



Order F23-31

PROVINCIAL HEALTH SERVICES AUTHORITY

Jay Fedorak
Adjudicator

April 24, 2023

CanLII Cite: 2023 BCIPC 37
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 37

Summary: An applicant requested copies of records relating to the quality of supply chains and procurement from the Provincial Health Services Authority (PHSA). PHSA disclosed records but withheld some information under s. 13(1) (advice and recommendations). The adjudicator found that PHSA had correctly applied s. 13(1) to the information. The adjudicator confirmed the decision of PHSA to withhold the information at issue under s. 13(1).

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

INTRODUCTION

[1] An individual (applicant) requested from the Provincial Health Services Authority (PHSA) under the *Freedom of Information and Protection of Privacy Act* (FIPPA), copies of records relating to the quality of supply chains and procurement, including the report of a consultant. PHSA responded by providing the applicant with records, while withholding information under s. 13(1) (advice and recommendations) and s. 17(1) (harm to the financial interests of the public body).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the response.

[3] Mediation failed to resolve the remaining issues and the applicant requested that the matter proceed to an inquiry. PHSA subsequently ceased to rely on s. 17(1).

[4] **Preliminary Issues/Matters** – The applicant raises an issue regarding the completeness of the PHSA’s response to his request. He asserts that the PHSA had failed to provide copies of internal leadership reports and a supply chain improvement strategy that he had requested. PHSA replies that the only matter at issue in this inquiry is the application of s. 13(1). It asserts that the adequacy of its search for records in accordance with s. 6(1) of FIPPA is not at issue.

[5] The application of s. 6(1) is a new issue. The applicant has not requested permission to introduce the application of s. 6(1) regarding the adequacy of PHSA’s search for records as an issue in this inquiry. As previous orders have indicated, parties must request and receive permission from the OIPC to introduce new issues at an inquiry.¹ The applicant has not done so in this case. I see no compelling reason to allow the applicant to introduce this new issue into the inquiry at this late stage. Therefore, I decline to add, or consider, s. 6(1).

ISSUE

[6] The issue to be decided in this inquiry is whether s. 13(1) authorizes PHSA to withhold information at issue. Under s. 57(1), PHSA has the burden of proving that the applicant has no right of access to the information it withheld under s. 13(1).

DISCUSSION

[7] **Background** – PHSA is the health authority responsible for specialized health care and related services in British Columbia. In 2018, PHSA merged with the BC Clinical Services Society (BCCSS) and took responsibility “in relation to supply chain and the procurement of clinical and non-clinical goods and services”.²

[8] **Records at issue** – The records consist of a report entitled “BCCSS Consulting Engagement Process Review Improvement and Optimization Project Report” (Optimization Report); PHSA working notes relating to implementing the recommendation of the Optimization Report; an incomplete draft of an audit report; notes of proposed updates for the audit report; and a list of frequently asked questions with recommended answers.

[9] There are 125 pages of records in total. PHSA has withheld some information on 11 pages and 16 pages in their entirety.

¹ For example, see Order F12-07, 2012 BCIPC 10 (CanLII), para. 6; Order F10-27, 2010 BCIPC 55 (CanLII), para. 10; Decision F07-03, 2007 BCIPC 30393 (CanLII), paras. 6-11; and Decision F08-02, 2008 BCIPC 1647 (CanLII).

² PHSA’s initial submission, para. 8.

Section 13(1) – advice or recommendations

[10] Section 13(1) allows a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister to protect its deliberative processes.³ The parts of the provision that are relevant in this case read as follows:

- 13 (1) 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.
- (2) The head of a public body must not refuse to disclose under subsection (1)
 - (a) any factual material,
 - ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[11] The first step in the analysis is to determine whether disclosing the information at issue would reveal advice or recommendations under s. 13(1). If it would, the next step is to decide whether the information falls into any of the provisions in s. 13(2) or whether it has been in existence for more than 10 years in accordance with s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, it cannot be withheld under s. 13(1).

Advice or Recommendations

[12] The term “advice” is broader than “recommendations” and includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact” and “expert opinion on matters of fact on which a public body must make a decision for future action”.⁴ “Recommendations” include suggested courses of action that will ultimately be accepted or rejected by the person being advised.⁵ Section 13(1) would also apply when disclosure would allow an individual to make accurate inferences about any advice or recommendations.

³ *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025, para 52.

⁴ *John Doe v Ontario (Finance)* 2014 SCC 36 [John Doe], para 24. *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 113.

⁵ *John Doe*, para 23.

[13] PHSA submits that the information to which it has applied s. 13(1) consists of advice or recommendations. PHSA asserts that it is clear on the face of the Optimization Report and the related working notes that the information that it has withheld constitutes recommendations. It also submits that the working notes also include advice as to how the PHSA should respond to those recommendations.⁶

[14] PHSA describes the draft audit report as advice and recommendations from its internal audit team to management. The process for conducting audits involves the internal audit team performing a review and analysis and formulating preliminary findings for the consideration of management. Management subsequently deliberates on the draft report and may amend the report or require the internal audit team to conduct further work. Once management accepts the findings and recommendations of the draft audit report, it formulates an action plan. Regarding the draft report at issue, PHSA submits that it includes advice and recommendations relating to identification and classification of risks associated with the Engagement Process that was the subject of the Optimization Report. The next record consists of working notes on the draft audit report. It includes assessments of the recommendations to the draft audit report and draft responses to the risks identified. The information withheld from disclosure, PHSA asserts, represents recommended changes to the draft report.⁷

[15] The applicant does not dispute the application of s. 13(1) other than to highlight the need generally for accountability and transparency relating to decisions of senior officials in the health care sector.⁸

Analysis

[16] To meet its burden of proof, PHSA must go further than merely claiming that s. 13(1) applies. It must demonstrate how the exception applies to the specific information at issue. It must explain why the information at issue meets the definition of advice or recommendations.

[17] I have reviewed the information at issue. I confirm that it is obvious on the face of the record that the information that PHSA withheld in the Optimization Report and related notes consist of recommendations. This information falls under the headings of “CEP Improvement Recommendations” and “Staging of Recommendations”. The information in the related notes quotes directly from the recommendations in the Optimization Report and indicates the response of the PHSA to those recommendations. I find that disclosure of this information will reveal advice and recommendations.

⁶ PHSA's initial submission, paras. 26-31.

⁷ PHSA's initial submission, paras. 32-41.

⁸ Applicant's response submission, pp. 4-5.

[18] The information in the draft audit report, apart from a brief introduction, consists entirely of the evaluations of identified risks and recommendations to mitigate those risks. These evaluations and recommendations constitute advice and recommendations. As the entire draft report is subject to amendment and approval of management, the record constitutes recommendations by the internal audit team regarding the material that should be included in the final report. As such, even the brief introduction is a recommendation by the internal audit teams as to what should appear in the introduction. It would be for management to decide whether to accept that recommended description and wording or to change it.

[19] The next record consists of recommended updates or revisions to the draft audit report. It quotes directly from the advice and recommendations in the report. Disclosure of this information would reveal advice or recommendations. The recommended updates and revisions also constitute advice or recommendations.

[20] Therefore, I conclude that PHSA has correctly applied s. 13(1) to all of the information at issue.

Section 13(2)

[21] The applicant does not raise any provisions within s. 13(2) that might apply.

[22] PHSA concedes that the passages in the records contain descriptions of facts, but these descriptions do not constitute “factual material” in accordance with s. 13(2)(a). PHSA submits that all facts in the records are directly related to and form part of the advice and recommendations.⁹

[23] I have reviewed the information that I have found reveals advice and recommendations. I find that none of the information is purely factual. The passages that fall within s. 13(1) consist of recommendations or expert opinions. They do not include any factual background information unrelated to the advice or recommendations. Therefore, I find that s. 13(2)(a) does not apply to any of the information.

[24] PHSA also submits that the draft audit report does not constitute a final report on the performance or efficiency of PHSA, its policies or programs, in accordance with s. 13(2)(g). In the first place, PHSA argues, the matter at issue in the reports was not the performance or efficiency but rather finding ways to address challenges and frustrations within the Engagement process. In the

⁹ PHSA's initial submission, para. 44.

second place, PHSA asserts that it is clear on the face of the report that it is not a final report.¹⁰

[25] I have reviewed the draft audit report. I can confirm that it is clear from the face of the record that it is not a final report. There are many passages that include sections indicating where information would be inserted at a later date. It is obvious that this draft is not yet complete.

[26] Therefore, I find that s. 13(2)(g) does not apply. I see no other provisions within s. 13(2) that might apply. Consequently, I find that s. 13(2) does not apply to any of the information that I found reveals advice or recommendations.

Section 13(3) Information in existence for more than 10 years

[27] Finally, it is clear from the dates of the records that the information has not been in existence for more than 10 years, so I find that s. 13(3) does not apply.

Conclusion, s. 13

[28] In conclusion, I confirm the decision of PHSA to withhold the information at issue under s. 13(1).

CONCLUSION

[29] For the reasons given above, under s. 58 of FIPPA I confirm the decision of PHSA to withhold information under s. 13(1).

April 24, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F20-84240

¹⁰ PHSA's initial submission, paras. 46-49.