



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-18

MINISTRY OF FINANCE

D. Hans Hwang
Adjudicator

March 21, 2023

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Summary: An applicant requested the Ministry of Finance (Ministry) provide access to records about its property transfer tax assessment and the related appeal. The Ministry provided records, withholding some information under s. 13 (policy advice or recommendations) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that s. 13 applies to some of the information in dispute. The adjudicator ordered the Ministry to disclose the information it was not authorized to refuse to disclose under s. 13.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 13(1), 13(2)(a) and 13(3).

INTRODUCTION

[1] A corporation (applicant) requested the Ministry of Finance (Ministry) provide it with records about a property transfer tax assessment and the related appeal. The Ministry provided records but withheld some information under ss. 13(1) (advice or recommendations), 21 (harm to third party business interests) and 22(1) (unreasonable invasion of third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter and the applicant requested that it proceed to an inquiry.

[3] During the submission phase, the applicant and the Ministry confirmed ss. 21 and 22 are not in dispute, so those FIPPA exceptions are no longer issues in the inquiry.¹

¹ Applicant's submission at para. 2.2; Ministry's reply submission at para. 3.

Preliminary Issues – Late raising of s. 3(2)(a)

[4] After the submission phase of this inquiry was closed, the applicant asked to make a further submission regarding the bearing of s. 3(2)(a) on the s. 13(1) issue in this inquiry. Section 3(2)(a) states that Part 3 of FIPPA (Protection of Privacy) applies to all employees, officers and directors of a public body.

[5] Past OIPC Orders and Decisions have consistently said parties may not add new issues into the inquiry without the OIPC's prior consent.² The OIPC's notice of inquiry and its *Instructions for Written Inquiries*³ clearly explain the process for adding new issues to an inquiry. Here, the applicant did not apply to the OIPC for permission to add s. 3(2)(a) into the inquiry nor explain why it is only raising this issue at this late stage. In addition, nothing before me suggests that it would be fair to add this new issue or that there is any exceptional circumstance that warrants adding s. 3(2)(a). Therefore, I will not add that issue or consider the applicant's submissions about it any further.

ISSUE AND BURDEN OF PROOF

[6] In this inquiry, I will decide whether the Ministry is authorized to refuse to disclose the information at issue under s. 13.

[7] Section 57(1) of FIPPA states that the Ministry, who is a public body in this case, has the burden of proving that the applicant has no right to access to records or parts of records under s. 13.

DISCUSSION

Background⁴

[8] The Ministry conducts property transfer tax assessments. A taxpayer can appeal the Ministry's decision on the assessment under the *Property Transfer Tax Act* (appeal).⁵

[9] The Minister of Finance (Minister) is a statutory decision maker who decides the appeal. The Minister may delegate their power to conduct the appeal to another person, i.e., the Deputy Minister or Associate Deputy Minister (Decision Maker).

² For example, see Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-27, 2010 BCIPC 55 at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).

³ Available online: <https://www.oipc.bc.ca/guidance-documents/1744>

⁴ The information in this background section is based on the Ministry's initial submission and affidavit evidence. The applicant accepts the facts set out in the Ministry's initial submission. The information in this section is also based on the applicant's response submission at paras. 3.2-3.6.

⁵ R.S.B.C. 1996 c. 378.

[10] A taxpayer can file an appeal by submitting an “Appeal to Minister” form or by writing a letter, and they normally include supporting documents and explain the basis of their appeal. The appellant has the burden of proof to show that the assessment is incorrect.

[11] An appeals officer of the Tax Appeals and Litigation Branch of the Ministry (appeals officer) works on appeal matters in consultation with their director and other appeals staff. The appeals officer’s director and executive director review that officer’s analysis, advice and recommendations before it is presented to the Decision Maker.

[12] After examining the evidence, the Decision Maker may accept the appeals officer’s findings or may make alternate or additional findings or assumptions of fact.

[13] When the appeal is decided, the Decision Maker sends the appellant the decision letter explaining how the relevant legislation applies to the specific circumstances and facts at issue.

[14] In some cases, the appellant has a right to further appeal that decision to the Supreme Court of British Columbia.

[15] In 2019, the Ministry assessed the applicant’s property transfer tax, and the applicant filed an appeal to the Minister. The Decision Maker decided on the applicant’s appeal and sent the decision letter in March 2022.

Records and information at issue

[16] There are 308 pages of records at issue. The Ministry withheld small portions to entire pages of information in the following records:

- Email correspondence between the appeals officer and several Ministry employees;⁶
- Appeals officer’s notes;⁷
- Draft of a Decision letter to the applicant;⁸
- Draft of a Memorandum of Advice to the Minister;⁹ and
- Draft of a Summary of advice;¹⁰

[17] I will identify and discuss the specific information withheld from these records as it relates to s. 13.

⁶ Pages 31, 32, 272-273, 274-276 and 306 of the records in dispute.

⁷ Pages 23-29 of the records in dispute.

⁸ Pages 2-6 of the records in dispute.

⁹ Pages 7-13 of the records in dispute.

¹⁰ Page 1 of the records in dispute.

Policy Advice or Recommendations, s. 13

[18] Section 13(1) says that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. 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.¹¹

[19] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.¹² In addition, 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.¹³

[20] The courts have also said that the term “advice” has a broader meaning than “recommendations”.¹⁴ 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”.¹⁵ In addition, the Supreme Court of Canada and past OIPC Orders have found that “advice” under s. 13(1) includes a public servant’s view of policy options and alternative courses of action to be accepted or rejected in relation to a pending decision.¹⁶

[21] As well, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.¹⁷ This includes factual information compiled and selected by an expert, using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.¹⁸

[22] The first step in the s. 13 analysis is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or

¹¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 45-51.

¹² Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

¹³ *John Doe*, *supra* note 11 at paras. 23-24.

¹⁴ *John Doe*, *supra* note 11 at paras. 23-24.

¹⁵ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

¹⁶ *John Doe* *supra* note 11 at paras. 25-27; Order F21-60, 2021 BCIPC 69 at para. 15.

¹⁷ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

¹⁸ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

for a public body. If it would, then I must decide if ss. 13(2) or (3) apply to the information. Section 13(2) lists types of information and records that public bodies cannot withhold under s. 13(1) and s. 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.

Parties' position on s. 13

[23] The Ministry submits that it correctly applied s. 13 to withhold the information at issue based on “confidential nature and the fact these records were created to advise the Minister (or the statutory decision-maker) for the purpose of their deliberations and decision-making on the tax appeal matter.”¹⁹ The Ministry argues that s. 13(1) applies to this information because it consists of internal communications in which the employees of the Ministry used “their professional expertise to determine the significance of matters, evaluate the information they have and determine an appropriate course of action.”²⁰ Also, the Ministry submits that various comments and notes related to the applicant’s tax appeal would disclose advice or recommendations by Ministry employees.

[24] The applicant disputes the Ministry’s application of s. 13(1) to the information at issue. It submits that s. 13(1) applies only to advice or recommendations developed by “the Ministry” and s. 13(1) does not apply to anything developed by the Ministry’s individual employees.²¹ Further, the applicant submits that no evidence indicates that “the Minister rather than the Deputy Minister” reviewed or considered any advice or recommendations.²²

[25] Alternatively, the applicant defines the information at issue as discussions, consultations or opinions.²³ It asserts that advice or recommendations under s. 13 do not include these types of information.²⁴ Therefore, the applicant argues the Ministry cannot withhold the information at issue under s. 13(1).

[26] In response to the applicant’s arguments, the Ministry points out that s. 23 of the *Interpretation Act* says that words in an enactment directing or empowering a minister of the government to do something includes a deputy or associate deputy of the minister.²⁵ The Ministry says that it is a public body under Schedule 1 of FIPPA and the advice or recommendations at issue were developed by or for the Ministry that is a public body.²⁶ Further, the Ministry contends that s. 13 recognises some degree of deliberative secrecy fosters the decision-making

¹⁹ Ministry’s initial submission at para. 61.

²⁰ Ministry’s initial submission at para. 62, citing Order F18-03.

²¹ Applicant’s response submission at para. 3.20.

²² Applicant’s response submission at para. 3.12.

²³ Applicant’s response submission at para. 3.26.

²⁴ Applicant’s response submission at para. 3.27.

²⁵ Ministry’s reply submission at para. 7, citing the *Interpretation Act*, R.S.B.C. 1996 c. 238.

²⁶ Ministry’s reply submission at para. 9.

process and the meaning of “advice” includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact and expert opinion on matters of fact.²⁷ Therefore, the Ministry argues it can withhold the information at issue.

Analysis and findings on advice and recommendations

[27] Now, I turn to whether each information in dispute qualifies as advice or recommendation under s. 13(1).

[28] **Emails:** I find that some of the information withheld from the emails is advice or recommendations under s. 13(1), for the reasons that follow:

- The Ministry employee provided the Appeals Officer with opinions about what the Minister’s response to the applicant should say about various issues pertaining to the appeal.²⁸
- The Appeals Officer provided several Ministry employees with opinions on how to interpret and apply the relevant statutes to the facts and issues of the appeal.²⁹
- Based on their analysis of the facts, evidence and law, the Appeals Officer provided the Ministry employees with recommendations on what step to take next in the appeal.

[29] I am not persuaded by the Applicant’s arguments that s. 13(1) “does not apply to anything developed by the Ministry’s individual employees.” As previously mentioned, the Supreme Court of Canada and OIPC Orders have found that “advice” under s. 13(1) includes a public servant’s view of policy options and alternative courses of action to be accepted or rejected in relation to a pending decision.³⁰ In my view, that is the kind of information here. It is apparent that the appeals officer and Ministry employees, as public servants, provided the Decision Maker with their opinions and proposed disposition of the appeal based on their expertise in the property transfer tax appeal. The information is the opinions of employees who are exercising their judgment and skill to weigh the significance of matters of fact on which a public body must make a decision.

²⁷ Ministry’s reply submission at paras. 13-16, citing Order F18-43, 2018 BCIPC 46 at para. 49 and *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner) [College]*, 2002 BCCA 665 at paras 103 and 105.

²⁸ Information withheld in page 31 and 306.

²⁹ Some of the information withheld in pages 272-273 and 274-276.

³⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 25-27; Order F21-60, 2021 BCIPC 69 at para. 15.

[30] However, I find the rest of the information withheld from the emails is not advice or recommendations under s. 13(1); therefore, the Ministry is not authorized to withhold this information for the reasons that follow:

- The person writing the email is only communicating about the likelihood of the appeal proceeding.³¹ Past OIPC Orders have found that an exchange of information that informs, or alerts a fellow employee about an action or step that another employee intends to or has taken, is a “heads up” and does not fall within s. 13.³² I find the information withheld in this record only reveals the conveying of “heads up” or “timeline” information.
- The information only reflects a summary of what was said about a topic but no advice or recommendations about the topic.³³ For example, some information in the emails is only basic factual information related to the appeal, such as information about what the applicant argued and what evidence the applicant submitted.
- The Appeals Officer was seeking feedback from several Ministry employees.³⁴ A question or request for advice certainly may *lead* to advice or recommendations, but the question or request itself does not amount to advice under s. 13 unless it would allow for accurate inferences as to advice actually received, and in this instance, I find it would not.³⁵

[31] **Appeals Officer’s notes:** I find the information withheld in this document consists of the Appeals Officer’s notes that he wrote from meetings and discussions with Ministry employees regarding issues on the appeal.³⁶

[32] Some of the information reveals the Appeals Officer’s advice and recommendations about the matter under discussion. It also includes background information and facts that are integral to the advice and recommendations and necessary, in my view, to understand what the Appeals Officer’s analysis and

³¹ Page 32 of the records in dispute.

³² Order F15-52, 2015 BCIPC 55 at para. 28; Order F19-27, 2019 BCIPC 29 at para 32; Order F12-15, 2012 BCIPC 21 at para. 18.

³³ Pages 272-273 (repeated on pages 25-26 and 276) and 274-276 (repeated on pages 26-27) of the records in dispute.

³⁴ Pages 273 (repeated on pages 26 and 276) of the records in dispute.

³⁵ See, for example, Order F14-19, 2014 BCIPC 22 at para. 35; For similar reasoning, see Order F17-23, 2017 BCIPC 24 at para. 19 in which Adjudicator Whittome found that information that refers to the intention to seek advice or recommendations does not fit within the meaning of s. 13(1).

³⁶ Pages 25-26 repeated emails of pages 272-273; pages 26-27 repeated emails of 274-275. I already found some of the information withheld in these emails is not advice or recommendations. So, it is not necessary for me to consider again whether s. 13 applies to the information repeated here.

suggested course of action is. This is the type of background facts and information that the Courts and OIPC orders have said is part of the deliberative process s. 13 protects because it is “necessary to the consideration of specific or alternative courses of action.”³⁷ Therefore, I conclude disclosing this would allow reveal advice.

[33] **Draft version of documents:** The Ministry is refusing to disclose all of the draft Decision³⁸ and the draft Memorandum³⁹ under s. 13. It is only refusing access to a small part of the draft Summary of Advice⁴⁰ under s. 13.

[34] Past OIPC Orders have found that a document does not automatically contain advice simply because it is a draft, and a public body may withhold only the information from a draft or earlier version that would reveal advice or recommendations.⁴¹

[35] Having reviewed the records, I find the information withheld in the draft Decision⁴² consists of advice and recommendations on what the decision letter should say. The Ministry employee drafting this document provided their advice to the Decision Maker who ultimately decides what the final version of the decision letter will say.

[36] However, I am not persuaded that the Ministry can withhold the draft of a Memorandum of Advice⁴³ in its entirety because it is a draft.⁴⁴ I find some of the information in the draft Memorandum is factual information: file number, date, issues, and items of the appeal, background, statutes referenced and the applicant’s position. I am satisfied that some information withheld in the draft Memorandum reveals advice and recommendations that the author gave the executive director about their analysis and proposed decision for the Decision Maker to consider. I find this is the type of information that the court said in *College* is “advice”,⁴⁵ so s. 13(1) applies.

³⁷ *College* at paras. 106. See also *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 52; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 79-96 [PHSA].

³⁸ Pages 2-6 of the records in dispute.

³⁹ Pages 7-13 of the records in dispute.

⁴⁰ Page 1 of the records in dispute.

⁴¹ See, Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6, Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59; Order F14-44, 2014 BCIPC 47 (CanLII) at para. 32; Order F15-22, 2015 BCIPC 36 (CanLII) at para. 23; Order F18-38, 2018 BCIPC 41 (CanLII) at para. 17; Order F17-13, 2017 BCIPC 14 at para. 24; F20-37, 2020 BCIPC 43 at para. 33.

⁴² Pages 2-6 of the records in dispute.

⁴³ Pages 7-13 of the records in dispute.

⁴⁴ See Order F11-04, 2011 BCIPC 4 (CanLII) at para. 8 in which Commissioner Denham found that a public body that applies s. 13(1) to withhold information has to conduct the line-by-line analysis under FIPPA.

⁴⁵ *College* at para. 113.

[37] I am not persuaded that the handwritten notations and comments on the draft Memorandum constitutes advice or recommendations.⁴⁶ In my view, the notations and comments correct only clerical errors and do not qualify as substantive editorial advice or recommendations about specific content and wording of the documents.⁴⁷ Also, it is not apparent to me, and the Ministry does not explain, how these clerical notations and comments constitute a necessary or integrated part of any advice or recommendations.

[38] Also, I am not satisfied that s. 13(1) applies to the information withheld in the draft Summary of Advice.⁴⁸ Having reviewed the record, I find none of this information reveals, directly or by inference, any advice or recommendations on how the draft Decision should be worded or what the decision letter should say.

Analysis and findings on Sections 13(2) and (3)

[39] The next step in the s. 13 analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice or recommendations developed by or for a public body or minister.

[40] The Ministry argues that no subsections of s. 13(2) apply, including s. 13(2)(a).⁴⁹ The applicant says nothing about ss. 13(2) and 13(3).

[41] Section 13(2)(a) states that a public body must not refuse to disclose “any factual material”. Factual “material” is distinct from factual “information”.⁵⁰ The difference is whether the facts are a necessary and integrated part of the advice. If they are not, then the information is “factual material” and s. 13(2)(a) applies. Having reviewed the information to which I found s. 13(1) applies, I find none of this information contains “factual material”. Although some of the information is “factual” in nature, in my view, it is a necessary and integrated part of the advice. Therefore, s. 13(2)(a) does not apply.

[42] I also find that the records have not been in existence for 10 or more years. The oldest records at issue were created in 2019. Consequently, s. 13(3) does not apply.

⁴⁶ Ministry’s submission at paras. 46a)j and 59a).

⁴⁷ Previous orders have recognized that editorial advice and recommendations regarding the content and wording of documents contained in the drafts can be withheld under s. 13(1). For example, see Order 03-37, 2003 CanLII 49216 (BC IPC); Order 04-15, 2004 CanLII 34269 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC); Order F07-17, 2007 CanLII 35478 (BCIPC).

⁴⁸ Page 1 of the records in dispute.

⁴⁹ Ministry’s initial submission at paras. 68-73.

⁵⁰ *PHSA*, *ibid* at para. 91

[43] Given my findings respecting ss. 13(2) and (3), I conclude that s. 13(1) authorizes the Ministry to withhold the information that I have found reveals advice or recommendations.

Summary, s. 13(1)

[44] In summary, I find that the Ministry has established that disclosing some of the information it withheld under s. 13(1) would reveal advice or recommendations developed by or for the Ministry. Sections 13(2) and (3) do not apply to that information, so the Ministry may withhold it under s. 13(1). There are, however, some instances where I find that the information may not be withheld under s. 13(1) because disclosure would not reveal any advice or recommendations.⁵¹

CONCLUSION

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

1. Subject to paragraph 2 below, I confirm, in part, the Ministry's decision that it is authorized to refuse the applicant access to information under s. 13(1).
2. The Ministry is authorized to refuse to disclose all of the withheld information on pages 2-6 and to refuse to disclose only information that I have highlighted on pages 7-13, 23-29, 31, 272-273, 274-276 and 306. The Ministry is required to disclose rest of the information it withheld under s. 13(1) to the applicant.
3. The Ministry must provide the OIPC Registrar of Inquiries with proof that it has complied with the terms of this order, along with a copy of the relevant records.

Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by May 4, 2023.

March 21, 2023

ORIGINAL SIGNED BY

D. Hans Hwang

OIPC File No.: F20-84370

⁵¹ I applied highlighting to the information that may be withheld under s. 13(1) in a copy of pages 7-13, 23-29, 31, 272-273, 274-276 and 306 of the records that the Ministry will receive with this order.