



Order F22-27

COLLEGE OF PHARMACISTS OF BRITISH COLUMBIA

Lisa Siew
Adjudicator

June 2, 2022

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Summary: The College of Pharmacists of British Columbia (College) requested the commissioner exercise their discretion, under s. 56 of the *Freedom of Information and Protection of Privacy Act* (FIPPA), to not conduct an inquiry regarding the College's decision to refuse an applicant partial access to the requested record. The College argued an inquiry should not be held because it is plain and obvious that s. 13(1) (advice and recommendations) applied to the withheld information. The adjudicator determined that it was not plain and obvious the College was authorized to withhold the information at issue under s. 13(1). Therefore, the adjudicator dismissed the College's s. 56 application and directed the matter to an inquiry.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2) and 56(1). *Health Professions Act*, ss. 1 (definition of "registrant"), 27, 28 and 33.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the College of Pharmacists of British Columbia (College) provide access to records related to the College's investigation of a complaint involving the applicant.

[2] The College provided the applicant with access to most of the responsive records, but withheld some information under ss. 15(1)(a) (disclosure harmful to a law enforcement matter) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The College later reconsidered its decision and added s. 13(1) (advice and recommendations) to the same information that it withheld under s. 15(1)(a).

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the College's decision, including whether the

College exercised its discretion “reasonably”.¹ The applicant later clarified that he was not interested in the information withheld under s. 22(1). The OIPC’s investigation and mediation process did not resolve the other issues between the parties and the applicant requested that the matter proceed to an inquiry.

[4] The College later requested the commissioner decline to hold an inquiry into this matter. Under s. 56(1) of FIPPA, the commissioner has the discretion to choose whether to hold an inquiry. The College argued that it was plain and obvious that s. 13(1) (advice and recommendations) applied to the information at issue and that it exercised its discretion appropriately under s. 13(1). The College also further reconsidered its decision and added s. 12(3)(b) (local public body confidences) to the same information that it withheld under ss. 13(1) and 15(1)(a).

ISSUE AND BURDEN OF PROOF

[5] As the commissioner’s delegate, I will determine whether to grant the College’s request not to hold an inquiry under s. 56(1) because it is plain and obvious that:

1. The College is authorized to withhold the information at issue under s. 13(1).
2. The College exercised its discretion under s. 13(1) and that it did so appropriately.

[6] The College bears the burden of proving that its application under s. 56(1) to not hold an inquiry should be granted.² As the respondent in this application, the applicant does not have to prove why the inquiry should proceed; however, as noted in earlier decisions “where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide some cogent basis for arguing the contrary.”³

DISCUSSION

Background

[7] In accordance with the *Health Professions Act (HPA)*,⁴ the College is the professional regulator of the pharmacy profession and its functions include education, quality assurance, complaints investigations and discipline activities.⁵

¹ Applicant’s request for review dated May 10, 2021.

² Order F16-37, 2016 BCIPC 41 (CanLII) at para. 10.

³ Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 18.

⁴ RSBC 1996, c. 183.

⁵ College’s s. 56 application at p. 2.

[8] In terms of complaints, the College's registrar is responsible for receiving complaints made against a "registrant" of the College.⁶ Upon receipt of a complaint, the registrar must forward the complaint to the College's inquiry committee.⁷ Section 33 of the *HPA* requires the College's inquiry committee to investigate the complaint as soon as possible.

[9] The applicant is a registrant of the College. The College received a complaint involving the applicant. A College "investigator" (Investigator) looked into the matter and then prepared a written document for the inquiry committee.⁸

Record at issue

[10] The record at issue is a 21-page document titled "Complaint Assessment, Recommendation and Rationale" (Record).⁹ The Record was written and prepared by the Investigator. The College provided the applicant with partial access to the Record, but withheld information on several pages.¹⁰

Discretion to conduct an inquiry – s. 56

[11] Section 56(1) of FIPPA provides that if the matter in dispute between the parties is not referred to a mediator or settled under s. 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. It is well-established that s. 56 gives the commissioner or their delegate a "broad discretionary power to determine whether or not to hold an inquiry."¹¹

[12] As set out in earlier decisions, the commissioner or their delegate may decline to conduct an inquiry on a number of grounds, including that it is plain and obvious that the disputed records are subject to an exception to disclosure under FIPPA.¹² Regardless of the basis for the s. 56 application, in each case, it must be clear that there is no issue which merits adjudication in an inquiry.¹³ Put another way, the party asking that an inquiry not be held must establish there is "no arguable case that merits an inquiry."¹⁴

⁶ A "registrant" is defined under s. 1 of the *HPA* as "in respect of a designated health profession, a person who is granted registration as a member of its college in accordance with section 20."

⁷ College's s. 56 application at p. 2.

⁸ *Ibid* at pp. 4-5.

⁹ For example, College's s. 56 application at p. 2.

¹⁰ Information located on pp. 160, 162, 163, 164, 165, 166, 167 of the records.

¹¹ *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII) at para. 47.

¹² Decision F07-04, 2007 CanLII 67284 (BC IPC) at para. 16.

¹³ *Ibid*.

¹⁴ Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

[13] The College submits an inquiry should not be held because it is plain and obvious that it is authorized to withhold the information at issue under s. 13(1). The College also says that it exercised its discretion appropriately in withholding the information at issue under that exemption. I will consider those arguments below.

Advice and Recommendations – s. 13

[14] 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 minister. Previous OIPC orders recognize that s. 13(1) protects “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.”¹⁵

[15] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. The term “recommendations” includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.¹⁶ The term “advice” has a broader meaning than “recommendations.”¹⁷ “Advice” includes an opinion that involves exercising judgment and 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.¹⁸

[16] I also note that s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice.¹⁹ This includes factual information 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.²⁰

[17] If I find s. 13(1) applies, then the next step is to consider if any of the categories listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

¹⁵ For example, Order 01-15, 2001 CanLII 21569 at para. 22.

¹⁶ *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

¹⁷ *Ibid* at para. 24.

¹⁸ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

¹⁹ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

²⁰ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

The parties' submissions on s. 13

[18] The College submits that the information withheld from the Record consists of advice and recommendations prepared by the Investigator for the College. The College says the Record contains the Investigator's recommendations to the inquiry committee about the complaint.²¹ It argues that it is obvious from previous OIPC orders that this information clearly qualifies as advice or recommendations under s. 13(1).

[19] The College further argues that none of the circumstances or information under s. 13(2) applies. Specifically, the College submits that it has disclosed any factual material in the Record, in accordance with s. 13(2)(a), and only withheld the Investigator's advice and recommendations.

[20] The College also contends that s. 13(2)(k) does not apply since the record at issue is not "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body." The College says the Record was prepared by a College investigator who is an "employee" that investigates complaints about registrants as part of their regular duties.²² Relying on Order F18-41, the College argues the OIPC has accepted that s. 13(2)(k) does not apply to this type of situation.²³

[21] In Order F18-41, Adjudicator Lott found some of the information withheld by two provincial ministries in emails and attachments to those emails (letters, briefing notes and speaking notes) qualified as advice and recommendations. Adjudicator Lott then considered whether any of the categories under s. 13(2) applied. She concluded the following about s. 13(2)(k):

I have also considered whether s. 13(2)(k) applies. However, none of the records are a report of a task force, committee, council or similar body. The records were created by ministry employees in their daily work. As a result, s. 13(2)(k) does not apply.²⁴

[22] The applicant does not dispute that the information withheld in the Record qualifies as advice and recommendations under s. 13(1).²⁵ Instead, the applicant contends the College cannot withhold the information at issue under s. 13(1) since the Record falls under s. 13(2)(k) as a report of a task force, committee, council or similar body.²⁶ The applicant notes the College's inquiry committee appointed an "inspector" to investigate the complaint in accordance with ss. 27

²¹ College's s. 56 application at p. 4.

²² *Ibid* at p. 5.

²³ *Ibid* at p. 5, footnote 6, citing Order F18-41, 2018 BCIPC 44 (CanLII).

²⁴ Order F18-41, 2018 BCIPC 44 (CanLII) at para. 38.

²⁵ Applicant's submission at p. 2.

²⁶ *Ibid*.

and 28 of the *HPA*.²⁷ Under those provisions, the applicant says the appointed inspector was then required to report back their findings to the inquiry committee. As a result, the applicant submits this scenario arguably falls under s. 13(2)(k).

[23] Furthermore, the applicant submits there is no previous OIPC decision that considered whether s. 13(2)(k) applies to “the disclosure of a report that is the result of an inquiry committee’s direction to investigate.”²⁸ The applicant says Order F18-41 is distinguishable because the records at issue in that order were not reports and the public body employees “had not been assigned to consider and make a report or recommendation on any matter.”²⁹

[24] The applicant accepts the Investigator was a College employee and “their report was surely part of their daily work”; however, the applicant argues the present scenario is different because the College’s inquiry committee “exercised its statutory power to direct the inspector” to investigate and report back on a particular matter.³⁰ Therefore, the applicant submits there is an arguable case that merits adjudication as to whether s. 13(2)(k) applies to the Report.

[25] In response, the College says it does not matter that the inquiry committee assigned the Investigator the task of investigating a discrete matter and making a report. The College argues what matters is that the Investigator was “exercising his job functions” and “exercising investigative duties in furtherance of the College’s law enforcement functions.”³¹ As a result, the College argues that Order F18-41 clearly applies.

[26] The College also contends that s. 13(2)(k) does not apply because the Investigator does not qualify as a task force, committee, council or “a body similar” to those entities. The College says the applicant is ignoring the plain language and statutory intent of s. 13(2)(k). It submits that the Legislature did not intend for s. 13(2)(k) to apply to this scenario.

Analysis and findings on s. 13 and the College’s s. 56 application

[27] Based on the parties’ submissions, I find the applicant and the College agree that the information withheld in the Record qualifies as advice and recommendations under s. 13(1).³² From my own review of the Record, I conclude the withheld information consists of the Investigator’s advice and recommendations to the inquiry committee about the complaint.

²⁷ Applicant’s submission at p. 1.

²⁸ *Ibid* at p. 3.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ College’s reply submission at p. 3.

³² Applicant’s submission at p. 2.

[28] Turning now to ss. 13(2) and 13(3), I am satisfied the College disclosed any factual material in the Record, in accordance with s. 13(2)(a), that was not intertwined with any of the Investigator's advice and recommendations. I can see that the College disclosed most of the factual and background information in the Report and only withheld a small amount of factual information that is an integrated part of the advice and recommendations.³³ As previously noted, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendations.³⁴

[29] Furthermore, I also conclude that ss. 13(2)(a) to (j) and (l) to (n) do not apply. I can also see that the information in the Record has not been in existence for 10 or more years; therefore, s. 13(3) is not applicable in this case. As a result, the central issue on this application is whether it is plain and obvious that s. 13(2)(k) applies to the Record. If s. 13(2)(k) does not apply, then it is clear to me, for the reasons set out above, that the College would be authorized to withhold the information at issue under s. 13(1).

[30] Section 13(2)(k) states the head of a public body must not refuse to disclose under s. 13(1) "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body." Although they do not directly say so, I find the parties agree that the Record qualifies as a "report" for the purposes of s. 13(2)(k). The applicant and the College did not argue otherwise and also refer to the disputed record in their submissions as a "report".³⁵

[31] Nevertheless, I am satisfied the record at issue qualifies as a "report" under s. 13(2)(k). Past OIPC orders have defined the term "report" under s. 13(2)(k) as "a formal statement or account of the results of the collation and consideration of information"³⁶ and "an account given or opinion formally expressed after investigation or consideration."³⁷ I find the record at issue in this case meets this definition since it is the Investigator's formal statement to the College's inquiry committee about the results of his investigation, including his evaluation and opinion of the information and evidence that he gathered and compiled from the investigation.

[32] The remaining question is whether a College investigator qualifies as a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body. The College argues it is plain and obvious that a College investigator is not a "task

³³ Information withheld on p. 164 of the records.

³⁴ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

³⁵ For example, College's s. 56 application at p. 2.

³⁶ Order F17-33, 2017 BCIPC 35 (CanLII) at para. 17.

³⁷ Order F17-39, 2017 BCIPC 43 (CanLII) at para. 46.

force, committee, council or similar body” and that the Legislature did not intend for s. 13(2)(k) to apply to this particular situation. However, the College does not define and apply any of those terms or identify the purpose and intent of s. 13(2)(k). I am also not aware of any previous OIPC orders or court decisions that defined those terms, including what is a “similar body”, or addressed the legislative intent behind s. 13(2)(k).

[33] In my opinion, the ordinary meaning of the terms “task force, committee, council” is commonly associated with a group of people. However, the term “similar body” under s. 13(2)(k) leaves open the question as to whether a single College investigator qualifies as a “similar body”. In my view, the answer requires statutory interpretation, including analysis about the legislative intent behind s. 13(2)(k), and may depend on whether it is the structure of the reporting body that is important under s. 13(2)(k) (i.e. the number of people) or the function of the reporting body (i.e. to produce a report and make recommendations to a public body). As a result, I find there are questions regarding the applicability of s. 13(2)(k) that merit adjudication in an inquiry.

[34] Furthermore, contrary to the College’s claim, I find Order F18-41 is clearly distinguishable from the circumstances of this case. As noted by the applicant, the records at issue in Order F18-41 were not reports and were produced by public body employees in the normal course of their job duties. Those facts are different from the present case where the inquiry committee appointed an “inspector” under ss. 27 and 28 of the *HPA* to investigate the complaint made against the applicant.³⁸ As the appointed inspector, the Investigator was then required, under s. 28(3) of the *HPA*, to report their findings in writing to the inquiry committee. Therefore, I find the inquiry committee’s statutory exercise of its authority to appoint an inspector to investigate and report back in writing on a particular matter raises a legitimate question as to the applicability of s. 13(2)(k).

[35] As previously noted, to succeed on its s. 56 application, the College must establish that there is no issue which merits adjudication in an inquiry. For the reasons given, I find there is an arguable case that merits adjudication as to whether s. 13(2)(k) applies to the Record. Therefore, I conclude the College has not proven that it is plain and obvious that it is authorized to withhold the information at issue under s. 13(1).

[36] Given my finding, it is not necessary for me to also consider whether it is plain and obvious that the College exercised its discretion and that it did so appropriately under s. 13(1).

³⁸ Sections 27 and 28 of the *HPA* use the term “inspector” while the College refers to this individual as an “investigator”.

CONCLUSION

[37] For the reasons given above, I dismiss the College's s. 56 application for the commissioner not to hold an inquiry regarding the College's decision to refuse an applicant partial access to the requested record. I conclude the matters at issue between the parties will proceed to an inquiry under Part 5 of FIPPA so the Commissioner or their delegate can consider the parties' evidence and argument and decide whether FIPPA authorizes the College to refuse access to the information at issue.

June 2, 2022

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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