



Order F23-67

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Jay Fedorak
Adjudicator

August 22, 2023

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Summary: A property owner requested a copy of the Property Acquisition Manual of the Ministry of Transportation and Infrastructure (Ministry). The Ministry disclosed the record but withheld some information under s. 13(1) (advice and recommendations) and s. 17(1) (financial harm to the public body). The adjudicator found that ss. 13(1) did not apply and he ordered the Ministry to disclose the information it had withheld under that section. He found that ss. 17(1) applied to some of the information and authorized the Ministry to withhold it but ordered the Ministry to disclose the remainder.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 13(1), 17(1)(a), 17(1)(d), 17(1)(f).

INTRODUCTION

[1] A property owner (applicant) requested a copy of the Property Acquisition Manual (Manual) of the Ministry of Transportation and Infrastructure (Ministry). The applicant subsequently reduced the scope of his request to Chapters 3 and 4 of the Manual. The Ministry disclosed the chapters of the Manual but withheld some information under s. 13(1) (advice and recommendations) and s. 17(1) (financial harm to the public body) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested a review by the Office of the Information and Privacy Commissioner. Mediation failed to resolve the matter and it proceeded to an inquiry. In his reply submission, the applicant again reduced the scope of his request to only Chapter 3 of the Manual.

ISSUES

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

1. Whether s. 13(1) authorizes the Ministry to withhold the information at issue.
2. Whether s. 17(1) authorizes the Ministry to withhold the information at issue.

[4] Under s. 57(1), the Ministry has the burden of proving that the applicant has no right of access to the information it withheld under ss. 13, and 17.

DISCUSSION

[5] **Background** – The applicant is the owner of property adjacent to a highway that the Ministry wanted to expand. The Ministry entered into negotiations with the applicant for the purchase of a portion of the applicant's property. The negotiations failed, but the Ministry entered into a temporary licence agreement for the use of a small portion of the applicant's property. The applicant subsequently filed a notice of civil claim against the Ministry for trespass, breach of contract and de facto expropriation of his property.

[6] **Records at issue** – The records initially responsive to the request consist of two chapters of the Manual. However, as explained, the applicant now only seeks access to Chapter 3. Chapter 3 concerns the Property Acquisition Process. It comprises 26 pages and the withheld information is on 19 pages.

Section 13(1) – advice or recommendations

[7] 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.¹ The relevant provision reads 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,
 - ...
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

¹ *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025, para. 52.

[8] 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).

[9] 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”.² “Recommendations” include suggested courses of action that will ultimately be accepted or rejected by the person being advised.³ Section 13(1) would also apply when disclosure would allow an individual to make accurate inferences about any advice or recommendations.

Parties’ submissions

[10] The Ministry acknowledges that s. 13(1) generally does not apply to policy and procedures manuals, as was the case in Order F14-34. It submits that the Manual is different from other policy and procedures manuals. It describes the Manual as advisory rather than prescriptive. It argues that negotiators involved in property acquisition must retain a significant level of latitude and discretion given the unique circumstances of each case. The Ministry characterizes the Manual as a reference guide rather than a policy document. It asserts that the Manual identifies high level objectives and offers advice and recommendations on pursuing those objectives. The Ministry adds that the Manual facilitates business continuity by sharing the knowledge, experience and expertise among staff.⁴

[11] The Ministry submits that the Manual provides guidance rather than direction. It argues that the Manual does not contain any “hard rules, directives, or prescriptive policies”, but rather offers suggestions and cautions for negotiators.

[12] It acknowledges that some of the wording in the passages that it withheld under s. 13(1) appears to be prescriptive. It submits that the phrasing or word choices that the drafters used when drafting the Manual are misleading, and it asserts the intent of the language is to be “permissive”.⁵

[13] The Ministry submits that most of the information to which it has applied s. 13(1) consists of advice. It characterizes some passages as containing advice

² *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 [College of Physicians], para. 113.

³ John Doe *supra*, para 23

⁴ The Ministry’s initial submission, paras. 61-69.

⁵ The Ministry’s initial submission, paras. 74-76.

and recommendations, but it does not differentiate between the information that it believes constitutes recommendations from the information that constitutes advice.

[14] The applicant does not make submissions as to whether the information at issue constitutes advice or recommendations.

Analysis

[15] While adjudicators must not interpret the term “advice” too narrowly, it is equally true they must not define it so broadly that it exceeds the bounds of a purposeful interpretation.

[16] The purpose of s. 13 is to protect the deliberative process by ensuring that advisors provide decision makers with full and frank advice. Advisors must be free of any constraints that could result from the prospect of public disclosure of proffered advice.

[17] The Ministry characterizes the Manual as providing guidance rather than direction, it does not, however, explain how specific passages in the Manual constitute “advice”. The Ministry has not established that such “guidance” equates to “advice” for the purposes of s. 13(1) nor that as a “reference tool” the Manual contains such advice.

[18] I have reviewed the relevant portions of the Manual. It appears to be a training manual that the employer has provided to its employees instructing them with best practices for how to do their job. It does not include expert opinions from an advisor to a decision maker on a specific set of facts. The Manual identifies Ministry objectives and indicates in general terms how best to achieve them. By its very title is a procedures manual. It outlines procedures for employees to follow when facilitating property acquisition. While acknowledging that each case may have its own unique circumstances that may require different approaches, the Manual sets clear expectations and boundaries on employees. I find the Ministry has failed to establish that the information at issue would reveal advice or recommendations. It is not apparent on the face of the record that the information at issue consists of advice or recommendations.

[19] In conclusion, I find that the Ministry has failed to establish that disclosing the withheld passages in the Manual would reveal advice or recommendations under s. 13. Therefore, the Ministry is not authorized to refuse to disclose the information to the applicant under s. 13(1).

Section 13(2)

[20] As I have found that s. 13(1) does not apply, I need not consider the application of any provisions in s. 13(2).

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

[21] Finally, as I have found that s. 13(1) does not apply, I do not need to consider the application of s. 13(3).

Conclusion, s. 13

[22] In conclusion, I find that the Ministry has not proven that it is authorized to refuse to disclose the information it withheld under s. 13(1).

Section 17(1) – harm to the financial or economic interests of the public body

[23] The Ministry is refusing to disclose some information under s. 17(1). The Ministry's arguments raise the following parts of s. 17:

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

(a) trade secrets of a public body or the government of British Columbia;

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

...

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[24] To rely on s. 17(1), the Ministry must establish that disclosure of the information could reasonably be expected to harm its financial interests. The "reasonable expectation of harm" standard for s. 17(1) is "a middle ground between that which is probable and that which is merely possible."⁶ There is no need to show on a balance of probabilities that the harm will occur if the information is disclosed, but the public body must show that the risk of harm is well beyond the merely possible or speculative.⁷

⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 201.

⁷ *Ibid*, para. 206. See also *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, paras. 52-54.

[27] **Section 17(1)(a) (trade secrets)** – The Ministry submits that some of the information that it has withheld under s. 17(1) constitutes its trade secrets. FIPPA defines “trade secret” as follows:

“trade secret” means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that

- (a) is used, or may be used, in business or for any commercial advantage,
- (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
- (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
- (d) the disclosure of which would result in harm or improper benefit.

[25] The Ministry characterizes property acquisition for transportation projects as a “business”. It submits that it keeps the Manual confidential, and it assists the Ministry in saving money. It argues that saving money equates with deriving “independent economic value”. Finally, it submits that disclosing the information it withheld under s. 17(1) would result in financial harm to itself and improper benefit to the property owners it negotiates with.⁸

[28] It also argues that the passages contained in the Manual regarding preparing for property negotiations, including making financial estimates, constitute trade secrets.

[29] The applicant makes no submission with respect to the application of s. 17(1)(a).

Analysis

[30] It is not sufficient for the Ministry merely to claim that s. 17(1) applies. It must demonstrate how the exception applies to the specific information at issue. It must establish a direct connection between the disclosure of that information and the harm it envisages. The Ministry must provide sufficient explanation and evidence (including, but not limited to, examples) to demonstrate that the risk of harm does indeed meet the required standard.

⁸ The Ministry’s initial submission, paras. 107-111, 160.

[31] It is important to note that, with few exceptions, most public bodies provide services, rather than engage in business for profit.⁹

[32] In this case, the Ministry has not established that it is engaged “in business”. It submits that it acquires property for public policy objectives. It makes no mention that it pursues commercial objectives. In the process of negotiating property acquisitions, its stated goal is to ensure that the Ministry pays property owners fair market value and appropriate compensation to ensure that property owners remain in the same financial position as before the acquisition.¹⁰ I am not persuaded that its strategies in determining the fair market value and negotiating with property owners are trade secrets that would prove of value to competitors. It has no competitors who could benefit from the knowledge of these purported trade secrets.

[33] Therefore, I find that the information at issue does not reveal “trade secrets” and s. 17(1)(a) does not apply.

[34] **Section 17(1)(d) (undue gain)** – The Ministry submits that disclosure of its negotiating strategies would result in undue gain to property owners with whom it negotiates property acquisition. It cites previous orders that have found that, if disclosure would give a party an advantage, effectively for nothing in return, the gain to that party would be undue.¹¹ It argues that disclosure of its negotiating strategies would give property owners an advantage in negotiations with the Ministry for nothing in return.¹²

[35] The applicant does not contest the application of s. 17(1)(d).

Analysis

[36] While I accept that disclosure of the information at issue could lead to the Ministry finding it more difficult to conclude negotiations where property owners receive fair market value, I disagree that this could lead to the property owners receiving any undue gain. As the Ministry submits, these types of negotiations are merely one of several options for property acquisition. Under statute, the Ministry is authorized to compel the property owner to sell. While the Ministry said it prefers a negotiated settlement on the terms of fair market value, it has the ability to impose a settlement on those terms. Therefore, I fail to see how disclosure of the Ministry’s negotiating strategies would result in property owners receiving an excessive amount for their properties. The Ministry has the option of

⁹ The Insurance Corporation of British Columbia is an example of public body that engages in business in a competitive marketplace in competition with private sector insurers.

¹⁰ The Ministry’s initial submission, paras. 22-24.

¹¹ The Ministry uses the term “competitor” but I understand it to mean the property owners the Ministry negotiates with.

¹² The Ministry’s initial submission, para. 112; Order 00-10, 2000 BCIPC 11042 (CanLII), p. 18; Order F15-66, 2015 BCIPC 72 (CanLII).

refusing to agree to terms of purchase where the property owner's demands exceed fair market value. The Ministry may incur additional costs in imposing a settlement, but this does not mean that the property owner would realize an undue financial gain.

[37] Therefore, I am not satisfied that disclosing the information at issue could reasonably be expected to result in undue financial gain to a third party. I find that s. 17(1)(d) does not apply in this case.

[38] **Section 17(1)(f) (harm to negotiations)** – The Ministry submits that disclosure of the information at issue would harm its negotiating position during property acquisition negotiations with property owners. It cites a series of previous orders that have found that s. 17(1)(f) apply to the following:

- A public body's negotiating objectives when they include direct financial and economic considerations;
- Information that negatively impacts a public body's ability to negotiate future contracts or treaties;
- Contingency funds/amounts or the ceiling amount available to public bodies in negotiations;
- Project status;
- Assessments of financial costs of future project changes;
- Financial assumptions and expected savings targets;
- Evaluation of risks associated with financial models; and
- How best to estimate revenue sharing from various projects and how those different methods may apply to revenue generated from the project.¹³

[39] The Ministry submits that disclosure of some of the information at issue would harm the negotiating position of a public body or the government of British Columbia.¹⁴

[40] The Ministry also submits that disclosure of the information at issue would "Reveal BC's negotiating interests and objectives and the Ministry's negotiation techniques and negotiation strategy unfairly putting the Ministry in a weaker negotiating position than a private citizen".¹⁵

[41] The applicant makes no submission regarding the application of s. 17(1)(f).

¹³ The Ministry's initial submission, para. 130; Order 02-50, 2002 BCIPC 51 (CanLII), paras. 47, 52-53, 64, 140 and 149; Order F20-38, 2020 BCIPC 44 (CanLII); F10-34, 2010 BCIPC 50 (CanLII), para. 24; Order 03-35, 2003 BCIPC (CanLII) Order 03-35, 2003 BCIPC 49214 (CanLII); F20-48, 2020 BCIPC 57 (CanLII), paras. 229-43; Order F20-20, 2020 BCIPC23 (CanLII), para. 113-19; Order 18-51, 2018 BCIPC 55 (CanLII), paras. 10, 18, 23, 29, 55 and 57.

¹⁴ The Ministry's initial submission, paras. 15-16.

¹⁵ The Ministry's initial submission, para. 132.

Analysis

[42] It is clear from the face of the records that the disclosure of some of the information to which the Ministry has applied s. 17(1) would harm the Ministry's negotiating position. The Manual indicates that the Ministry has several financial and non-monetary objectives in negotiating licences and property acquisition. It is reasonable to conclude that revealing information about terms that its employees must seek to include in an agreement, or terms that they must or should be willing to concede to property owners, would give those property owners leverage in the negotiations. The disclosure of the Ministry's non-monetary objectives would also give leverage to the property owners. This could make it more difficult or costly to achieve a settlement and could reasonably be expected to cause the Ministry financial harm. Therefore, I find that s. 17(1)(f) applies to this information.

[43] The Ministry has also withheld some information regarding the administration of the negotiation process. This information relates to activities beyond the control of the property owners, and which are not subject to negotiation, such as Ministry record keeping requirements. These are standard procedures or legal requirements. The Ministry has not demonstrated how disclosure of this information would give any leverage to the property owners or otherwise make it more difficult or costly for the Ministry to achieve a settlement during negotiations. It is not apparent on the face of the record how disclosure of this information could reasonably be expected to harm the Ministry's negotiating position under s. 17(1)(f) or cause the Ministry financial harm more generally under s. 17(1).

Conclusion on s. 17(1)

[44] I find that s. 17(1) applies to some, but not all, of the information that the Ministry has withheld under that provision. I have highlighted the information that the Ministry may refuse to disclose under s. 17(1) in a copy of the records which is provided to the Ministry along with this order.

CONCLUSION

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

1. Section 13(1) does not authorize the Ministry to withhold any of the information at issue.
2. I confirm in part the decision of the Ministry to withhold information under s. 17(1). I have highlighted the information that Ministry may refuse to disclose under s. 17(1) in a copy of the records which is provided to Ministry along

with this order. It must disclose all information in the responsive records, except the passages that I have highlighted.

3. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 2 above.

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

August 22, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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