



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

Order F08-05

MINISTRY OF SMALL BUSINESS AND REVENUE

Michael McEvoy, Adjudicator

March 4, 2008

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Summary: The applicant, a former employee of the Ministry, requested records relating to a dispute between himself and his former employer about his appointment to the council of a self-governing professional body. The Ministry released a number of records, some of which it severed because, the Ministry argued, they revealed advice or recommendations under s. 13(1) of FIPPA. The Ministry is authorized to withhold some of the information under s. 13(1) and ordered to disclose other information to which s. 13(1) does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(n).

Authorities Considered: **B.C.:** Order F08-06, [2008] B.C.I.P.C.D. No. 10; Order No. 218-1998, [1998] B.C.I.P.C.D. No. 11; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

1.0 INTRODUCTION

[1] The applicant is a former employee of the Ministry of Small Business and Revenue (“Ministry”). He is also the applicant in a related Order F08-06¹ concerning the Ministry of Community Services which I am issuing concurrently with this Order. While employed by the Ministry in 2005, the applicant was appointed as a member of the council of a professional self-governing body (“council”). Upon learning this, the Ministry expressed concerns that the appointment might pose a potential conflict between the applicant’s duties as

¹ [2008] B.C.I.P.C.D. No. 10.

a government employee and his duties as a member of the council. The applicant disagreed and a dispute ensued over the issue, including whether the applicant was entitled to leave without pay in order to attend meetings of the council. The applicant left the public service in early 2006 and about that time made a request for information under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) from the Ministry, chiefly relating to his appointment to the council. The Ministry responded by providing copies of the requested records, some of which it severed under ss. 13(1) and 22 of FIPPA. The applicant asked this Office to review the Ministry’s decision to withhold the information. Mediation resulted in the release of further records and an agreement by the parties to remove s. 22 as an issue. A written inquiry was held under Part 5 of FIPPA to deal with the balance of the severed information.

2.0 ISSUE

[2] The issue in this inquiry is whether the Ministry is authorized to refuse access to the withheld information under s. 13(1) of FIPPA. Under s. 57(1) of FIPPA, the Ministry has the burden of proof.

3.0 DISCUSSION

[3] **3.1 Preliminary Matter**—The applicant argues in his reply submission that the severed information cannot be withheld because it is related to a decision of a public body, made in the exercise of a discretionary power or an adjudicative function.² He therefore contends that under s. 13(2)(n) of FIPPA the Ministry must not refuse to disclose the disputed information.

[4] The applicant argues that the decision in question occurred in August 2005 when the Ministry’s Executive Director required him to resign either his job or his appointment. He submits that all of the records at issue in this inquiry stemmed from, and are connected with, this action that affects his rights.³

[5] I cannot accept the applicant’s argument. The instructions given to the parties in the Notice of Inquiry state that the purpose of reply submissions is to let the parties address each other’s initial submissions. New issues will not generally be considered in reply because the opposing party has no chance to respond to them. For this reason the applicant’s s. 13(2) argument is not properly before me and I reject it.⁴

² Applicant’s reply, para. 2.

³ Applicant’s reply, para. 3.

⁴ For a detailed discussion of why newly raised issues outside the scope of a Notice of Inquiry will not generally be entertained, please refer to the analysis of Senior Adjudicator Francis in Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

[6] However, even if I were to entertain the applicant's argument, I would find that it is without merit. The applicant fails to provide any evidence supporting his claim that the Executive Director required him to choose between his Ministry job or his appointment with the council in August of 2005. To the contrary, the evidence suggests there was an ongoing discussion with the applicant throughout 2005 about whether he should continue his role as a member of the council but the Ministry had not made a decision about how to handle the matter. It was this indecision that caused the Ministry, in the latter part of 2005, to seek advice from the Public Service Agency ("PSA"), the body which provides human resource management services to government ministries.

[7] Further, even if I found that the Executive Director made the kind of decision envisaged by s. 13(2)(n), the applicant's contention would still be without validity because the information the applicant seeks is much broader than the alleged decision and the reasons for it.

[8] This was a point addressed in Order No. 218-1998.⁵

The applicant relies on section 13(2)(n) to compel disclosure of this information. I agree with the Ministry that the applicant's reliance on section 13(2)(n) to compel disclosure is misguided.... It does not require the disclosure of all records which relate in any way to the exercise of a discretionary power or an adjudicative function. Only the records which contain a decision or reasons for it must be disclosed.

[9] For all of the reasons given, I would reject the applicant's s. 13(2) argument.

[10] **3.2 Advice or Recommendations**—The relevant provision of s. 13 of FIPPA reads as follows:

Policy advice or recommendations

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.

[11] The purpose of s. 13(1) is to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.⁶ A number of orders have considered the interpretation of s. 13(1) and without repeating them here I apply the principles set out in those orders.⁷

⁵ [1998] B.C.I.P.C.D. No. 11, para. 32.

⁶ In Order 01-15, [2001] B.C.I.P.C.D. No. 16, the Commissioner noted that this was especially the case while the public body is considering a given issue.

⁷ See for example Order 02-38, [2002] B.C.I.P.C.D. No. 38.

[12] In this case, the Ministry argues that the records at issue relate to labour relations matters concerning the applicant.⁸ It says that, when the applicant accepted an appointment to the council, the Ministry was concerned about a potential conflict between the applicant's duties as a government employee and his duties as a member of the council. As a result of those concerns, senior Ministry officials sought labour relations advice from the PSA concerning the applicant's employment.⁹ The Ministry argues that s. 13 can apply to advice or recommendations provided by an official of one public body to another public body.¹⁰ It also submits that, if disclosing information would permit an individual to draw accurate inferences about advice or recommendations developed for a public body, such information may be withheld under s. 13(1). In general terms, the Ministry argues that the severed information constitutes advice relating to which courses of action were preferred or desirable and/or advice about an existing set of circumstances relating to the applicant's employment with the Ministry.¹¹

[13] As for the specific reasons for each severance, the Ministry refers to a chart attached as an exhibit to the affidavit of Debra Clarry, an information and privacy analyst with the Ministry. The chart sets out each severed passage and the reason for the severance. Broadly speaking, the Ministry submits that the severed information falls into one of two categories: it is protected advice or disclosure of the severed information would allow the applicant to draw an accurate inference of the advice given by the PSA.¹² Clarry also swears in her affidavit that the Ministry's Deputy Minister, Robin Ciceri, advised her that she considered a series of relevant factors in exercising her discretion under s. 13.¹³

[14] The applicant argues that it is clear from the records already disclosed that all of the information withheld under s. 13 is about him and accordingly he has the almost unfettered right to access his own personal information.¹⁴ He says his rights of access apply even if the withheld information is, in part, advice or recommendations, because the predominant characteristic of the advice relates to him.¹⁵ The applicant argues that the mandatory nature of s. 22 of FIPPA underscores the importance of the right of access to one's own personal information and must trump any s. 13 right to withhold information.¹⁶

⁸ Ministry's initial submission, para. 4.01.

⁹ Ministry's initial submission, para. 4.02.

¹⁰ Ministry's initial submission, para. 4.18.

¹¹ Ministry's initial submission, para. 4.21.

¹² Clarry affidavit, exhibit F.

¹³ Clarry affidavit, para. 11.

¹⁴ Applicant's initial submission, para. 2.

¹⁵ Applicant's initial submission, para. 3.

¹⁶ Applicant's initial submission, para. 5.

[15] The Ministry replies that any claim that s. 13 cannot be used to withhold personal information about an applicant is inconsistent with the wording of s. 4 of FIPPA.¹⁷ The Ministry contends that s. 4 makes clear that the right to personal information does not extend to records excepted from disclosure under Division 2 of Part 2 of FIPPA.¹⁸ It argues that, in stating that the right to personal information trumps s. 13(1), the applicant is effectively arguing there is inconsistency or conflict between ss. 2, 4 and 13 of FIPPA. The Ministry submits there is no conflict between these provisions and that ss. 2(1) and 4(2) clearly provide that, where an exception such as s. 13 applies, the applicant has no right of access to that information.¹⁹

[16] In reply, the applicant disagrees with the Ministry's characterization of this matter as a labour relations issue. He says this ignores the fact that the labour relations matters arose many months after the Executive Director's decision of August 2005 and his subsequent refusal to consider the possibility that it was he, and not the applicant, who was in a conflict of interest.²⁰

[17] I have carefully considered the submissions of the parties and begin by saying that I do not accept the applicant's assertion that the right to one's own personal information trumps, as the applicant puts it, s. 13. Section 4(1) does provide that a person has a right of access to any record in the care or custody of a public body, including the person's own personal information. However, s. 4(2) exempts from the scope of the s. 4(1) information excepted from disclosure under Division 2 of Part 1 of FIPPA. There is nothing in FIPPA, read either explicitly or implicitly, which lends itself to the applicant's position that, because the information concerns him, he has an overriding right of access to it in spite of any other provisions of FIPPA.

[18] Therefore the question before me is whether the information falls within the scope of s. 13(1) and if so whether the Ministry has properly exercised its discretion in applying the provision.

[19] My review of the records indicates that the Ministry severed ten discrete email passages. In some cases, these passages recur throughout the materials because the emails were copied to numerous parties whose records were also subject to the applicant's access requests. I will analyze each of these passages in turn and for the sake of convenience refer to them as they are identified in Exhibit F of the Clarry affidavit filed with the Ministry's submission.

1. Email from Ian Forman, Executive Director, Revenue Programs Division, Ministry, to Aman Nijjar, Human Resources Consultant, PSA, December 6, 2005.

¹⁷ Ministry's reply, para. 1.

¹⁸ Ministry's reply, para. 3.

¹⁹ Ministry's reply, para. 4.

²⁰ Applicant's reply, para. 5.

[20] The Ministry argues that disclosure of the severed information would allow someone to accurately infer advice given by the PSA to the Ministry found at pp. 42 and 56 of the materials provided.

[21] My first observation about this submission is that I have not been provided any direct evidence that the PSA provided the advice referred to by the Ministry. Instead, what the Ministry proffers, *in camera*, is a brief third-person account of advice that the person says the PSA conveyed to the Ministry. Assuming this account is accurate, I am not persuaded that revealing the gist of the severed passage (which is a request for advice by the Executive Director to the PSA concerning the applicant) would reveal the PSA's alleged advice. Accordingly, I have provided a re-severed version of the disputed information in a manner that does not reveal anything beyond a mere request for advice.

2. Email from Ian Forman, Executive Director, Revenue Programs Division, Ministry, to Jeffrey Krasnick, Acting Manager of Provincial-Federal Tax Strategies, Ministry, December 9, 2005.

[22] This email, more accurately described, is from Ian Forman to Elan Symes, Assistant Deputy Minister and forwarded to Jeffery Krasnick. The Ministry argues that, if disclosed, the severed information would allow the applicant to draw an accurate reference concerning advice by Rob Vaterlechner of PSA to the Ministry. My review of the material leads me to agree with the Ministry's conclusion. The severed passage directly refers to advice that Rob Vaterlechner gave the Ministry as concerns the applicant and his appointment to the council.

3. Email from Rob Vaterlechner, Senior Labour Relations Specialist, PSA to the Ministry, December 9, 2005.

[23] The Ministry argues that the severed information consists of advice the PSA gave in response to the Ministry's request for labour relations advice as to whether the applicant's appointment to the council was compatible with his continued employment as a Ministry employee. This severed information is clearly advice which the public body may refuse to disclose under s. 13(1) of FIPPA.

4. Email from Ian Forman, Executive Director, Revenue Programs Division, Ministry, to Aman Nijjar, Human Resources Consultant, PSA, December 9, 2005.

[24] In filing its initial submission to this Office on March 12, 2007 the Ministry stated amongst other things:

Also enclosed is a copy of the submissions with *in camera* portions severed for the Applicants [*sic*] as well as a copy of the severed version for your file.

[25] In reviewing this Office's copy of the severed version sent to the applicant it appears that the email in dispute has been disclosed to the applicant, save and except the final sentence.²¹ In light of this disclosure, I find there is no merit to the Ministry's *in camera* argument that the final sentence of this email should now be withheld.

5. Email from Kirn Khaira, Ministry, to the applicant, December 21, 2005.

[26] This passage is withheld under s. 22 of FIPPA and, as noted above, the parties have agreed s. 22 matters do not form part of this inquiry.

6. Email from Elan Symes, Assistant Deputy Minister, to Robin Ciceri, Deputy Minister, Ministry, December 9, 2005.

[27] The Ministry contends that the information in question is advice from the Assistant Deputy Minister to the Deputy Minister and that the passage also references advice from the PSA. Though I am limited in what I can say here without revealing the disputed information, I have concluded that the Ministry has properly characterized the information in question.

7. Email from Robin Ciceri, Deputy Minister, to Elan Symes, Assistant Deputy Minister, Ministry, December 9, 2005.

[28] The Ministry argues that, if the severed passage in this email is disclosed, it would allow the applicant to draw an accurate inference concerning the underlying advice from the PSA to the Ministry. I agree with the Ministry's assessment in that the Deputy's Minister's response suggests the advice she received from her Assistant Deputy Minister.

8. Email from Ian Forman, Executive Director, Revenue Programs Division, Ministry, to Elan Symes, Assistant Deputy Minister, Ministry, December 6, 2005.

[29] The Ministry submits that the severed information is advice to the Assistant Deputy Minister and I agree with this characterization of the evidence. The advice concerns how the Ministry should deal with the applicant's suggestions as to how to resolve the disagreement about whether his council appointment put him in a conflict situation.

9. Two Email communications between Ian Forman, Executive Director, Revenue Programs Division, Ministry, and Elan Symes, Assistant Deputy Minister, Ministry, December 8, 2005.

²¹ See Clarry affidavit, Exhibit E, p. 34.

[30] The Ministry contends that, if disclosed, the severed information would enable someone to draw an accurate inference concerning advice received by the Ministry from the PSA. I agree with this for the most part. However, the first severed sentence of the Forman email bears no relation to the Ministry's *in camera* contention concerning it. This brief passage does not contain any advice nor infer it. It only answers a question. As the Ministry makes no other argument in support of severance I find that s. 13(1) does not apply to the first severed sentence of this email.

10. The Minister's Weekly Briefing Meeting, December 6, 2005.

[31] The Ministry says the severed information is outside the scope of the applicant's request because it does not relate to him. This is clearly the case because other listed agenda items in the record that have been severed are not responsive to the applicant's request.

Has the Ministry properly exercised its discretion?

[32] The evidence provided in this regard comes from Debra Clarry, who recounts her conversation on this issue with Deputy Minister Robin Ciceri. This hearsay evidence is not ideal but in this case I am prepared to accept it. Clarry states that, in making her decision in respect of s. 13(1), the Deputy Minister considered, among other factors, the age of the document, the fact that individuals should have information about themselves and whether disclosure of the information would increase public confidence in the operation of the Ministry. Based on this and other relevant matters the Deputy Minister considered, I am satisfied that the Ministry properly exercised its discretion under s. 13(1) in this case.

4.0 CONCLUSION

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

1. Under s. 58(2)(a), I require the Ministry to give the applicant access to the information specified in numbers 1, 4, and 9 above. I have prepared a re-severed copy of these pages for the Ministry to disclose to the applicant and have highlighted in yellow the portion which I have found that the Ministry is not authorized to withhold;
2. Under s. 58(2)(b), I confirm that the Ministry is authorized by s. 13(1) to refuse access to the remainder of the withheld information;

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3. Under s. 58(4) of the Act, I require the Ministry to deliver a copy of the re-severed records to the applicant and to me within 30 days, as that term is defined in FIPPA, from the date of this order.

March 4, 2008

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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