



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

Order F08-06

MINISTRY OF COMMUNITY SERVICES

Michael McEvoy, Adjudicator

March 4, 2008

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Summary: The applicant, a former employee of the Ministry of Small Business and Revenue, 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 of Community Services released a number of records, some of which it severed because, it argued, they revealed advice or recommendations under s. 13(1) of FIPPA. The Ministry of Community Services 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*, s. 13(1), 13(2)(n).

Authorities Considered: **B.C.:** Order F08-05, [2008] B.C.I.P.C.D. No. 9; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

1.0 INTRODUCTION

[1] The applicant is a former employee of the Ministry of Small Business and Revenue (“MSBR”). He is also the applicant in a related case, Order F08-05,¹ concerning MSBR which I am issuing concurrently with this Order. While employed by MSBR in 2005, the applicant was appointed as a member of the council of a professional self-governing body (“council”). Upon learning this, MSBR expressed concerns that the appointment might pose a potential conflict between the applicant’s duties as a government employee and his duties as a member of the council. The applicant disagreed. A dispute arose over the

¹ [2008] B.C.I.P.C.D. No. 9.

issue when MSBR denied the applicant three days' leave to attend a council meeting. The applicant took the days off anyway, causing MSBR to record the applicant's absence as a suspension without pay. The applicant grieved MSBR's decision, but his union dropped the matter not long after when the applicant decided to resign his position.² From the time of learning of the applicant's appointment to the council to its dispute over the leave request, MSBR sought advice from the Public Service Agency ("PSA") which provides human resource management services to provincial ministries in government. On or about the time of his departure, the applicant made a request for information under FIPPA from the PSA³ for records relating to his appointment to the council and allegations of conflict of interest and breach of MSBR policy. The PSA responded by providing copies of the requested records, some of which it severed under s. 13(1) of FIPPA. The applicant asked this Office to review the PSA's decision to withhold the information. Mediation resulted in the release of further records but was otherwise unsuccessful. A written inquiry was therefore held under Part 5 of FIPPA to deal with the balance of the undisclosed severed information.

2.0 ISSUES

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

3.0 DISCUSSION

[3] **3.1 Preliminary Matter**—In his reply submission, the applicant raises for the first time reliance on s. 13(2)(n) of FIPPA. He states 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.⁴

[4] In Order F08-05, referred to at the outset, I rejected the identical argument made by the applicant. Since the factual bases for Order F08-05 and this case are essentially the same, I reject the applicant's argument for the same reasons set out in Order F08-05.⁵

[5] **3.2 Advice or Recommendations**—The relevant provisions of s. 13 of FIPPA read as follows:

² PSA's initial submission, paras. 4.02, 4.03 and 4.04; the applicant did not contradict any of this.

³ The PSA is an agency which operates under the Ministry of Community Services, which is therefore the public body involved here. I have however, for the most part, used the term PSA throughout this Order, for ease of reference.

⁴ Applicant's reply, para. 2.

⁵ Para's. 5 to 9.

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.

[6] 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

[7] The PSA argues that it is clear on the face of the records that the severed information was prepared for the purpose of providing advice and recommendations to MSBR concerning labour relations issues involving the applicant. It contends that s. 13 can apply to advice or recommendations provided by an official of one public body to another public body.⁸ 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 PSA 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 MSBR.⁹

[8] The PSA's submission delineates six instances where it severed information and sets out its reasons for doing so in each case. Broadly speaking, the PSA submits that the severed information falls into one of two categories: either it is advice or disclosure of the severed information would allow the applicant to draw an accurate inference of the advice given by the PSA. In addition, the PSA appends the affidavit of Cindy Elbahir who swears that the Assistant Deputy Minister responsible for the PSA, Linda Tarras, considered a series of factors in exercising her discretion under s. 13.¹⁰

[9] 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.¹¹ The applicant made the identical argument in Order F08-05 and the public body made an identical response to the position it posits here. For the reasons I stated in that Order,¹² I reject the applicant's argument on this point.

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.

⁸ PSA's initial submission, para. 4.15.

⁹ PSA's initial submission, para. 4.19.

¹⁰ Elbahir affidavit, para. 8.

¹¹ PSA's initial submission, para. 2.

¹² Para. 17.

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

[11] My review of the records indicates there are six discrete email passages which the PSA has severed. 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.

1. Email from Rob Vaterlechner, Senior Labour Relations Specialist, PSA, to MSBR, December 9, 2005.

[12] The PSA argues that the severed information consists of advice the PSA gave in response to the MSBR's request for labour relations advice as to whether the applicant's appointment to the council was compatible with his continued employment as a MSBR employee. I dealt with this same severed email in Order F08-05 and repeat that this particular severed information is clearly advice within the meaning of s. 13(1) of FIPPA.

2. Email from Rob Vaterlechner, Senior Labour Relations Specialist, PSA, to Aman Nijjar of PSA and Norm MacPhee, legal counsel for the PSA, January 26, 2006.

[13] The PSA argues that the severed information was communicated for the purpose of the provision of advice to MSBR. It submits that a PSA official responsible for day-to-day labour relations advice later communicated the advice to MSBR. I find that the severed information concerns advice on the matter of the applicant's appointment to the council and how MSBR should deal with it, and therefore comes within the ambit of s. 13(1) of FIPPA.

3. Email from Rob Vaterlechner, Senior Labour Relations Specialist, PSA, to Paul Straszack, Assistant Deputy Minister for the PSA, February 10, 2006.

[14] The PSA argues that, in this instance, Rob Vaterlechner provided advice to Paul Straszack concerning how he should respond to a letter from the applicant. My review of the severed information reveals that two recommendations are made to Paul Straszack as to how he should respond to the applicant's request for a meeting. This is clearly a matter captured by s. 13(1) of FIPPA.

4. Email from Paul Straszack, Assistant Deputy Minister for the PSA, to Rob Vaterlechner, Senior Labour Relations Specialist, PSA, February 10, 2006.

[15] The PSA argues that the severed information, if revealed, would indirectly disclose the advice that Rob Vaterlechner provided in item 3 above. After reviewing the severed passage, I agree with the PSA. In the severed information, Paul Straszack provides direction to Rob Vaterlechner and in the course of doing impliedly reveals Rob Vaterlechner's advice to him.

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

[16] The PSA argues that, if the severed information were disclosed, it would enable someone to draw an accurate inference concerning the advice the MSBR received from Rob Vaterlechner of the PSA on December 9, 2005. I also dealt with this matter in Order F08-05 and repeat the conclusion I reached in that case; in light of the fact this email has been disclosed, save and except the last sentence, I find there is no merit to the PSA's *in camera* argument that the final sentence of this email should now be withheld.

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

[17] The PSA argues that disclosure of the severed information would allow someone to accurately infer advice given by the PSA to MSBR found at pp. 42 and 56 of the materials relating to Order F08-05.

[18] I considered this passage in Order F08-05 and concluded for the reasons given in that order that the essence of the passage could be disclosed and doing so would not reveal any advice the PSA may have provided to MSBR.¹³ I make the same finding here.

Has the PSA properly exercised its discretion?

[19] Cindy Elbahir swears that, in signing off the decision document with respect to the applicant's request, Assistant Deputy Minister Linda Tarras 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 PSA.

[20] As I said in Order F08-05,¹⁴ this is a less than satisfactory manner of submitting evidence to support a claim that the PSA exercised its discretion under this section. The best evidence is that which comes from the delegate of

¹³ Para. 21.

¹⁴ Para. 32.

the head of the public body making the decision in question, in this case, Lynda Tarras. However, in this instance I am prepared to accept that the Assistant Deputy Minister did consider the matters attributed to her and I am satisfied that the PSA properly exercised its discretion under s. 13(1).

4.0 CONCLUSION

[21] 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 of Community Services to give the applicant access to the information specified in numbers 5 and 6 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 of Community Services is authorized by s. 13(1) to refuse access to the remainder of the withheld information;
3. Under s. 58(4) of the Act, I require the Ministry of Community Services 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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