



Order F24-13

MINISTRY OF FINANCE

Jay Fedorak
Adjudicator

February 20, 2024

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Summary: An applicant requested the Ministry of Finance (Ministry) provide records relating to public opinion polls conducted from January to September 2020. The Ministry provided records but withheld some information under s. 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that s. 13(1) applied to some but not all of the information. The adjudicator ordered the Ministry to disclose some of the information.

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

INTRODUCTION

[1] An applicant requested, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), records relating to public opinion polls that the Ministry of Finance (Ministry) conducted from January to September 2020. The Ministry responded providing records but withholding information under s. 12(1) (cabinet confidences), s. 13(1) (advice or recommendations), s. 16(1) (harm to intergovernmental relations) and s. 22 (unreasonable invasion of personal privacy) of FIPPA.

[2] The applicant was dissatisfied with this response and requested a review by the Office of the Information and Privacy Commissioner (OIPC). During mediation, the Ministry ceased to rely on s. 12(1). Mediation failed to resolve matters further and the applicant requested a formal inquiry.

[3] In its initial submission, the Ministry said it had ceased to rely on s. 22(1). During the course of the inquiry, the Ministry also ceased to rely on s. 16(1).

ISSUE

[4] The issue to be decided in this inquiry is whether s. 13(1) authorizes the Ministry to withhold the information at issue.

[5] Under s. 57(1), the Ministry has the burden of proving that the applicant has no right of access to the information it withheld.

DISCUSSION

[6] **Background** – The Ministry employs third party service providers to obtain feedback through opinion polls from the public on government policies and programs.¹

[7] **Record at issue** – The specific records at issue in this inquiry are as follows:

- a February 2020 report on the results from a public opinion poll on various issues;
- a February 2020 report on what focus groups said about government priorities and infrastructure; and
- a COVID-19 daily tracking poll.

[8] There are 2889 pages in total. Only 33 of those pages remain severed, in whole or in part.

Section 13(1) – advice or recommendations

[9] 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.² 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)
- ...
- (b) a public opinion poll ...

¹ Ministry's initial submission, paras 17-19.

² *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025, para 52.

- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[10] 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) and 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

[11] 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.”³ “Recommendations” include suggested courses of action that will ultimately be accepted or rejected by the person being advised.⁴ Section 13(1) would also apply when disclosure would allow an individual to make accurate inferences about any advice or recommendations.

[12] The Ministry 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.

[13] The Ministry submits that s. 13(1) applies to three categories of information: draft poll questions, advice and recommendations on the wording of poll questions, and information in a service provider’s report on what a focus group said about government priorities and infrastructure.

1. Draft Poll Questions

[14] The first category of information is draft poll questions suggested by employees of service providers and the Ministry, which in the end were not included in the polls. The Ministry argues that these questions were the employees’ recommendations for what should be included in the polls. It cites Order F23-39 where the adjudicator found that draft poll questions constituted recommendations for the purpose of s. 13(1).⁵

³ *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.

⁴ John Doe, para 23.

⁵ Ministry’s initial submission, paras 36-37; OIPC Order F23-39, 2023 BCIPC 47 (CanLII), paras 18-20.

[15] The applicant concedes that the Ministry may withhold under s. 13(1) any draft opinion poll questions that were not used in the poll with the public.⁶

[16] As in the case of Order F23-39, I find that s. 13(1) applies to questions recommended but not included in opinion polls.⁷

2. Advice and Recommendation on Wording Poll Questions

[17] The second category of information is, according to the Ministry, “editorial advice and recommendations regarding the content and wording of correspondence or documents.”⁸ The information at issue, according to the Ministry, involves recommendations to the Ministry about the wording of questions that were used in the polls.⁹ The Ministry cites previous orders that have found this type of information to constitute advice and recommendations within the meaning of s. 13(1).¹⁰

[18] The applicant makes no submissions with respect to editorial advice and recommendations regarding the content and wording of correspondence.

[19] I have reviewed the information at issue, and I find that the second category of information is clearly editorial advice and recommendations regarding the content and wording of correspondence. For that reason, I find that it is advice and recommendations within the meaning of s. 13(1).

3. Public Feedback in the Report of the Focus Group on Government Priorities and Infrastructure

[20] The third category of information is contained in the service provider’s report of what a focus group said about government priorities and infrastructure. The Ministry submits that some of this information is advice and recommendations for the purpose of s. 13(1) because it is feedback and opinions. The Ministry submits that, as the government may use this feedback in formulating future policy and program choices, this information constitutes advice and recommendations.¹¹

[21] The applicant submits that s. 13(1) does not apply to the questions asked or the answers given, and it also does not apply to reports summarizing opinion

⁶ Applicant’s response submission, para 26.

⁷ Order F23-39, *supra*.

⁸ Ministry’s initial submission, para 38.

⁹ Ministry’s initial submission, paras 38-59.

¹⁰ Order F19-28, 2019 BCIPC 30 (CanLII); Order F14-44, 2014 BCIPC 47(CanLII), para 32; Order F18-41, 2018 BCIPC 44 (CanLII), para 29.

¹¹ Ministry’s initial submission, paras 30-31.

polls. The applicant notes that there are no previous orders or court decisions where “any adjudicator has held that records of either polling questions asked of the public; answers or opinions given by the public; or commissioned reports summarizing the same may be withheld from disclosure by a government body.”¹²

[22] I have reviewed the report of the focus group. The report summarized the responses of polling groups in different regions of the province on issues such as government priorities, jobs and infrastructure, and comparing the government of the day with previous governments. It also involved participants reviewing advertisements and providing feedback on them.

[23] The Ministry has applied s. 13(1) to most of the executive summary of the report, including a statement about the purpose of the focus groups. It has severed some of the actual responses of participants, as well as some of the summaries of those responses that the service provider created. The Ministry has not indicated why it withheld some of this information but disclosed similar information, other than to state that it has applied s. 13(1) to advice and recommendations.

[24] While the courts have found that advice includes expert opinions on matters of fact on which a public body must make a decision, this does not mean that all opinions necessarily constitute advice. It is only the opinions of experts, using skill and judgment, that constitute advice for the purposes of s. 13(1). While I accept that service providers with expertise in polling may provide expert opinions on the significance of polling results, the actual responses of members of the public who were polled do not constitute expert opinions. As a result, I am not persuaded the responses of the general public constitute advice or recommendations.

[25] I now turn to the question as to whether the service providers have provided advice in the report. I note that the summaries and descriptions of the results are entirely factual. The passages the Ministry has severed do not contain the service providers’ analysis or opinions. They do not identify the significance of the results or provide any evaluation as to what is important for the Ministry to understand about the focus group’s responses.

[26] The Ministry submits that it procured the services of the service providers to gather public feedback through polling. I see no evidence to suggest that the Ministry ever requested the service providers also to provide advice or recommendations. The service providers provided the Ministry only with the results in factual terms. They did not provide any expert analysis that would provide any additional meaning to the results.

¹²Applicant’s response submission, paras 21-22.

[27] Moreover, it appears significant to me that the type of information that the Ministry has withheld in this one report also appears in other reports at issue and the Ministry has disclosed it. The Ministry has not explained why it did not treat this type of information consistently. It is not evident on the face of the record why s. 13(1) would apply to public feedback in one report but not public feedback in another report.

[28] Therefore, for the reasons above I find that the Ministry has failed to establish that s. 13(1) applies to the information in the report of the focus group.

[29] In summary, I find that s. 13(1) applies to the draft poll questions and the advice and recommendations on the wording of poll questions, but not to the information in the service provider's report on what the focus group said about government priorities and infrastructure.

[30] I will now decide if s. 13(2) applies to the information that I found would reveal advice or recommendations.

Section 13(2)(b) – a public opinion poll

[31] Section 13(2)(b) says that a public body may not withhold a public opinion poll under s. 13(1).

[32] I found that s. 13(1) applied to draft poll questions not used. The Ministry submits that draft poll questions do not constitute a public opinion poll. It cites Order F23-39, where the adjudicator found that draft poll questions did not constitute a public opinion poll because that information was never included in any poll.¹³

[33] I find that the same reasoning applies in this case. The draft poll questions were never included in any poll, so they do not constitute a public opinion poll for the purposes of s. 13(2)(b).

[34] Neither of the parties said whether they think s. 13(2)(b) applies to the editorial advice and recommendations that I found fall within s. 13(1). It is evident from the face of the records that these comments were never part of any poll, so s. 13(2)(b) does not apply to them.

[35] Neither of the parties discuss whether s. 13(2)(b) applies to the report on what the focus group said about government priorities and infrastructure. As I found that s. 13(1) does not apply to the information at issue in that record, I do not need to consider the application of s. 13(2)(b) to that information.

¹³ Ministry's initial submission, paras 63-64; Order F23-39 supra, paras 23-24.

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

[36] It is clear from the wording of the request and the dates on the documents that none of the records have been in existence for more than 10 years. Therefore, s. 13(3) does not apply.

Conclusion on s. 13

[37] I have found that s. 13(1) applies to the draft poll questions not used and to the editorial advice about the wording of questions used. The Ministry is authorized to withhold that information. However, I have found that the Ministry has not established it is authorized to refuse to disclose the remaining information under s. 13(1).

CONCLUSION

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

1. Subject to item 2 below, I confirm the decision of the Ministry to refuse to disclose information under s. 13(1).
2. The Ministry is not authorized under s. 13(1) to refuse to disclose the information on pages 152,154-156,158-168,171-180, and 188-190 of the records. It must disclose this information to the applicant.
3. The public body must concurrently provide the OIPC registrar of inquiries a copy of its cover letter and the records it provides to the applicant in compliance with item 2 above.

[39] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **April 4, 2024**.

February 20, 2024

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

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