



Order F21-58

MINISTRY OF FINANCE

Celia Francis
Adjudicator

November 12, 2021

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Summary: The BC Official Opposition Caucus (applicant) requested a copy of the binders used for the committee stage of Bill 44-2018, *Budget Measures Implementation (Employer Health Tax) Act, 2018* (Bill 44) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry of Finance (Ministry) disclosed some of the information but withheld other information under s. 13(1) of FIPPA (advice or recommendations). The adjudicator found that s. 13(1) applies to some of the withheld information. The adjudicator found that s. 13(1) does not apply to other withheld information and ordered the Ministry to disclose this information to the applicant.

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

INTRODUCTION

[1] This order concerns a request for the binders used at committee stage for Bill 44-2018, *Budget Measures Implementation (Employer Health Tax) Act, 2018* (Bill 44), for the period October 1 to November 30, 2018.

[2] Early in February 2019, the applicant, a researcher for the BC Official Opposition Caucus, requested access from the Ministry of Finance (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to these binders. The Ministry disclosed the responsive records in July 2019, withholding information under s. 13(1) of FIPPA (advice or recommendations).

[3] The applicant requested a review of the Ministry's decision by the Office of the Information and Privacy Commissioner (OIPC) in September 2019, arguing that the material was intended for debate in the Legislature and public discussion of Bill 44. Mediation of the request for review did not resolve the matter which

then proceeded to inquiry. The OIPC received submissions from both parties. After the OIPC issued the notice for this inquiry, the Ministry disclosed more information.¹

ISSUES

[4] The issue I am to decide is whether the Ministry is authorized to refuse to disclose the information at issue under s. 13(1) of FIPPA.

[5] Under s. 57(1) of FIPPA, the Ministry has the burden of proving that the applicant has no right of access to the records under s. 13(1) of FIPPA.

DISCUSSION

Background

[6] The Minister of Finance and Deputy Premier introduced Bill 44 to the BC Legislative Assembly in October 2018. The purpose of Bill 44 was to eliminate Medical Services Plan premiums and introduce the employer health tax.

[7] A Bill goes through several legislative stages to become law: (1) First Reading, (2) Second Reading, (3) Committee Stage, (4) Third Reading, (5) Royal Assent and (6) Commencement. The Committee stage, to which the applicant's request referred, is a Committee of the Whole. At a Committee of the Whole, the full Legislative Assembly can review a Bill and debate the contents of the Bill section by section. The Committee may also decide to amend the Bill. Committee members may ask the Bill's sponsor detailed questions about each section's meaning and purpose. After a section is debated, it is subject to a vote.²

Information in dispute

[8] The 639 pages of responsive records are divided into several sections:

- Bill 44 (pp. 1-57).
- First Reading speaking notes (pp. 58-61).
- Second Reading notes (pp. 62-76).
- Committee Notes (pp. 77-624).
- Third Reading speaking notes (pp. 625-627).
- Questions and Answers (Qs and As) (pp. 628-638).
- Media release on Bill 44 (p. 639).

¹ Ministry's initial submission, para. 7.

² Ministry's initial submission, paras. 14-15; Affidavit of Director, Income Tax, Tax Policy and Intergovernmental Fiscal Relations Branch, Ministry of Finance (Director), paras. 6-7.

[9] The Ministry disclosed Bill 44, the first, second and third reading speaking notes and the media release. It also disclosed quotations of the provisions in Bill 44 which appear in the Committee Notes.³

[10] The information in dispute is the information the Ministry withheld under s. 13(1) and it is as follows:

- information in the Committee Notes about the individual provisions in Bill 44 (approximately 160 pages); and
- the Qs and As.

Advice or recommendations – s. 13(1)

[11] The courts have said that the purpose of exempting advice or recommendations is “to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice”,⁴ recognizing that some degree of deliberative secrecy fosters the decision-making process.⁵ They have interpreted the term “advice” to include an expression of opinion on policy-related matters⁶ and expert opinion on matters of fact on which a public body must make a decision for future action.⁷ They have also found that advice includes policy options prepared in the course of the decision-making process.⁸ Previous orders have found that a public body is authorized to refuse access to information, not only when it directly reveals advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.⁹

[12] Order F21-16¹⁰ sets out the process for determining if s. 13(1) applies:

The s. 13 analysis involves two steps. First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must determine whether the information falls into any of the categories listed in ss. [sic] 13(2) or 13(3). If it does, the public body cannot refuse to disclose it.

³ The Ministry also disclosed the cover page to the Committee notes, pages introducing each provision (saying “Section 1”, “Section 2” and so on) and pages annotated “intentionally left blank”.

⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36 [John Doe], at paras. 34, 43, 46, 47.

⁵ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College of Physicians], para. 105.

⁶ *John Doe*, para. 46.

⁷ *College of Physicians*, para. 113.

⁸ *John Doe*, para. 35.

⁹ See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

¹⁰ Order F21-16, 2021 BCIPC 21 (CanLII).

Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1). For example, s. 13(2)(a) says that public bodies cannot withhold factual material under s. 13(1). Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.¹¹

[13] 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.

Parties' submissions on s. 13(1)

[14] The Ministry said that its staff created the responsive records to guide the Minister in sponsoring Bill 44, in particular during the Committee stage. It said that the Committee Notes contain Ministry staff's professional opinions on the purpose of each section of the Bill. The Ministry added that its staff used the withheld information in the Committee Notes to "provide on the spot advice" and recommendations to the Minister on how to characterize each section of Bill 44 in a particular manner, in response to committee members' questions. The Ministry said that the Qs and As provided recommended answers to general questions that staff anticipated that the Minister might receive from Committee members or the media.¹²

[15] The applicant argued that the records in this case are no different from estimates briefing notes:

They are both created to prepare a minister for public debate, to provide factual information about issues, to remind, explain and justify decisions that government has made, and to anticipate lines of inquiry and responses. They are defence handbooks for the policy decision that has already been made, not an analysis or exploration of options or advice or recommendations for a policy decision that has not yet been made. They contain factual material, information regarding an approved plan or proposal to establish a new program or activity, and/or information which is to be publicly disseminated by public officials as the reasons and justifications for those policy decisions that they have already made.¹³

[16] The applicant also noted that, in December 2020, under directives issued under s. 71 of FIPPA,¹⁴ the BC government established new categories of proactive disclosure, including estimates notes, transition binders prepared for ministers and corporate binders. In the applicant's view, the Ministry should

¹¹ Order F21-16 at paras. 14 and 15.

¹² Ministry's initial submission, para. 28-32; Director's affidavit, paras. 10, 13, 14,

¹³ Applicant's reply submission, para. 3.

¹⁴ Section 71 says that the head of a public body must establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under this Act. Section 71 also allows a public body to charge fees for such records and to withhold information from them under FIPPA's exceptions.

similarly proactively disclose the records at issue in this case, with appropriate severing. The applicant also noted that, in response to past FIPPA requests, he had received similar records, such as briefing notes, estimates binders and question period binders, as well as other records related to Bill 44, all with minimal severing.¹⁵

Analysis and findings

Committee Notes

[17] The Committee Notes are structured to show the Minister the particular provision of Bill 44 under discussion on the left-hand page and what the Ministry called “guidance” information on the facing, right-hand page. As noted above, the Ministry disclosed the various provisions of Bill 44 (i.e., information on the left-hand pages) and withheld all of the “guidance” information (i.e., information on the right-hand pages).

[18] **Headings:** For each Bill 44 provision on the left-hand page, the withheld guidance information on the right-hand page is organized under the same generic headings for the various parts, divisions and sections. The headings are straightforward and factual. They contain, in my view, no advice, opinions, analysis or recommendations, either implicit or explicit. I find that disclosure of the headings would not reveal advice or recommendations prepared for the Minister.

[19] **General information on parts, divisions and sections:** This withheld information (repeated as applicable throughout the Committee Notes) sets out the function of each part, division and section of Bill 44 in a straightforward and plain-language manner. There is, in my view, no key messaging or promotional wording in the language used in these portions. The information does not, for example, provide implicit or explicit suggestions to the Minister on how to characterize each part of the Bill. I also detect no explicit or implicit professional opinions on how to characterize the purpose of each provision. Disclosure of this information would not, in my view, reveal advice or recommendations to the Minister.

[20] **More detailed information on each section of Bill 44:** Some of this withheld information describes or repeats the purpose of each section or states how some sections refer or link to others in Bill 44, in a factual and straightforward manner.¹⁶ It does not, in my view, reveal any implicit or explicit

¹⁵ Applicant’s reply submission, paras. 24-39.

¹⁶ For example: p. 91; p. 95; p. 99; two bullets at bottom of p. 131; bullets at bottom of p. 135; p. 271; last bullet on p. 301; two bullets on bottom of p. 305; last three bullets on bottom of p. 343. These page numbers refer to the numbers on the bottom right of the 639 pages of the records, not the page numbers of the committee notes.

advice to the Minister as to how to characterize the sections. I could also detect no analysis or opinion information in these withheld portions. Disclosure of this information would not, in my view, reveal advice or recommendations prepared for the Minister.

[21] However, I find otherwise for the following information on the right-hand pages:

- reasons for, or significance of, adopting a particular section;
- background information, such as why a particular section was drawn from or based on, or harmonizes or is consistent with, other legislation;
- consequences likely to flow from a section; or
- key messaging, including implicit suggestions to the Minister on how to justify or characterize a particular section or how to put it in a good light.¹⁷

[22] In my view, this information consists of background and analysis or implicit advice, all compiled to assist the Minister in characterizing certain aspects of Bill 44 or respond to anticipated questions about the Bill. I am satisfied that Ministry staff used their professional expertise to select and compile this information. I find that its disclosure would reveal advice or recommendations prepared for the Minister.

Qs and As

[23] This information consists of a series of questions and answers on various aspects of Bill 44 and the employer health tax program. I accept the Ministry's evidence that its staff prepared recommended answers to various questions they thought the Minister might receive from the Committee members or the media.¹⁸

[24] Indeed, I can see from the wording of the Qs and As that they were intended to advise the Minister on the questions she could anticipate receiving, on how to respond to them and on how to justify and characterize the employer health tax in a particular manner.¹⁹ I am satisfied that Ministry staff used their professional expertise in preparing this information. I find that its disclosure would reveal advice prepared for the Minister.

¹⁷ For example: the last bullet on p. 103 and only bullet on p. 105; first and second bullets on p.109; the second and third bullets on p. 115 and all of the bullets on p. 117; only bullet on p. 123; first two bullets in middle of p. 127; two bullets bottom of p. 139; second and fourth bullets at bottom of p. 143; the last bullet on p. 191; the last bullet on p. 195; last bullet on p. 203; last three bullets on bottom of p. 337; bullet at bottom of p. 353. These page numbers refer to the numbers on the bottom right of the 639 pages of the records, not the page numbers of the committee notes.

¹⁸ Director's affidavit, paras. 14-16.

¹⁹ The Qs and As in this case are similar in character and style to the records I considered in Order F09-01, 2009 CanLII 3225 (BC IPC).

Does s. 13(2) apply?

[25] The applicant argued that ss. 13(2)(a), (l) and (m) apply to the withheld information. The Ministry disagreed.

[26] The relevant provisions read as follows:

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material

...

(l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, ...

[27] **Factual material – s. 13(2)(a):** The applicant argued that the Ministry should not withhold any factual material such as observations, statements of fact and background facts.²⁰

[28] The Ministry argued that any factual information is integral to, and intermingled with, the advice and recommendations the records contain.²¹

[29] Past orders have discussed the difference between “factual material” to which s. 13(2)(a) applies (and which may not be withheld under s. 13(1)) and factual information which may be captured by s. 13(1):

It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert’s advice or the deliberative process at hand would constitute “factual material” under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or if the expert’s advice can be inferred from the work product, it falls under s. 13(1) and not under s. 13(2)(a).²²

²⁰ Applicant’s response submission, paras. 51-55.

²¹ Ministry’s initial submission, para. 38.

²² Order F16-43, 2016 BCIPC 47 (CanLII), at para. 25, with reference to *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII).

[30] Some of the withheld information which I found is advice or recommendations is factual. However, it was, in my view, selected and compiled by Ministry staff, using their expertise and judgement, as part of their advice to the Minister on how to present a section or respond to potential questions. In my view, disclosing this factual information would reveal advice to the Minister.

[31] **Plan or proposal – s. 13(2)(l):** The applicant argued that Bill 44 constituted an approved plan or proposal to establish a new program, that is, an employer health tax.²³

[32] The Ministry said that the records are not a plan or proposal within the meaning of s. 13(2)(l) but rather are a “key messages document” and a guide for the Minister for use in the Committee stage.²⁴ It added that, when the records were developed, Bill 44 had already been drafted and its policy rationale formulated.²⁵

[33] The withheld information does not concern a plan or proposal. It is quite different from such a document. I find that s. 13(2)(l) does not apply here.

[34] **Information cited publicly – s. 13(2)(m):** The applicant suggested that there is a “high likelihood” that the Minister publicly cited information in the responsive records as a basis for Bill 44.²⁶

[35] The Ministry acknowledged that the Minister relied on the records while speaking publicly, during the Committee stage. However, it argued, the records in this case are “not analogous to a report or a paper detailing various policy options which a public body may cite as a reason for reaching a certain decision.”²⁷

[36] I do not necessarily agree with the Ministry that the records need to correspond to a policy paper or analogous document in order for s. 13(2)(m) to apply. In any event, according to Hansard, the discussion of Bill 44 during Committee Stage was wide-ranging, frequently delving into various concepts behind the Bill, research the Ministry had done and other more general topics. There is comparatively little discussion in Hansard on the actual sections of the Bill. In any case, it is not possible, in my view, to determine definitively if or how the discussions on Bill 44’s sections linked to or arose from the Committee Notes or Qs and As. I find, therefore, that s. 13(2)(m) does not apply here.

²³ Applicant’s response submission, paras. 56-59.

²⁴ Ministry’s reply submission, paras. 15-18.

²⁵ Ministry’s reply submission, paras. 19-24.

²⁶ Applicant’s response submission, paras. 60-66.

²⁷ Ministry’s reply submission, para. 21.

Conclusion on s. 13(1)

[37] I found above that disclosing some of the information in dispute would reveal advice or recommendations developed for the Minister. I also find that ss. 13(2)(a), (l) and (m) do not apply to that information. I find, therefore, that s. 13(1) applies to it.

[38] I also found above that disclosing the rest of the information in dispute would not reveal advice or recommendations. I find, as a result, that s. 13(1) does not apply to this other information.

[39] I also find that none of the withheld information is older than 10 years. Section 13(3) does not, therefore, apply to it.

Exercise of Discretion

[40] Section 13 is discretionary. This means that the head of a public body must properly exercise its “discretion in deciding whether to refuse access to information, and upon proper considerations.”²⁸ If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.”²⁹

[41] The Ministry said that, given the passage of time, it had decided to disclose some information that it had withheld under s. 13(1) in pages 58-67 and 627 (speaking notes). The Ministry said it exercised its discretion in deciding to withhold the remaining information. It said it considered these factors: the age of the information; its past practice with respect to similar records; the nature and sensitivity of the information; and the purpose of the legislation.³⁰

[42] These are generic, rote factors that many public bodies have cited in past orders. The Ministry also did not provide affidavit evidence from the decision-maker in this case. In addition, the withheld information is dated and not at all sensitive, in my view. It is thus not clear why the Ministry would bother withholding it three years after the fact.

²⁸ Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.

²⁹ *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.

³⁰ Ministry’s initial submission, para. 43.

[43] Moreover, as the applicant argued, the information in dispute was designed for public use in Committee stage. It also strikes me as the kind of information the Ministry might include in guidance for use by employers or the public in interpreting and complying with the Act.

[44] It also seems to me that the Ministry would want to disclose this information, perhaps under s. 71, to demonstrate how Bill 44 was enacted to the benefit of British Columbians. I certainly encourage it to do so.

[45] However, I am unable to conclude that the Ministry acted in bad faith, failed to take relevant considerations into account or took into account irrelevant considerations. I am satisfied that the Ministry exercised its discretion properly in deciding to withhold the information.

CONCLUSION

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

1. Subject to item 2 below, I confirm that the Ministry is authorized by s. 13(1) to withhold some of the information in dispute, as highlighted in yellow on the copies of the Committee Notes the OIPC provides to the Ministry with its copy of this order.
2. I require the Ministry to disclose the other information it withheld under s. 13(1).

[47] Under s. 59(1), the Ministry is required to comply with this order by December 29, 2021.

November 12, 2021

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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