College, supra* note 6 at para. 105.
[16] Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII).

skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.[17]

[29] The process for determining whether s. 13(1) applies to information involves two stages.[18] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, then it is necessary to consider whether 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).

[30] The Ministry submits that disclosing the descriptions it is withholding under s. 13 would reveal advice or recommendations provided in briefing notes to the Attorney General, the Deputy Attorney General and the Deputy Solicitor General. The Ministry provides four affidavits in support.[19]

[31] I have considered the information at issue as well as the affidavit evidence about it, and I find as follows:

a) Briefing note 21 – The description of this briefing note would easily allow an accurate inference about a recommendation related to legislation.

b) Briefing note 61 – This description reveals a recommendation on what action cabinet should take on a specific human resources matter.

c) Briefing notes 94, 114 and 118 – The Ministry's evidence is that this is the same briefing note to the Deputy Solicitor General, but it appears three different times in the list of responsive records, each time worded slightly differently.[20] Regardless of why the subject of this briefing note is described in three ways, in my view, all three descriptions clearly reveal advice and recommendations on the topic they address.

d) Briefing note 102 – This is a five sentence description about matters related to a meeting Ministry representatives had with their counterparts from other Canadian jurisdictions. In my view, these five sentences are background about a common issue, but I cannot see how they reveal anything about advice or recommendations about that issue (or any other). I find that this information is not advice or recommendations, so s. 13(1) does not apply.

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[17] *College, supra* note 6 at para. 113.
[18] Order F07-17, 2007 CanLII 35478 (BC IPC), para 18.
[19] Senior Policy Analysts (Lee and Ward), Criminal Justice and Legal Access Policy Division, Justice Services Branch; Executive Director, Civil Policy and Legislation Office, Justice Services Branch; Supervising Counsel for the Civil Litigation Group, Legal Services Branch.
[20] Senior Policy Analyst (Lee) affidavit, para. 8.

e) Briefing notes 108 and 110 – The senior policy analyst who wrote these briefing notes says that it is her belief that disclosure would reveal or allow accurate inferences about the policy advice provided to the Deputy Solicitor General and Deputy Attorney General. [21] However, based on my own review of the descriptions of the subject matter of these two briefing notes, I cannot agree. The information being withheld under s. 13 describes what individuals are being directed to do. They are clearly instructions, which do not reveal advice or allow accurate inferences about advice or recommendations. Therefore, I find that s. 13(1) does not apply to the descriptions of these two briefing notes.

[32] Based on my review of the eight descriptions and the supporting evidence provided by the Ministry, it is evident to me that the descriptions of briefing notes 21, 61, 94, 114 and 118 all reveal or would allow accurate inferences about advice or recommendations. I also find that none of the types of information listed in s. 13(2) apply to the information to which s. 13(1) applies. Therefore, the Ministry is authorized to refuse to disclose the descriptions of those five briefing notes to the applicant under s. 13(1).

[33] However, I find that s. 13(1) does not apply to the subject matter descriptions of briefing notes 102, 108 and 110, so the Ministry may not refuse to disclose those descriptions on that basis. Those three descriptions are also being withheld under s. 16(1)(b), so I will discuss them again below.

Disclosure Harmful to Intergovernmental Relations, s. 16(1)(b)

[34] Section 16(1)(b) says:

> 16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;
>
> …
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies …

[35] Section 16(1)(b) requires a public body to establish two things: that disclosure would reveal information it received from a government, council or organization listed in s. 16(1)(a) or one of their agencies, and that the information was received in confidence.[22]

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[21] Senior Policy Analyst (Lee) affidavit, paras. 12-13.
[22] Order 02-19, 2002 CanLII 42444 (BC IPC), para. 18; Order 331-1999, 1999 CanLII 4253 (BCIPC) at pp.6-9.

[36] The Ministry submits:

> … the Section 16 information satisfied the test set out in s. 16(1)(b) in that it relates to FPT discussions with governments from across Canada where the topics and shared materials are implicitly and explicitly understood to be received in confidence by all governments.[23]

[37] The Ministry provides affidavit evidence from its Senior Policy Analyst, Criminal Justice and Legal Access Policy Division, Justice Services Branch. She says that she coordinates all Ministry briefing notes related to the federal, provincial and territorial meetings, and she personally wrote briefing notes 108 and 110. She says that the information withheld under s. 16(1)(b) "relates to" briefing notes the Ministry prepared for confidential meetings between federal, provincial and territorial Canadian governments about justice and public safety topics.[24] She also says that disclosing the information would reveal or allow accurate inferences about the substance of the discussions at those meetings.

[38] As previously stated, I find that the subject matter description of briefing note 102 reveals background about a common issue and the descriptions for 108 and 110 reveal instructions to individuals within the Ministry. After reviewing the descriptions, it is evident to me that they reveal information that the Ministry generated internally. I cannot see how it is information that was "received" from another entity, let alone one listed in s. 16(1)(a). The Ministry's evidence and submissions do not identify from whom it "received" the information that it believes would be revealed by disclosure of these three descriptions.

[39] Section 16(1)(b) is about information "received" in confidence from a government, council or organization. While the information in dispute here may relate to or reveal a topic or issue of mutual interest to BC and its federal, provincial and territorial counterparts, I am not persuaded that it reveals information *received* from them.

[40] Further, while the Ministry's evidence is that the discussions at the federal, provincial and territorial meetings were confidential, that does not establish that the subject matter descriptions of these briefing notes is information received in confidence.

[41] In conclusion, the Ministry's evidence and submissions do not establish that disclosing the descriptions of briefing notes 102, 108 and 110 would reveal information received in confidence from a government, council or organization listed in s. 16(1)(a) or their agencies. Therefore, the Ministry may not refuse to disclose that information under s. 16(1)(b).[25]

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[23] Ministry's submissions, para. 80.
[24] Ministry submissions, paras. 71-73 and Senior Policy Analyst (Lee) affidavit, paras. 5-11.
[25] The Ministry only applied ss. 13 and 16(1)(b) to that information.

Sections 12 and 22

[42] The only information that I find the Ministry may not refuse to disclose are the descriptions of briefing notes 102, 108 and 110. The Ministry has not applied ss. 12 or 22 to those descriptions, so there is no need to consider either.

CONCLUSION

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

1. I confirm the Ministry's decision to refuse to give the applicant access to records and information pursuant to s. 3(1)(h) and 14.

2. I confirm the Ministry's decision to refuse to give the applicant access to records and information pursuant s. 13(1), subject only to paragraph 3 below.

3. The Ministry is not authorized under ss. 13(1) or 16(1)(b) to refuse to disclose the information about briefing notes 102, 108 and 110.

4. I require the Ministry to give the applicant access to the information about briefing notes 102, 108 and 110 by July 19, 2017. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

June 6, 2017

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F15-62966