



Order F23-95

METRO VANCOUVER

Jay Fedorak
Adjudicator

November 10, 2023

CanLII Cite: 2023 BCIPC 111
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 111

Summary: The Association of Professional Engineers and Geoscientists of the Province of British Columbia (applicant) requested records from the Metro Vancouver Regional District (Metro Vancouver). These records included a copy of a report Metro Vancouver had prepared for WorkSafeBC regarding an incident at a dam that resulted in the deaths of two members of the public. Metro Vancouver disclosed some information but withheld the remainder under s. 13(1) (advice and recommendations), s. 15(1) (harm to law enforcement), s. 19(1) (harm to public safety) and s. 22(1) (unreasonable invasion of privacy). The applicant raised the application of s. 25(1) (public interest disclosure). The adjudicator found that s. 25(1) applied. The adjudicator ordered Metro Vancouver to disclose the report.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 25(1)(a); *Workers' Compensation Act* RSBC 2019 c. 1, ss. 69(1), 71 and 72; *Professional Governance Act* SBC 2018 c. 47, s. 109.

INTRODUCTION

[1] The Association of Professional Engineers and Geoscientists of the Province of British Columbia (applicant) requested records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) from the Metro Vancouver Regional District (Metro Vancouver). These records included a copy of a report (the Report) Metro Vancouver had prepared for WorkSafeBC regarding an incident at a dam that resulted in the deaths of two members of the public. Metro Vancouver disclosed some information but withheld the remainder under s. 13(1) on the grounds that it constituted advice and recommendations, s. 15(1) on the grounds that disclosure would harm law enforcement, and s. 22(1) on the grounds that disclosure would be an unreasonable invasion of privacy of third parties.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review Metro Vancouver's decision to deny access to the

information. The applicant also raised the application of s. 25(1) on the grounds that disclosure was in the public interest. Metro Vancouver subsequently raised the application of s. 19(1) on the grounds that disclosure could harm public safety. Mediation failed to resolve the matter and the applicant requested that it proceed to an inquiry.

[3] The applicant and Metro Vancouver subsequently agreed to narrow the records in dispute in the inquiry to just the 27-page Report¹. The registrar of inquiries invited two appropriate persons to participate in the inquiry and make submissions with respect to the application of s. 22(1).

ISSUE

[4] The issues in this inquiry are:

1. Does s. 25(1) require Metro Vancouver to disclose the information without delay;
2. Does s. 13 (1) authorize Metro Vancouver to refuse to disclose information;
3. Does s. 15(1) authorize Metro Vancouver to refuse to disclose information;
4. Does s. 19(1) authorize Metro Vancouver to refuse to disclose information; and
5. Does s. 22(1) require Metro Vancouver to refuse to disclose personal information.

[5] Under s. 57(1), Metro Vancouver has the burden of proving that the applicant has no right of access to the information it withheld under ss. 13(1), 15(1) and 19(1). Under s. 57(2) of FIPPA, the applicant has the burden of proving that disclosure of any personal information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1) of FIPPA, while Metro Vancouver has the burden of proving that the information at issue is personal information.² There is no statutory burden of proof with respect to the application of s. 25(1). Previous orders have indicated that it is in the interests of both parties to provide the adjudicator with whatever evidence and argument they have regarding s. 25(1).³

¹ Applicant's response submission, para. 94; Email correspondence: Applicant to registrar of inquiries, 14 February 2023; Metro Vancouver to registrar of inquiries, 14 February 2023.

² Order 03-41, 2003 BCIPC 41 (CanLII), paras 9-11.

³ For example, see: Order 02-38, 2002 BCIPC 38 (CanLII) and Order F07-23, 2007 BCIPC 38 (CanLII).

DISCUSSION

Background

[6] Metro Vancouver is a regional district consisting of 21 municipalities, one electoral area and the Tsawwassen First Nation. One of its core responsibilities is to provide drinking water. One third of the drinking water for Metro Vancouver comes from the Capilano Reservoir, which Metro Vancouver manages through the use of a dam. In October 2020, the dam released a massive amount of water without notice to the users of the Capilano River, causing the deaths of two members of the public.⁴

[7] Section 69(1) of the *Workers' Compensation Act* (WCA) required Metro Vancouver to investigate to determine the cause of the incident, identify any unsafe conditions, acts or procedures that contributed to the incident and determine the corrective action necessary to prevent the recurrence of similar incidents.⁵

[8] The applicant is a local public body under FIPPA and a self-governing professional body of engineers and geoscientists in British Columbia, established under the *Engineers and Geoscientists Act*⁶. Since 2018, the applicant has been governed by the *Professional Governance Act* (PGA)⁷. It has statutory responsibility to oversee individual professional engineers as well as “firms”⁸, such as Metro Vancouver, that engage in the regulated practice of engineering.⁹

[9] Its mandate is to protect the safety of the public by establishing and enforcing registrants’ standards of practice. Professional engineers work in many areas of practice that have a direct impact on public safety. In accordance with s. 58(3) of the PGA, registrants, including firms, must report to the applicant when they have probable grounds to believe that a registrant is engaged in a regulated practice in a manner that poses a threat to public safety.¹⁰

[10] A number of agencies, including the applicant, regulate the operation of dams in British Columbia. The applicant’s role is to oversee professional engineers in the safe operation of dams. The applicant has produced guidelines for engineers for this purpose. The applicant has previously investigated

⁴ Metro Vancouver’s initial submission, paras. 1, 19-22.

⁵ Metro Vancouver’s initial submission, para. 30; *Workers' Compensation Act* RSBC 2019 c. 1, ss. 69(1), 71 and 72.

⁶ *Engineers and Geoscientists Act* RSBC 1996 c. 116.

⁷ *Professional Governance Act* SBC 2018 c. 47.

⁸ The PGA defines “firm” as including a government registrant proscribed by regulation.

⁹ Applicant’s response submission, paras 7-8.

¹⁰ Applicant’s response submission, paras. 18-29

allegations that professional engineers had contravened its standards of practice while operating dams.¹¹

[11] The applicant became aware of the role of registrants in the incident through media reports. The applicant contacted Metro Vancouver (which is a registrant subject to oversight by the applicant) seeking any information regarding possible unprofessional conduct on the part of any professional registrants. Metro Vancouver indicated that it would provide this information, but later insisted that the applicant must make a request under FIPPA. Metro Vancouver subsequently informed the applicant that a FIPPA request would not be necessary, as Metro Vancouver intended to provide all of the relevant information. Metro Vancouver indicated that it was preparing the Report for WorkSafeBC and promised to provide the applicant with a copy, once it completed the report. Metro Vancouver subsequently changed its mind again and refused to provide a copy of the Report or any other record unless the applicant made a request under FIPPA.¹²

[12] In response to the applicant's FIPPA request, Metro Vancouver informed the applicant that it was withholding all of the records in their entirety under ss. 13(1), 15(1), and 22(1).

Record at issue

[13] As explained above, the parties agreed to narrow the scope of the inquiry to Metro Vancouver's decision to refuse access to information in the 27-page Report. The Report is about the events relating to the incident at the dam that led to the deaths of two members of the public and measures that Metro Vancouver had taken to improve safety in light of the incident. Metro Vancouver withheld almost the entire contents of the report, disclosing only a few headings, sentences and phrases.

Public interest disclosure – section 25

[14] Section 25 requires a public body to disclose information in certain circumstances without delay despite any other provision of FIPPA. This section overrides all FIPPA's discretionary and mandatory exceptions to disclosure. The applicant submits that both ss. 25(1)(a) and (b) apply. The relevant parts of s. 25 state:

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

¹¹ Applicant's response submission, paras. 30-45.

¹² Applicant's response submission, paras. 71-78; Affidavit of Associate Director, Investigation and Discipline, paras. 20-25.

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

[15] Because s. 25 overrides all other provisions in FIPPA, previous orders have found that it applies in only the clearest and most serious situations. Section 25 sets a high threshold, intended to apply only in significant circumstances.

Section 25(1)(a) - Risk to health or safety of the public

[16] Section 25(1)(a) requires a public body to immediately disclose information about a risk of significant harm to the environment or to human health or safety. Former Commissioner Loukidelis stated that determining whether s. 25(1)(a) applies is contextual and he provided the following non-exhaustive list of types of information that should be disclosed under s. 25(1)(a):

- Information that discloses the existence of the risk;
- Information that describes the nature of the risk and the nature and extent of any harm; and
- Information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.¹³

[17] The applicant submits that Metro Vancouver should disclose the entire Report in accordance with s. 25(1)(a) because it contains information relating to a significant risk of harm to public health and safety. Two members of the public died as a result of the incident. Metro Vancouver has indicated that engineering issues or the conduct of registrants were the cause of the incident.¹⁴ The applicant notes that Metro Vancouver terminated the employment of certain registrants responsible for the incident, and some of them have obtained employment elsewhere.¹⁵

[18] Based on the little information that Metro Vancouver disclosed pursuant to the FIPPA request at issue, the applicant asserts that the information withheld relates to the applicant's mandate to protect the health and safety of the public.

¹³ Order 02-38, 2002 BCIPC 38 (CanLII), para. 56.

¹⁴ Applicant's response submission, para. 256.

¹⁵ Applicant's response submission, para. 98.

[19] The applicant submits that:

the nature of the information in the Report is responsive to the Applicant's public safety mandate. This includes but is not limited to the sections regarding: the conditions that contributed to the Incident (so the Applicant can obtain all relevant information about the registrants and regulated practice involved), as well as the corrective actions taken by the Public Body to prevent similar occurrences (so the Applicant can also consider whether recommendations for corrective action have been undertaken and whether there is an ongoing public safety risk).¹⁶

[20] The applicant observes that Metro Vancouver has withheld information about engineering operations related to safety and the identities of individuals who might possess important information about such matters. The applicant explains that it already knows the identity of, and could interview, any registrants who may have information relevant to the investigation. However, it does not know the identity of, or have the ability to interview, non-registrants who may have provided relevant information to the investigator that may be contained in the Report.¹⁷

[21] The applicant argues:

The information [in] the Report is critical to the Applicant's understanding of the Incident. Without the Report, the Applicant is unable to confirm whether it has all available evidence and an accurate account of the cause of the Incident, including with respect to the involvement of the registrants.¹⁸

[22] The applicant argues that it serves the public interest by protecting the health and safety of the public and it requires a copy of the Report to fulfill that purpose. It concludes that it is in the public interest of promoting public safety for Metro Vancouver to provide it with a copy of the Report.

[23] Metro Vancouver submits that disclosing the Report to the applicant under s. 25(1) would pose a threat to public safety and that the applicant has other means for obtaining access to the Report.¹⁹ It also argues that a finding that s. 25(1) applies in this case would set a precedent whereby public bodies would be required proactively to disclose information to any regulatory body with a public interest mandate, where that information would be related to an investigation by that body.²⁰ Furthermore, it asserts that for s. 25(1) to apply, the record must be disclosed to the public generally. Metro Vancouver takes the position that s. 25(1) cannot apply to a disclosure limited to one applicant.²¹

¹⁶ Applicant's response submission, para. 99.

¹⁷ Applicant's response submission, para. 133.

¹⁸ Applicant's response submission, para. 136.

¹⁹ Metro Vancouver's initial submission, para. 166.

²⁰ Metro Vancouver's reply submission, para. 34.

²¹ Metro Vancouver's reply submission, para. 44.

[24] The applicant submits that s. 25(1) can apply in certain circumstances where disclosure is limited to one applicant. It cites the wording of the provision, which includes disclosure “to the public, to an affected group of people, or to an applicant.” It argues that the legislation cannot be considered to have given the terms “public” and “an applicant” the same meaning. Therefore, s. 25(1) contemplates disclosure in the public interest to a single applicant.²²

[25] The applicant also submits that it made the FIPPA request during the course of performing its functions under the PGA. It only resorted to a FIPPA request because Metro Vancouver, after changing its mind several times, refused to provide a copy any other way. The applicant asserts, therefore, that the confidentiality requirements of s. 109 of the PGA apply to a copy of the Report that it would receive as a result of this Inquiry. Section 109 of the PGA stipulates that “A person must preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising a power or performing a duty under this Act.” Consequently, the applicant would be prohibited by law from disclosing the record further.²³ This would negate any potential risks of harm that might result from it receiving a copy of the Report.

Analysis, s. 25(1)(a)

[26] The requirement for public bodies to disclose information in the public interest is divided into two parts. The first is found in s. 25(1)(a) and concerns information about a risk of harm to the environment or to public health or safety. This provision relates directly to the prospect of harm. The second is in s. 25(1)(b) and covers all other circumstances where disclosure would be clearly in the public interest.

[27] It is obvious from the face of the record, that the Report at issue concerns a risk of harm to the health and safety of the public in accordance with s. 25(1)(a), and Metro Vancouver does not dispute this. The Report provides details and explanation of events that led to an incident involving a dam that caused the deaths of two members of the public. It also outlines the progress that Metro Vancouver has made in implementing remedial measures. The Report explains how WCA required Metro Vancouver to investigate the incident and provide a copy of the Report to WorkSafeBC to protect worker health and safety. The fact that two individuals died demonstrates that the incident involved a threat of significant harm.

[28] I can confirm that the Report contains information relating to the existence and the nature of the risk and the extent of the harm posed. These are two relevant circumstances arguing in favour of the application of s. 25(1)(a).

²² Applicant's response submission, para. 124.

²³ Applicant's response submission, para. 64.

[29] A third relevant circumstance I have considered is whether disclosure of the information will enable the public to take measures necessary to mitigate the risk and prevent the harm that would be caused if a similar incident were to occur again at this dam or another one.

[30] In this case, the applicant argues that it is able to represent the public by reviewing the information and taking any necessary precautions in its power to reduce the risk of a recurrence. It has the authority to regulate both Metro Vancouver with respect to the remedial measures it has taken, and the engineers involved in the incident. I agree that s. 25(1) contemplates disclosure to a single applicant. That interpretation is supported by a plain language reading of the phrase “the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant.” This is a case where a single applicant, a professional regulatory body with statutory oversight powers, could act effectively on behalf of the public to mitigate the risks concerned.

[31] It is important to note that, as a result of the incident, Metro Vancouver terminated several engineers and implemented corrective measures. This raises serious questions about the standards of practice that the engineers employed and whether this contributed to the deaths of two members of the public. While the Report does not contain the substance of direct testimony of identifiable witnesses, it does provide a chronological, narrative description of the relevant events and activities of engineers relating to the incident. It is also significant that some of these engineers have obtained employment elsewhere. The Report also outlines the status on the implementation of corrective measures that Metro Vancouver identified.

[32] The applicant has the experience, ability and authority to determine whether the current employment of any of these engineers poses a threat to public health and safety and whether Metro Vancouver has properly implemented appropriate corrective measures. It is evident to me, from reviewing the Report, that its contents might be relevant to a determination by the applicant as to whether there continues to be a risk to public health and safety.

[33] Therefore, I conclude that, in accordance with the criteria noted in paragraph 15 above, s. 25(1)(a) applies in this case.

[34] I emphasize that this determination applies only to the particular circumstances of this case. It would be incorrect to conclude that public bodies must always proactively disclose information to regulatory bodies with public interest mandates. This case is exceptional. It presents evidence of a credible threat of significant harm to public health and safety and a threat to life, where the applicant is uniquely qualified and authorized to evaluate and mitigate that threat, if necessary.

[35] I now turn to whether s. 25(1)(a) requires disclosure of all or just part of the Report. The applicant has the jurisdiction to review information about the events that led to the incident as well as the corrective measures that Metro Vancouver had implemented or was in the process of implementing. The Report is concerned entirely with these two issues. There is nothing extraneous in the Report that does not relate to the jurisdiction of the applicant. Therefore, I conclude that it is necessary for Metro Vancouver to disclose the entire Report.

Summary, s. 25(1)(a)

[36] In conclusion, for the reasons provided above, I find that s. 25(1)(a) requires Metro Vancouver to disclose a complete copy of the Report to the applicant.

Section 25(1)(b) – Disclosure clearly in the public interest

[37] As I have determined that s. 25(1)(a) applies, I do not need to consider the application of s. 25(1)(b), and I decline to do so.

Sections 13(1), 15(1), 19(1) and 22(1) – Exceptions to disclosure

[38] As s. 25(1) applies despite any other provision of FIPPA, I do not need to consider the application of ss. 13(1), 15(1), 19(1) or 22(1), and I decline to do so.

CONCLUSION

[39] For the reasons given above, under s. 58 of FIPPA, I order Metro Vancouver to provide the applicant with a complete copy of the Report.

[40] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **December 27, 2023**.

November 10, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F21-86866; F21-86867