



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F05-01

BRITISH COLUMBIA HOUSING MANAGEMENT COMMISSION

Celia Francis, Adjudicator
January 13, 2005

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Summary: Applicant requested report or audit of Portland Housing Society. BC Housing withheld record in full. Sections 13(1) and 21(1) apply to most of record. BC Housing Commission ordered to disclose some information.

Key Words: Policy – advice or recommendations – developed by or for a public body or a minister – party financial and commercial information – supplied in confidence – competitive position – negotiating position – interfere significantly with.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 21(1) and 25(1)(a) and (b).

Authorities Considered: **B.C.:** Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 04-08, [2004] B.C.I.P.C.D. No. 8.

Cases Considered: *The College of Physicians and Surgeons v. British Columbia (The Information and Privacy Commissioner)* (2002), BCCA 665; *Clubb v. Saanich*, [1996] B.C.J. No. 218.

1.0 INTRODUCTION

[1] The applicant in this case is a media organization. It requested from the British Columbia Housing Management Commission (“BCHMC”) a copy of what the applicant called an “audit” conducted on the Portland Hotel Society (now the PHS Community Services Society) (“PHS”) between December 2001 and January 2002. After consulting with the PHS, the BCHMC told the applicant it was refusing access to the audit, in full, under ss. 13(1) and 21(1) of the *Freedom of Information and Protection of Privacy Act* (“Act”).

[2] The applicant requested a review of this decision, arguing that the PHS, which provides housing and other services to the mentally ill, had grown rapidly in recent years, received large revenues from a variety of public sources and had been running a deficit. The applicant said that it has been difficult to determine the PHS's management structure and the extent of its financial and social interests. The audit should be public information, the applicant concluded.

[3] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

[4] The Office invited and received written submissions from the applicant, the public body and the third party, the PHS. It later also invited and received submissions from two intervenors, an individual and the Freedom of Information and Privacy Association ("FIPA").

2.0 ISSUE

[5] The issues before me in this case are:

1. Does s. 25(1) apply to the record in dispute, requiring its disclosure?
2. Is the BCHMC required by s. 21(1) to refuse access to the record?
3. Is the BCHMC authorized by s. 13(1) to refuse access to the record?

[6] Under s. 57(1) of the Act, the BCHMC has the burden of proof regarding ss. 13(1) and 21(1).

[7] Previous decisions of the Commissioner have held that, while s. 57 of the Act is silent on the burden of proof in determining whether s. 25 applies, as a practical matter, it is in the interests of each party to present evidence as to whether s. 25 applies and requires disclosure.

3.0 DISCUSSION

[8] **3.1 Background** – In its initial submission, the PHS said it is a non-profit society. It also had this to say about itself:

2. PHS's mandate is to secure funding to deliver various programs, particularly housing and support services to individuals with chronic physical and mental disabilities, persons with criminal histories and/or involvement in the criminal justice system and persons engaged in active chronic alcohol/drug use.

3. The public body, BC Housing [BCHMC] is a provincial crown corporation that develops, manages and administers subsidized housing in British Columbia. PHS receives funding from BC Housing for various of its projects.

[9] The BCHMC described its functions and its connection with the PHS in its initial submission as follows:

2. BC Housing has a mandate that includes developing, managing and administering Provincial and Federal-Provincial housing and properties, and, in particular, assisting in making affordable housing available to persons with low incomes or other disadvantages. BC Housing carries out this mandate under various programs and with the assistance of various groups.

3. One of the groups through which BC Housing carries out its mandate is the Third Party, Portland Hotel Society (“Portland”). The Program Operations department of BC Housing administers the non-profit housing portfolio and in that capacity pays operating subsidies to non-profit housing providers to provide social housing in British Columbia. Portland is one such non-profit housing provider.

[10] **3.2 Procedural Matters** – After the close of the inquiry, the Information and Privacy Commissioner received a request from an individual to be permitted to comment on the issues in this inquiry. The Commissioner granted intervenor status to this individual, as well as to FIPA. Both intervenors provided submissions to which the applicant, public body and third party were given the opportunity to respond. The PHS, while recognizing the Commissioner’s authority to invite the participation of intervenors, objected to the fact that the intervenors were not involved until over three months after the close of the inquiry, prolonging the inquiry process and causing the parties additional effort and expense to respond.

[11] As the PHS itself pointed out, the Commissioner has the power to invite the participation of intervenors to contribute a broader perspective to the issues in an inquiry. The participation of the intervenors in this inquiry was appropriate for this reason, although I acknowledge and understand the PHS’s concerns.

[12] The PHS also objected to the individual intervenor making allegations about issues which it viewed as not relevant to this inquiry. It also said that both intervenors were arguing that, because the PHS receives public funding, its affairs should be accessible to the public. The purpose of the Act is to make public bodies more accountable, it argued, not the private sector. To the extent that the intervenors made arguments that were not germane to the issues before me, I have not taken them into account.

[13] **3.3 Public Interest Disclosure** – I will deal first with the issue of whether or not s. 25(1) requires disclosure of the record as, if it does, the application of ss. 13(1) and 21(1) is moot.

Application of sections 25(1)(a) and (b)

[14] Numerous orders have considered whether s. 25 requires a public body to disclose records. See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38. I will apply here, without repeating them, the principles set out in those orders.

[15] Sections 25(1)(a) and (b) read as follows:

Information must be disclosed if in the public interest

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

- (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.

Does section 25(1)(a) or (b) apply?

[16] The applicant's submissions on this issue occupied the majority of its brief initial submission. It said that the PHS had operating revenues of almost \$7 million in the 2002 fiscal year, most of it from taxpayer-funded sources. It said that the PHS's rapid growth has been of intense interest in Vancouver's Downtown Eastside and that its article about the PHS engendered many calls and letters from the public. The applicant said that the public has few avenues of obtaining information about the PHS's finances, apart from one or two public sources, such as the BC Corporate Registry. It concluded:

The society [PHS] functions in the public interest and spending of public funds is a public activity. We believe the society's business interests are superceded by the public interest.

[17] FIPA and the individual intervenor made similar points. They also consider that public accountability and oversight of the PHS's management and administration of its funds are necessary for the health and safety of the PHS's clients. Disclosure of the report is essential, in FIPA's view,

to ensure the public's right to know how PHS, effectively an agent of government, is handling its affairs. FIPA submits that the time sensitivity requirement in section 25(1) is met because PHS is likely to be the recipient of large amounts of public funding in the very near future [pp. 16-17, initial submission].

[18] The BCHMC and PHS made overlapping arguments, referring to *Clubb v. Saanich*, [1996] B.C.J. No. 218, and a number of previous orders which set out the basis for applying s. 25(1) (pp. 6 & 7, initial submission of the PHS; paras. 35-40, initial submission of the BCHMC). Both argued that the fact that the public might have an interest in the PHS's financial affairs does not meet the test of s. 25(1)(b). In particular, in their view, the required element of "temporal urgency" and other circumstances that might trigger s. 25(1) are not present. Section 25(1) is not meant to be used as an investigative tool, the PHS argued.

[19] The record in dispute here, variously described as an "audit" and a "report", is a 22-page document dated April 2002 by a firm of chartered accountants engaged to examine the PHS's financial and management controls. The record, already a year old at the time of

the request, sets out the scope of the engagement, background information, methodology, findings, analysis, recommendations and general observations. The small amount of information the record contains about the services that the PHS provides to its clients is drawn from the operating agreements between the PHS and the BCHMC, is similar to or corresponds to information the applicant already knows, as shown in its articles, or is publicly available, as discussed below.

[20] The record contains no information even remotely connected to a risk of significant harm to the environment or to the health or safety of the public or a group of people, as the Information and Privacy Commissioner has interpreted this term in past orders. Section 25(1)(a) therefore has no application here.

[21] As for s. 25(1)(b), I accept that the public may have an interest in the report's contents. However, as the PHS and the BCHMC have pointed out, this does not mean that disclosure of the report is clearly in the public interest for the purposes of s. 25(1)(b). Not only is there no urgency to the situation, there is also "no clear gravity and present significance to the public interest" in disclosure of the record, as the Commissioner has said would be necessary for s. 25(1)(b) to apply (para. 65, Order 02-38). I find that s. 25(1)(b) does not apply here either.

[22] **3.4 Duty to Sever** –The BCHMC took exception to the suggestion on p. 1 of FIPA's initial submission that the BCHMC had not complied with its obligation under s. 4(2) of the Act to sever the record. The BCHMC said that it had considered its obligation to sever and that, if s. 13(1) were the only exception in issue, severing might have been possible. However, since, in its view, s. 21(1) applies to all of the factual information on which the advice or recommendations were based, it had concluded that nothing substantive would be releasable after severing (paras. 1-3, further reply).

[23] I find below that ss. 13(1) and 21(1) apply to some but not all of the record. Contrary to the BCHMC, I believe that it is reasonable to sever the record so as to release those portions which do not fall under these exceptions, although the applicant will not receive a great deal of information as a result.

[24] **3.5 Third-Party Business Information** – The BCHMC, PHS and FIPA provided arguments on ss. 21(1)(a)(ii), (b) and (c)(i), (ii) and (iii) which read as follows:

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

- (a) that would reveal
 - ...
 - (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
- (b) that is supplied, implicitly or explicitly, in confidence, and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
- (iii) result in undue financial loss or gain to any person or organization,
-

[25] The Information and Privacy Commissioner has considered the application of these sections in numerous orders, for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2. Order 04-08, [2004] B.C.I.P.C.D. No. 8, also provides useful guidance. I have applied the principles set out in those orders, without repeating them.

Financial or commercial information

[26] According to the BCHMC, s. 21(1)(a)(i) applies to all of the factual information in the report, in particular, the factual information supplied by the PHS. The PHS takes the position that the report is “in substance” financial and commercial information of or about the PHS, by which I take it to mean that it believes that s. 21(1) applies to the entire record. The purpose of the audit or report, they said, was for the BCHMC to assess the PHS’s financial and commercial information (paras. 22 & 29, initial submission & para. 22, reply, BCHMC; para. 4, initial submission & para. 24, reply, PHS).

[27] FIPA argued that not all of the information in the report could be the PHS’s financial or commercial information and gave examples of information which in its view would not fall into these categories (p. 10, initial submission).

[28] The record in dispute consists largely of financial and management information that the PHS provided, directly or indirectly, to the accounting firm, as well as information the accounting firm generated, based on such information, from its examination of the PHS’s compliance with financial and management aspects of its operating agreement with the BCHMC. These portions are all financial and commercial information of or about the PHS, for the purposes of s. 21(1)(a)(i), or information from which such financial or commercial information could, I accept, be accurately derived or inferred.

[29] Not all of the record comprises financial or commercial information of or about the PHS. Some, for example, relates to the accounting firm’s methodology and the scope of its engagement with the BCHMC.

Supply in confidence

[30] The PHS and the BCHMC said that the financial and commercial information of or about the PHS was derived or obtained directly from the PHS’s own records and directors and was supplied, in confidence, to the BCHMC. The BCHMC said that it assured the PHS that the report would be kept confidential between the PHS and the BCHMC. The PHS also said it received assurances from both the BCHMC and the accounting firm that they would maintain the report in confidence. Both provided affidavit evidence in support of these points (p. 7, initial submission of the BCHMC; paras. 3-5, Douglas affidavit; para. 9, Tiessen affidavit; p. 4, initial submission of the PHS; paras. 6, 9 & 10, first Townsend affidavit).

[31] FIPA suggested that the information at issue was not supplied by the PHS but was generated by the accounting firm. It also cast doubt on the PHS's and BCHMC's confidentiality arguments. FIPA referred to a number of Ontario and British Columbia orders and a federal decision which it said support its views on this point. It also argued that any publicly-available information does not meet the test of confidentiality (pp. 10-14, initial submission).

[32] The evidence from the PHS and the BCHMC shows that the PHS supplied financial and commercial information of or about the PHS in confidence to the BCHMC, directly or indirectly, through the auditor. The fact that the conduit of the information to the BCHMC was the accounting firm has no bearing on this issue. See Order 04-08 for similar findings on these points.

[33] After the close of the inquiry, the applicant wrote to this Office, saying that he had heard that a Vancouver reporter had been allowed to examine the report in issue in this inquiry and had been allowed to take notes "providing he would not report on the document". The Information and Privacy Commissioner asked the BCHMC and the PHS to provide affidavit evidence as to whether the report had been disclosed to members of the media and, if so, under what circumstances.

[34] The BCHMC replied it had not disclosed or provided access to the report to the media or to others outside the BCHMC, its legal counsel or the PHS. The PHS provided an affidavit from its senior manager in which he deposed that he had provided a reporter with access "on a strictly off-the-record, confidential basis" to satisfy the reporter that certain allegations about the report were not true. The PHS also said the reporter was not allowed to take notes, copy the report, take it away or circulate it. In the PHS's view, this strictly-controlled access had not negated the confidentiality in which the report had been maintained nor of the supply of the information (pp. 1-2, further reply; paras. 7-11, second Townsend affidavit).

[35] I am satisfied from my review of this material that the financial or commercial information of or about the PHS in the report was supplied in confidence within the meaning of s. 21(1)(b), noting again my earlier observation that financial or commercial information of or about PHS could be accurately derived or inferred from information in the record. The one-off confidential disclosure of the report to the reporter, and the controlled circumstances surrounding it, do not affect this issue.

[36] I do not include here background information on the PHS's role and mandate as a society, and information on the PHS's current projects (beginning near the bottom of p. 3 of the report and ending near the top of p. 6). This passage consists primarily of information drawn from the operating agreements between the PHS and the BCHMC, copies of which, according to the PHS's reply (at p.2), the applicant has received. It also corresponds to, or is similar in nature to, information in the PHS's audited financial statements for the years 2000 and 2001 (which the PHS provided to the applicant, as well as to this Office, with its reply), to information on the PHS's affairs in an article that the applicant provided with its submission and in other articles on the applicant's website, as well as to other information publicly-available through searches on the Internet. I therefore am unable to conclude that this information was supplied in confidence to the BCHMC.

Significant harm to competitive position

[37] The PHS argued that disclosure of the report would significantly harm its competitive position in the development of housing and other projects in the Downtown Eastside as well as its negotiating position in securing funding from various private and public entities for future projects:

... PHS is operating in an environment where its credibility in the eyes of its funders is paramount to its survival. Disclosure of a report which raises questions regarding the PHS's financial management and accounting practices could be detrimental to the PHS's credibility and that would be harmful to its competitive and negotiating positions [p. 5, initial submission].

[38] One of the PHS's senior managers deposed that the PHS attempts to develop diverse sources of funds from public and private sources and that it has had to become more aggressive in seeking funding by entering into relationships with the private sector. He said that disclosure of the report about the PHS's 2001 financial position would likely cause negotiating partners to have concerns about the PHS's financial situation. He also provided *in camera* evidence on the negotiations in which the PHS was engaged at the time of the inquiry and the damage to those negotiations and consequent loss of revenue to the PHS to which disclosure of the report would likely lead (paras. 4-11, Small affidavit).

[39] The PHS also said that it expressed concerns to the accounting firm and the BCHMC about the report's contents, many aspects of which the PHS said, from its perspective, were "fundamentally flawed and inaccurate" (para. 11, Townsend affidavit). The Small affidavit raised similar concerns in an *in camera* portion (see para. 9).

[40] I have carefully reviewed the public and *in camera* evidence in this case, which is properly received *in camera* and which supports the PHS's and the BCHMC's arguments on the harm to the PHS's negotiating and competitive position. I conclude that, in the circumstances of this case, a reasonable expectation of harm to the PHS's competitive position and interference with its negotiating position was present for the purposes of s. 21(1)(c)(i). I arrive at this conclusion in light of the evidence as to the competitive market in which the PHS operates and in which it seeks its sources of funding. I do not therefore need to consider s. 21(1)(c)(ii) and (iii).

[41] **3.6 Advice or Recommendations** – The appropriate parts of ss. 13(1) and (2) read as follows:

Policy advice, recommendations or draft regulations

- 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,

...

- (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

Advice or recommendations versus factual information

[42] The BCHMC said its operating agreement with the PHS governs the terms on which it provides subsidies to the PHS. Through the agreement, the BCHMC said, it maintains a supervisory role of the PHS's affairs and requires the PHS to report regularly on its financial affairs. The BCHMC said that, in the course of PHS's regular reporting, the BCHMC became concerned about some of the PHS's operations. As a consequence, the BCHMC decided that an audit should be done of those operations (paras. 4-6, initial submission; paras. 5-6, Douglas affidavit).

[43] The purpose of the audit, according to the BCHMC's manager of program operations, was

7. ... to obtain professional accounting and business advice and recommendations concerning the operations of Portland. It was to identify issues relating to Portland's operations and advise and provide recommendations to BC Housing on ways in which Portland's operations could be changed or improved. Thereafter, BC Housing would rely on the recommendations and advice in the Audit to work with Portland to change and/or improve its social housing operations.

8. The Audit was necessary since, without it, BC Housing would not know what to request of Portland in terms of making improvements to its social housing operations [Tiessen affidavit].

[44] Once the BCHMC had received the audit, its property portfolio manager said,

7. ... it was shared with Portland, who expressed concerns to BC Housing about the veracity of all of the information contained in the Audit. Taking these concerns into account, I used the information and recommendations in the Audit to determine how BC Housing would deal with Portland and what it would require Portland to do with respect to the financial and commercial operation of Portland's social housing operations [Douglas affidavit].

[45] In the BCHMC's view, s. 13(1) applies to the following parts of the record: information under the heading "Recommendations" on pp. 8-17 of the record; information interwoven with advice or recommendations or from which the applicant could accurately infer advice or recommendations, under "General Observations and Recommendations" on pp. 20-22 of the record; and the auditor's opinions which the auditor derived from factual statements in the record and which occupy "much of the balance of the report" (pp. 8-22 of the record) and which in the BCHMC's view equate to advice.

[46] Any factual information in the report is intertwined with this advice and recommendations, the BCHMC argued, or would result in the disclosure of implicit advice and recommendations, such that it would not be reasonable to sever the report. The BCHMC

referred to *The College of Physicians and Surgeons v. British Columbia (The Information and Privacy Commissioner)*, (2002) BCCA 665, as support for its s. 13(1) arguments and said that this situation was analogous (paras. 13-21, initial submission). The PHS generally supported the BCHMC's arguments on s. 13(1).

[47] FIPA took the view that the report was about the PHS, not the BCHMC, and said that, based on the evidence in this case, the intended recipient of the advice was clearly the PHS. Since the purpose of the exception is to protect government decision—and policy-making, FIPA argued, s. 13(1) does not apply.

[48] The purpose of s. 13(1) is to protect a public body's internal decision-making and deliberative processes, in particular while those processes are still underway. The disputed record largely consists of advice and recommendations prepared, as the evidence shows, at the BCHMC's behest and directed at the BCHMC for its use in examining the PHS's financial and management controls, in its decision-making process and in deliberating on its future courses of action regarding the PHS. Other portions consist of information from which the applicant could accurately infer such advice and recommendations. This information all falls under s. 13(1) as previous orders have interpreted this exception and may therefore be withheld. I am also satisfied that the BCHMC exercised its discretion in applying s. 13(1).

[49] Other information in the record consists of the following categories of information: the "engagement scope" (the terms of reference for the accounting firm's examination of the PHS's financial affairs, including excerpts from the operating agreement, a copy of which FIPA obtained from the applicant and provided with its submission); the PHS's mandate as a society; the PHS's programs, including the properties it operates; and the accounting firm's "procedures" or steps it took in carrying out the examination. None of this information consists of advice or recommendations as the Information and Privacy Commissioner has interpreted s. 13(1) or in light of the Court of Appeal decision mentioned above. Rather, it is all factual information that falls under s. 13(2)(a). I consider that this factual information may reasonably be severed from the s. 13(1) information.

Final report or audit

[50] FIPA suggested that s. 13(2)(g) applies to the record as, in FIPA's view, it is an audit or report of one of the BCHMC's programs (pp. 4-7, initial submission). The PHS and the BCHMC both rejected this argument. While the BCHMC acknowledged that it has an interest in the PHS being well run, this does not make the PHS's internal operations a program of the BCHMC. The PHS says that the record is not an audit nor is it a final report on the BCHMC's performance or efficiency.

[51] I agree with the PHS and the BCHMC that s. 13(2)(g) does not apply here. Whether one calls it a report or an audit, the record is not about the performance or efficiency of any of the BCHMC's programs or policies, still less of the BCHMC as a whole. It concerns a particular group with which the BCHMC has an operating agreement, one of a number of such groups through which the BCHMC carries out its mandate and operates its programs.

4.0 CONCLUSION

[52] For the reasons given above, under s. 58 of the Act I find that the BCHMC is authorized by s. 13(1) and required by s. 21(1) to withhold some of the information as shown in red ink on the copy of the record in dispute provided to the BCHMC with its copy of this order.

[53] For reasons given above, no order under s. 25 is necessary.

January 13, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator