



Order F23-93

MINISTRY OF FINANCE

Rene Kimmett
Adjudicator

November 1, 2023

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Summary: The applicant requested access to information about an assessment of its property transfers conducted by the Ministry of Finance (Ministry) under the *Property Transfer Tax Act* (BC) and the Ministry's review of the applicant's objection to this assessment. The adjudicator reviewed the Ministry's decision to withhold some responsive information under s. 13(1) (advice and recommendations) of the *Freedom of Information and Protection of Privacy Act*. She determined the Ministry was authorized to withhold some but not all of the information in dispute under s. 13(1) and ordered the Ministry to provide the applicant with access to the information it was not authorized to refuse to disclose.

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

INTRODUCTION

[1] A corporation (applicant) requested access to information about an assessment of its property transfers conducted by the Ministry of Finance (Ministry) under the *Property Transfer Tax Act*¹ (PTTA) and the Ministry's review of the applicant's objection to this assessment.

[2] The Ministry responded to the applicant by partially disclosing 240 pages of records, withholding some information under the following sections of the *Freedom of Information and Protection of Privacy Act* (FIPPA): ss. 13 (advice and recommendations), 15 (harm to law enforcement), 21(1) (harm to third-party business interests), and 22 (unreasonable invasion of third-party privacy).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information

¹ *Property Transfer Tax Act*, RSBC 1996, c 378

under ss. 13 and 15. Mediation resolved the dispute under s. 15 but not under s. 13. The matter proceeded to inquiry.

PRELIMINARY MATTER

[4] The applicant sought to file a sur-reply in response to the Ministry's reply submission. The applicant said the sur-reply “was submitted to address points not made in the Ministry's original submission.”²

[5] The registrar denied the applicant's request and stated that the adjudicator may seek further submissions from the parties if fairness requires. I have not read the sur-reply the applicant sought to file.

[6] The OIPC's guidance document “Instructions for written inquiries” sets out the expectations for written submission.³ In a FIPPA inquiry, the public body provides an initial submission, followed by the applicant, and then the public body has the opportunity to provide a reply submission. The reply submission must only reply to what is contained in the applicant's submission.

[7] I find that the Ministry's reply submission appropriately responds to only the information contained in the applicant's submission and does not introduce information that is not directly responsive to the information submitted by the applicant. Accordingly, I find that a sur-reply from the applicant would not be fair in the circumstances, and I do not require additional submissions from either party to fairly decide the issues in this inquiry.

ISSUES

[8] In this inquiry, I must decide whether the Ministry is authorized to withhold the information in dispute under s. 13(1).

[9] Under s. 57(1) the Ministry has the burden of proving it is authorized to withhold the information in dispute under this section.

DISCUSSION

Background

[10] The background information below was provided by the Ministry in its initial submission. The applicant accepted these facts for the purpose of its submission.⁴

² Applicant's January 24, 2023 email to the OIPC and Ministry.

³ “Instructions for written inquiries” at 4.

⁴ Applicant's submission at para 1.1.

[11] Under the PTTA, a taxpayer may object to the Ministry's assessment of their property transfer.⁵ An appeals officer reviews the original assessment and the taxpayer's objection and makes a preliminary recommendation on the outcome of the objection.⁶ This preliminary recommendation is provided to the taxpayer and to a director and executive director.⁷

[12] Ministry staff then give the statutory decision-maker (i.e., the Minister of Finance, the Minister's delegate, a deputy minister or an associate deputy minister), a report that includes advice and recommendations about the objection.⁸ The statutory decision-maker reviews the recommended decision and sends a decision letter to the taxpayer notifying them that the assessment has been affirmed, varied, or reversed.⁹ The statutory decision-maker is not required to accept the recommendations of Ministry staff or the findings or assumptions of fact made by the original assessor.¹⁰

[13] The applicant filed an objection in relation to the Ministry's assessment of its property transfers. Ministry staff reviewed the objection using the above process¹¹ and gave the applicant its preliminary recommendation in September 2020.¹² A statutory decision-maker issued a final decision in August 2022.¹³

Records at issue

[14] The records in dispute are 18 completely withheld pages of a 240-page package. The withheld information is contained in three documents: 1) Summary of Assessment; 2) Draft Memorandum of Advice; and 3) Draft Decision Letter.

Advice and recommendations – s. 13

[15] Section 13(1) states:

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.

[16] A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations,

⁵ Ministry's initial submission at para 14 and 32.

⁶ *Ibid* at para 18

⁷ *Ibid* at para 19.

⁸ *Ibid* at para 29.

⁹ *Ibid* at paras 27, 28, and 31.

¹⁰ *Ibid* at paras 29 and 33.

¹¹ *Ibid* at paras 34 and 36.

¹² *Ibid* at para 18.

¹³ *Ibid* at para 34.

but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.¹⁴

[17] “Recommendations” include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.¹⁵ “Advice” has a broader meaning than the term “recommendations.”¹⁶ It includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.¹⁷

[18] The purpose of s. 13(1) is to allow public bodies to engage in free and frank discussion of advice and recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of decision-making were subject to excessive scrutiny.¹⁸ While the purpose of the provision is to prevent harm, a public body relying on s. 13 is not required to prove that harm may result from disclosure of the withheld information.¹⁹

[19] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) or (3) apply. Subsections 13(2) and (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).

Ministry's initial submission

[20] The Ministry submits that disclosure of the information in dispute would reveal advice or recommendations²⁰ or would allow an individual to accurately infer advice or recommendations developed by Ministry employees for the purpose of informing a statutory decision-maker.²¹

[21] The Ministry submits that none of the categories listed under s. 13(2) apply to the information in dispute. In particular, the Ministry submits s. 13(2)(a) does not apply because none of the information in dispute is factual material.²² Alternatively, if I find it is factual material, the Ministry submits that the information is inextricably interwoven with and integral to the advice or recommendations and the

¹⁴ Order 02-38, 2002 CanLII 42472 (BCIPC) at para 135; Order F17-19, 2017 BCIPC 20 (CanLII) at para 19; Order F20-29, 2020 BCIPC 35 at para 56.

¹⁵ *John Doe v Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at para 23.

¹⁶ *Ibid* at para 24.

¹⁷ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

¹⁸ Order 01-15, 2001 CanLII 21569 (BCIPC) at para 22; Order F15-61, 2015 BCIPC 67 at para 28.

¹⁹ Order F15-44, 2015 BCIPC 47 at para 25; Order F15-59, 2015 BCIPC 62 at footnote 31.

²⁰ Ministry's initial submission at para 62.

²¹ *Ibid* at para 64.

²² *Ibid* at para 70.

implications of those advice or recommendations, such that it cannot be reasonably severed from the information properly subject to s. 13.²³

[22] The Ministry submits that the information in dispute was not created more than ten years ago and, as such, s. 13(3) does not apply in the circumstances.²⁴

Applicant's submission

[23] The applicant submits that the Ministry erred in withholding the information in dispute for the following five reasons.

[24] First, the applicant argues that discussions, consultations, and opinions are neither advice nor recommendations.²⁵ It relies on case law from other jurisdictions to support this position.²⁶

[25] Second, the applicant argues that s. 13(1) only applies to policy advice and recommendations and submits that the Ministry has not suggested that the information in dispute relates to policy rather than facts and how the law applies to those facts.²⁷

[26] Third, the applicant submits that it knows “the nature of the ultimate advice or recommendation” because it received the final decision regarding its objection to the Ministry's assessment.²⁸ It submits that, because it knows the outcome, disclosure of the information in dispute would not have the effect of discouraging the free flow of information among government officials and, therefore, would not be contrary to the purpose of s. 13(1).

[27] Fourth, the applicant argues that s. 13(1) can only be used to withhold information that would reveal advice or recommendations developed for a minister and not, as was the case here, a deputy minister.²⁹ The applicant acknowledges that legislation that applies to a “minister” is usually read to also apply to a deputy or associate deputy minister as stipulated by s. 23(1) of the *Interpretation Act*.³⁰ However, the applicant submits that FIPPA contains a contrary intention³¹ that requires the word “minister”, in the context of s. 13(1), to mean only a minister and not a deputy or associate deputy minister. The contrary intention, as explained by

²³ Ministry's initial submission at para 71.

²⁴ *Ibid* at para 73.

²⁵ Applicant's submission at para 3.29 and 3.32.

²⁶ *Ibid* at paras 3.29-3.30, citing Order No. FI-18-005, 2018 CanLII 54181 (PE IPC); Interim Order PO-2054-I, 2002 CanLII 46456 (ON IPC); Order PO-3111, 2012 CanLII 58082 (ON IPC).

²⁷ Applicant's submission at para 3.33.

²⁸ *Ibid* at para 3.36.

²⁹ *Ibid* at para 3.13.

³⁰ *Interpretation Act*, RSBC 1996, c 238.

³¹ Section 2(1) of the BC *Interpretation Act* states: “Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act of the enactment.”

the applicant, is that s. 3(2)(a) of FIPPA does not apply to Part 2 of FIPPA, where s. 13(1) is located. Section 3(2)(a) says Part 3 of FIPPA applies to all employees, officers and directors of a public body. I understand the applicant to be arguing that if the Legislature wanted s. 13(1) to be read to include a deputy minister (or other employees, officers and directors) it would have explicitly stated this somewhere in FIPPA, rather than rely on the interpretation of “minister” dictated by the *Interpretation Act*.

[28] Lastly, the applicant argues that s. 13(1) refers to advice or recommendations developed “by the Ministry as the Ministry” and does not apply to anything developed by the Ministry’s employees “on their own behalf.”³² To support this position, the applicant again points to s. 3(2)(a) of FIPPA, which says that Part 3 of FIPPA applies to “all employees, officers and directors of a public body”.³³ The applicant notes that s. 13(1) is located in Part 2, not Part 3, of FIPPA.³⁴ I understand the applicant to be arguing that if the Legislature wanted s. 13 to apply to information that would reveal advice or recommendations developed by ministry “employees, officers and directors” then this would be explicitly stated in FIPPA.

[29] The applicant also contrasts the language of s. 13(1) with a similar provision found in Ontario’s FOIPPA,³⁵ which states:

13(1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[30] I understand the applicant to be arguing that Ontario’s legislation clearly states that the provision applies to the advice and recommendations of public servants, employees, and consultants and that, since BC’s FIPPA does not contain this clear statement, BC’s Legislature did not intend s. 13(1) to apply to advice or recommendations developed by public servants, ministry employees, or consultants.

Ministry’s reply submission

[31] In its reply, the Ministry submits that it disagrees with the applicant’s argument that advice and recommendations do not include discussions, consultations, or opinions.³⁶ It submits that s. 13 protects any instance where a public body is engaged in its internal decision-making process and considering

³² Applicant’s submission at para 3.22-3.23.

³³ *Ibid* at para 3.20.

³⁴ *Ibid* at para 3.21.

³⁵ *Ibid* at para 3.19.

³⁶ Ministry’s reply submission at para 22.

all potential outcomes.³⁷ It also submits that the deliberative process includes the investigation and fact-gathering necessary to consider specific or alternative courses of action.³⁸ The Ministry further submits that “advice” has been interpreted as including “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.”³⁹ The Ministry submits that if the discussions and consultations surrounding the Ministry's internal decision-making process were revealed, an individual would be able to draw accurate inferences regarding advice or recommendations.⁴⁰

[32] The Ministry submits that it disagrees with the applicant's argument that s. 13(1) is directed only at policy advice or recommendations.⁴¹ It states that while the word “policy” appears in the headnote above s. 13, it does not limit s. 13 to only “policy” advice. The Ministry submits that headnotes are not part of an enactment.⁴² The Ministry also cites an OIPC order that states that s. 13(1) is not limited to decisions only about “government policy”⁴³ and another OIPC order that lists examples of information that may be included under s. 13(1), including policy options, implications of options, expert opinions, pros and cons for a decision maker to consider, or editorial comments or track changes for drafters to consider.⁴⁴

[33] The Ministry submits that “minister” in s. 13(1) is to be read to include a deputy or associate deputy of the minister in accordance with s. 23(1) of the *Interpretation Act*⁴⁵ and that there is no contrary intention in FIPPA or the *Interpretation Act*.⁴⁶ The Ministry argues that the applicant misunderstands various paragraphs and parts of FIPPA.⁴⁷ It submits that this inquiry is about ensuring the Ministry's severing of the responsive records is consistent with Part 2, Division 2 (exceptions to the right of access) and, therefore, Part 3 of FIPPA (protection of privacy) is not relevant to this inquiry.⁴⁸

[34] In reply to the applicant's argument that s. 13(1) applies to the Ministry itself and not its employees, the Ministry submits that it is impossible for s. 13(1) to apply to only the “Ministry itself” and not the Ministry's employees, who carry out the daily work of the ministry.⁴⁹ The Ministry also points out that s. 13 of FIPPA uses the

³⁷ *Ibid* at para 22, citing Order 01-15, 2001 CanLII 21569 (BC IPC).

³⁸ Ministry's reply submission at para 23, citing *College*, supra note 17 at para 106.

³⁹ *Ibid* at para 24, citing *College*, supra note 17 at paras 112-113.

⁴⁰ *Ibid* at para 28.

⁴¹ *Ibid* at para 29.

⁴² *Ibid* at para 30, citing Ministry of Justice, “Part 2: Principles of Legislative Drafting”, *Guide to Legislation and Legislative Process in British Columbia* (August 2013) at 12-13.

⁴³ Ministry's reply submission at para 30, citing OIPC Order F20-32, 2020 BCIPC 38 at para 33.

⁴⁴ *Ibid* at para 31, citing OIPC Order F21-32, 2021 BCIPC 40 at footnote 35.

⁴⁵ *Ibid* at para 6.

⁴⁶ *Ibid* at para 8.

⁴⁷ *Ibid* at para 13.

⁴⁸ *Ibid* at paras 13-14.

⁴⁹ *Ibid* at para 16.

words advice or recommendations developed “by or for” and not advice or recommendations “of the Ministry”.⁵⁰

[35] The Ministry submits that Ontario's FOIPPA legislation does not support the applicant's argument because s. 13(1) in BC's FIPPA is drafted from the perspective of “who the advice is for” whereas the Ontario provision expresses a similar idea but from the perspective of “who provided the advice or recommendations”.⁵¹ The Ministry submits that the present inquiry is about the application of s. 13 of FIPPA and, therefore, the wording of Ontario's equivalent legislation is not relevant to whether the Ministry is authorized to withhold the information in dispute.⁵²

Analysis

Section 13(1)

[36] I will first consider whether disclosing the withheld information “would reveal advice or recommendations developed by or for a public body or a minister” within the meaning of s. 13(1).

[37] Turning first to the Summary of Assessment, I find only the last line contains information that would reveal advice or recommendations developed by or for the Ministry. The last line of this record clearly contains a recommendation. The rest of this record contains only factual statements providing a high-level summary of the Ministry's assessment of the applicant's property transfers. The Ministry has not persuaded me that this information would reveal, or allow accurate inferences to be made about, a recommended course of action or an opinion based on an exercise of judgment or skill. The lack of detail in this record and its relatively casual tone also makes it clear that the language itself is not being put forward as a recommendation or advice.

[38] Looking next at the information in the Draft Memorandum of Advice and the Draft Decision Letter, I find this information would reveal advice and recommendations developed by or for the Ministry. These records contain tracked changes, which convey advice and recommendations on how to best communicate to the statutory decision-maker or applicant, as applicable. In these records, ministry staff also exercise their skill and judgment to put forth findings of fact and conclusions that the statutory decision-maker has the discretion to accept or reject.

[39] I have carefully considered the applicant's arguments and, for the following reasons, am not persuaded by them.

⁵⁰ Ministry's reply submission at para 17.

⁵¹ *Ibid* at para 11.

⁵² *Ibid* at para 12.

[40] First, the applicant's argument that advice and recommendations do not include “discussions, consultations and opinions” is not supported by relevant case law. In *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, the Honourable Madam Justice Levine said, “In my view, [the word 'advice'] should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.”⁵³ Numerous OIPC orders rely on this interpretation of the word advice in the context of s. 13(1).⁵⁴ The applicant's submission does not persuade me that an alternative interpretation of advice is appropriate in the circumstances.

[41] Second, the applicant's submission that s. 13(1) only applies to policy-related advice and recommendations seems to be based on the headnote above s. 13(1), which says “Policy advice or recommendations”. The applicant's position is not supported by the conventions of statutory interpretation. Generally, headnotes are not part of an enactment and are provided for editorial convenience only.⁵⁵ Where judges have accepted that headnotes can indicate legislative meaning, they have not assigned them much value.⁵⁶ Additionally, numerous OIPC orders have found that a public body was authorized, under s. 13(1), to refuse to disclose information that would reveal advice or recommendation unrelated to policy.⁵⁷ I see no reason to deviate from this interpretation of advice and recommendations previously used by OIPC adjudicators.

[42] Third, I am not persuaded that the applicant already knows “the nature of the ultimate advice or recommendation” simply because it received the final decision regarding its objection to the Ministry's assessment. I recognize that past orders have found that s. 13(1) does not apply to advice or recommendations that have already been revealed.⁵⁸ However, that is not the situation here. Here, the applicant is only speculating that it knows the advice or recommendations developed by or for the Ministry. While the applicant knows the ultimate outcome of the decision, there is nothing before me to suggest that the substance of the advice and recommendations at issue has already been revealed elsewhere.

[43] Fourth, I am not persuaded by the applicant's argument that s. 13(1) does not apply to advice or recommendations developed for a deputy minister. The applicant has not adequately explained its submission that FIPPA contains a contrary intention that prevents “minister” in s. 13(1) from being read to include

⁵³ *College of Physicians*, *supra* note 17 at para 113.

⁵⁴ See e.g., Order F22-56, 2022 BCIPC 63 at para 13; Order F22-53, 2022 BCIPC 60 at para. 30; Order F22-43, 2022 BCIPC 48 at para 55.

⁵⁵ *Interpretation Act*, *supra* note 30 at s 11(1).

⁵⁶ See e.g., *Imperial Oil v Canada*, 2006 SCC 46 at para 57.

⁵⁷ See e.g., Order F23-27, 2023 BCIPC 31 at para 19; Order F22-27, 2022 BCIPC 30 at paras 10 and 27; Order F21-50, 2021 BCIPC 58 at para 74; Order F16-30, 2016 BCIPC 33 at para 24; Order F12-15, 2012 BCIPC 21 at para 12.

⁵⁸ See e.g., Order F23-13, 2023 BCIPC 15 at para 13; Order F20-32, 2020 BCIPC 38 at paras 36-37; Order F12-15, 2012 BCIPC 21 at paras 13 and 19.

“deputy minister” as would otherwise be the case in accordance with s. 23(1) of the *Interpretation Act*. In any event, s. 13(1) also explicitly applies to information that would reveal advice or recommendations developed by or for a “public body” which FIPPA defines as including “a ministry of the government of British Columbia”. The applicant does not argue and nothing before me suggests that the deputy minister is not part of the Ministry whose records are at issue here.

[44] Lastly, I am not persuaded by the applicant's submission that s. 13(1) does not apply because the advice or recommendations were developed by the Ministry's employees rather than the Ministry.⁵⁹ There is nothing before me to support the applicant's suggestion that the employees were developing the advice or recommendations “on their own behalf”, as the applicant submits, rather than on behalf of their employer, the Ministry. The applicant has also not explained how a ministry could conceivably develop advice or recommendations by itself without the involvement of individuals, such as employees or other agents. Additionally, s. 13(1) explicitly applies to information that would reveal advice and recommendations developed by or for a public body or minister. The provision does not place restrictions on who may develop the advice or recommendations “for” the public body or minister. It is clear on the face of the records that the advice and recommendations were developed for a public body.

[45] In summary, I find that most of the information in the Summary of Assessment would not reveal advice or recommendations and, therefore, cannot be withheld under s. 13(1). However, I conclude that the rest of the information severed from the records under s. 13(1) is information that would reveal advice or recommendations developed by or for the Ministry. I will now consider whether the information that reveals advice or recommendations falls into any of the categories under ss. 13(2) and 13(3).

Sections 13(2) and 13(3)

[46] As noted above, the Ministry submits that the information in dispute does not fall within any of the categories under s. 13(2), including s. 13(2)(a). Section 13(2)(a) says that the head of a public body must not refuse to disclose any “factual material” under s. 13(1). The Ministry draws a distinction between “factual material” and “factual information”. It states:

Factual material is the building block of factual information as “material exists prior to its use in service of a particular goal”. It is the selection by a public servant, exercising their skill and judgment to identify the factual material as being a relevant consideration in the development of the advice or recommendation that changes the

⁵⁹ For a similar finding, see Order F23-18, 2023 BCIPC 21 at para 29.

factual material (which must be released) into factual information which may be withheld pursuant to section 13.⁶⁰

[47] I am satisfied the withheld facts in the records are “factual information” compiled by employees, using their expertise, for the specific purpose of aiding the deliberative process⁶¹ and are not “factual material” within the meaning of s. 13(2)(a).

[48] The parties did not raise any other categories under s. 13(2). I find that no other category under this subsection is relevant to the information in dispute.

[49] I note that all the records in dispute were created sometime between December 2019 and August 2022 and, as a result, I find that s. 13(3) does not apply to them.

[50] In summary, the Ministry is authorized by s. 13(1) to refuse to disclose all the information I found reveals advice or recommendations.

Summary of findings

[51] I find that the Ministry is authorized to refuse to disclose all the information in the Draft Memorandum of Advice and Draft Decision Letter as well as the last line of the Summary of Assessment under s. 13(1). The Ministry must disclose the remainder of the Summary of Assessment to the applicant.

CONCLUSION

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

1. Subject to item 2 below, I confirm, in part, the Ministry's decision to refuse to disclose the information in dispute under s. 13(1).
2. The Ministry is not authorized under s. 13(1) to refuse to disclose the information that I have highlighted in a copy of the Summary of Assessment provided to the Ministry with this order. The Ministry is required to give the applicant access to the highlighted information.
3. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant together with a copy of the records described in item 2 above.

⁶⁰ Ministry's initial submission at para 67, citing *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [PHSA] at paras 93-95.

⁶¹ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para 52; PHSA, *supra* note 60 at para 91.

[53] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by **December 14, 2023**.

November 1, 2023

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F21-86134