



Order F25-04

CITY OF VANCOUVER

Carol Pakkala
Adjudicator

January 13, 2025

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Summary: An applicant requested the City of Vancouver (City) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records of his job interview for a promotion. The City provided responsive records but refused to disclose some information under ss. 3(3)(h) (scope of FIPPA) and 13(1) (advice or recommendations) of FIPPA. The adjudicator confirmed the City's decision, in full.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, 3(3)(h) and 13.

INTRODUCTION

[1] An applicant requested access to records of his interview for a leadership position with the City of Vancouver's (City) Fire and Rescue Service (Fire and Rescue). The request was for all interview evaluations and associated notes written by the interview panel members.

[2] The City provided access to the requested records but refused to disclose the interviewers' scores and comments under s. 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).¹ The City also withheld the interview questions under s. 3(3)(h) (outside scope of FIPPA).²

¹ From this point forward, when I refer to sections, I am referring to sections of FIPPA unless I indicate otherwise.

² The City's application of s. 3(3)(h) is in the OIPC's Fact Report. The parties state in their respective submissions that they agree with the facts stated in the Fact Report.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision to refuse access to the information. The OIPC's investigation and mediation process did not resolve this matter and the applicant requested that it proceed to an inquiry.

Preliminary Matter - Production of records

[4] The applicant asks the OIPC to seek access to the City's records about previous job competitions for the same position.³ The applicant says those records will show if the same interview questions are in repeated use by Fire and Rescue. I understand the applicant's position to be that proof of the City's past use of these questions is required for the City to justify its claim that s. 3(3)(h) applies.⁴

[5] While I do have the power to order the production of records for the purposes of an inquiry,⁵ I do not see the need to do so here. As I will clarify in my analysis below, s. 3(3)(h) is about future, not past use, so the historical records are not relevant to the s. 3(3)(h) analysis.

ISSUES AND BURDEN OF PROOF

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

1. The withheld information is outside the scope of FIPPA pursuant to s. 3(3)(h).
2. The City is authorized by s. 13(1) to refuse to disclose the information at issue.

[7] There is no statutory burden of proof with respect to scope issues, such as s. 3(3)(h). Previous orders have indicated that it is in the interests of both parties to provide the adjudicator with evidence and argument supporting their positions.⁶

[8] Under s. 57(1), the City has the burden of proving that the applicant has no right of access to a record or part of a record withheld under s. 13(1).

³ Applicant's submission at paras 15-16.

⁴ *Ibid* at para 19.

⁵ Section 44(1)(b), FIPPA.

⁶ See for example: Order F24-50, 2024 BCIPC 58 at para 7, Order 02-38, 2002 BCIPC 38 (CanLII) and Order F07-23, 2007 BCIPC 38 (CanLII).

DISCUSSION

Background

[9] The applicant, a City employee, applied for a promotion from his existing position and was ultimately unsuccessful.⁷ The records he requested relate to the job competition for that promotion. His request was for the evaluations and associated notes written by his interviewers.

Information at issue

[10] The City provided 41 pages of records and withheld information from approximately 24 of those pages. The withheld information consists of interview questions, interviewers' scores of the applicant's responses to the questions, and interviewers' comments.

Outside scope of FIPPA, s. 3(3)(h)

[11] The City applied s. 3(3)(h) to all of the interview questions and disclosed none of them.

[12] The relevant parts of s. 3(3)(h) state the following:

3(3) This Act does not apply to the following:

...

(h) a record of a question or answer to be used on an examination or test;

...

[13] Past caselaw shows that "question" or a "record of a question to be used in an examination or test," includes interview questions asked of applicants for university or employment.⁸ A record which discloses a question, either explicitly or implicitly, is included within this exclusion.⁹

[14] The purpose of the exclusion under s. 3(3)(h) is to protect the integrity of a public body's examination or testing process by preventing disclosure of information that would reveal the questions in advance to candidates. Such disclosure would diminish the value of those question for future use.¹⁰

⁷ Affidavit of City's Assistant Chief Equity & Inclusion for Vancouver Fire and Rescue Services at para 15.

⁸ *University of British Columbia v. Lister*, 2018 BCCA 139 at para 36. The BC Court of Appeal considered s. 3(1)(d) which is now renumbered as s. 3(3)(h) after amendments were made to FIPPA in 2021. There were no other changes to this provision.

⁹ *Ibid* at para 40.

¹⁰ *Ibid*.

[15] Previous OIPC orders establish that the use of the future tense language in this section, “to be used”, requires evidence that the interview questions are currently being used or that the public body intends to use them again in the future.¹¹ If this requirement is not met, s. 3(3)(h) does not apply to the questions.

Parties’ submissions, s. 3(3)(h)

[16] The City says s. 3(3)(h) applies to the interview questions. The City says these questions are in current use and are intended to be used in the future. To support its position, the City offers affidavit evidence from its Assistant Chief at Fire and Rescue (Assistant Chief).

[17] The Assistant Chief’s evidence is that he oversaw the screening process for this job competition and that the position reports directly to him.¹² He says that the interview questions are part of Fire and Rescue’s standardized process and are still in use, including already being used in a different competition that took place after the applicant’s interview.¹³ The Assistant Chief believes that Fire and Rescue intends to continue to use the same standardized process and interview questions in future competitions.¹⁴

[18] As noted above, the applicant says the OIPC should look to previous competitions for the same position to see if the interview questions to which he seeks access are in repeated use.¹⁵ The applicant also says that notwithstanding any potential exemption, Fire and Rescue “can still exercise discretion without setting precedent under section 3 of FIPPA and release the questions.”¹⁶

Analysis, s. 3(3)(h)

[19] For the reasons that follow, I find that s. 3(3)(h) excludes the interview questions from the scope of FIPPA. This exclusion is not, as the applicant suggests, a discretionary one.

[20] I reviewed the information withheld by the City under s. 3(3)(h) and I am satisfied it is captured by this section. I can see it clearly consists of interview

¹¹ Order F22-52, 2022 BCIPC 59 (CanLII) at para 19. See also the discussion in Order F20-13, 2020 BCIPC 15 (CanLII) at paras 9-11 relying on Order F17-13, 2017 BCIPC 14 (CanLII) at paras 13-16.

¹² Affidavit of the City’s Assistant Chief at para 11.

¹³ The Assistant Chief, at para 23, attests to the use of these questions as recently as October 2024. The applicant’s interview was in April 2023.

¹⁴ *Ibid* at paras 23-24.

¹⁵ Applicant’s submission at para 14.

¹⁶ Applicant’s submission at para 20.

questions. In addition, the City's evidence, which I accept, satisfies me that these interview questions are currently still in use and are intended to be used in future. I therefore conclude that s. (3)(3)(h) applies to these questions to exclude them from the scope of FIPPA.

Advice or recommendations, s. 13

[21] The City applied s. 13 to the interviewers' scores and comments.

[22] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. The purpose of s. 13(1) is to allow for full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative processes of decision and policy making were subject to excessive scrutiny.¹⁷

[23] The terms "advice" and "recommendations" are not defined in FIPPA but the courts have interpreted those terms and the OIPC has routinely adopted those interpretations in the s. 13(1) analysis. I adopt those same interpretations here:

- "Recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.
- "Advice" has a broader meaning than recommendations,¹⁸ and includes:
 - opinions that involve the exercise of judgment and skill in weighing the significance of matters of fact on which a public body must make a decision for future action;¹⁹
 - factual information that is integral to advice or recommendations because it was "compiled and selected by an expert, using [their] expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or ... the expert's advice can be inferred from the work product."²⁰

¹⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras 45-51 [*John Doe*].

¹⁸ *John Doe ibid* at para 24.

¹⁹ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113 [*College*].

²⁰ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at para 94 [*PHSA*].

[24] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences to be drawn about advice or recommendations.²¹

[25] The first step in the s. 13(1) analysis is to decide if the information in dispute would reveal advice or recommendations. If it would, then I must decide whether the information falls into any of the categories listed in s. 13(2) or whether it has been in existence for more than 10 years under s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, that information cannot be withheld under s. 13(1).

Parties' submissions, s. 13(1)

[26] The City says previous decisions of the OIPC have found that scores and evaluations prepared by staff in evaluating candidates may be withheld as advice and recommendations under section 13(1).²² The City further says it applied s. 13(1) consistently on a pinpoint and limited basis; withholding only the interviewers' scores and handwritten comments while disclosing their summaries of the answers given by the applicant.²³

[27] The City says disclosure of the withheld information would reveal or would allow an accurate inference to be drawn about, a course of action that will ultimately be accepted or rejected by the person being advised.²⁴ The City relies on the evidence of its Assistant Chief to support its position that both the interviewers' scores and the comments were part of the process whereby a recommended candidate would be identified and presented to the Fire Chief for her to make the final hiring decision.²⁵

[28] The applicant says the scores are simply numbers and do not constitute advice or recommendations without any surrounding context.²⁶ The applicant further says the interviewers' comments do not necessarily constitute advice or recommendations unless they include actual advice. The applicant gives the example of a note that says, "...missed the point of this question, not recommended to move on." The applicant says only the "not recommended to move on" portion of his example constitutes advice or recommendations.²⁷

²¹ *John Doe supra* note 16 at para 24.

²² City's initial submission at para 37-41.

²³ City's initial submission at para 42.

²⁴ City's initial submission at para 43.

²⁵ City's initial submission at para 45.

²⁶ Applicant's submission at para 27.

²⁷ Applicant's submission at para 28.

Analysis, s. 13(1)

[29] For the reasons that follow, I find that the interviewers' scores and comments are advice and recommendations developed by and for a public body within the meaning of s. 13(1).

[30] I reviewed the interviewers' scores and comments in the context they were recorded. I can see that they appear within interview booklets along with handwritten notes of the applicant's responses to the interview questions. The scores also appear in summary charts for each interviewer with the total score. Those pages where the scores are recorded in aggregate are titled "Notes to Chief."²⁸

[31] Most of the interviewers' notes were disclosed to the applicant, so he already has the context for the scores. By his own reasoning then, the scores are more than simply numbers once combined with the notes he already has. In my view, the scores represent the application of the interviewers' expertise to evaluate and recommend to the Chief how to rank each candidate for the position. I find these scores are "advice" because they are opinions that involve the exercise of judgment and skill in weighing the significance of the applicant's response to the interview questions. I find that the aggregated scores constitute the recommendation of the panel member of the appropriate candidate for the position.

[32] I reviewed the evaluative comments made by the interviewers. I find that these comments are "advice" because they reveal the opinions of the panel members involving the exercise of their judgment and skill in weighing the significance of the applicants' responses to the interview questions.

[33] For the above reasons, I find the interviewers' scores and comments are advice and recommendations within the meaning of s. 13(1).²⁹

Sections 13(2) and 13(3) exceptions to disclosure

[34] The next step in the s. 13(1) analysis is to consider whether any of the circumstances under ss. 13(2) and (3) apply to the information I found above would reveal advice or recommendations.

[35] Subsection 13(2) identifies certain types of records and information that a public body may not withhold under s. 13(1). I have considered the exceptions in s. 13(2) and I find that none apply. I have also considered s. 13(3) and find that it

²⁸ The titles were disclosed to the applicant.

²⁹ For similar analysis see: Order F14-52, 2014 BCIPC 56 (CanLII) at paras 38-39; Order F22-22, 2022 BCIPC 24 (CanLII) at paras 20-22; Order F15-37, 2015 BCIPC 40 (CanLII) at para 21, and Order F18-03, 2018 BCIPC 03 (CanLII) at paras 13-15.

does not apply because the records have not been in existence for more than 10 years.

Exercise of discretion, s. 13(1)

[36] Section 13(1) is a discretionary exception to disclosure and the head of a public body must properly exercise its “discretion in deciding whether to refuse access to information, and upon proper considerations.”³⁰ If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or the decision failed to take into account relevant considerations.”³¹

[37] The City acknowledges that s. 13(1) is a discretionary provision and outlines the factors it considered in exercising this discretion. The City relies on affidavit evidence from its Director of Access to Information and Privacy, to demonstrate the factors it considered in exercising its discretion under s. 13(1).³²

[38] The applicant also points to the discretionary aspect of s. 13(1).³³ I understand the applicant’s position to be that the City should have exercised this discretion in his favour and released the scores and comments. The applicant refutes the City’s suggestion that disclosure of the scores and comments could cause tension between the members of Fire and Rescue. He says the City’s “resistance to transparency and openness along with the blanket redaction of comments made about a particular person is much more likely to cause tension and it already has.”³⁴

[39] My review of the records reveals that the City applied s. 13(1) line by line. It disclosed most of the information in the records, withholding only the interviewers’ scores of the applicant’s responses to the questions and their evaluative comments about the same. The City offered evidence of the factors it considered in the exercise of its discretion, which I accept. My assessment of this evidence is that the City correctly exercised its discretion when it applied s. 13(1).

³⁰ Order 02-50, 2002 CanLII 43486 (BC IPC) at para 144.

³¹ *John Doe*, *supra* note 16 at para 52; see also Order F24-68, 2024 BCIPC 78 (CanLII) at para 35, Order 02-50, 2002 CanLII 43486 (BC IPC) at para 144, and Order 02-38, 2002 CanLII 42472 (BCIPC) at para 147.

³² Affidavit of the City’s Director, Access to Information and Privacy at para 47.

³³ Applicant’s submission at paras 24-25.

³⁴ Applicant’s submission at para 31.

CONCLUSION

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

1. I confirm the City's decision to withhold the interview questions as being outside the scope of FIPPA under s. 3(3)(h); and
2. I confirm the City's decision that it is authorized by s. 13(1) to withhold the interviewers' scores and comments.

January 13, 2025

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File No.: F23-93917