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

Order F09-02

MINISTRY OF LABOUR AND CITIZENS' SERVICES

Celia Francis, Senior Adjudicator

January 27, 2009

Quicklaw Cite: [2009] B.C.I.P.C.D. No. 3
Document URL: http://www.oipc.bc.ca/orders/2009/OrderF09-02.pdf

Summary: FIPA requested access to stakeholders' comments on proposed FIPPA amendments. Ministry disclosed some records in full where stakeholders had no concerns with disclosure and disclosed other records in severed form where stakeholders did have such concerns. It applied s. 13(1) to the withheld portions saying the comments were advice or recommendations to government on proposed courses of action. Section 13(1) found to apply to most of withheld information. Ministry found not to have exercised discretion properly and ordered to reconsider its decision to withhold information under s. 13(1).

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

Authorities Considered: B.C.: Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-22, [2003] B.C.I.P.C.D. No. 22.

Cases Considered: *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* 2005 BCCA 665; *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564.

1.0 INTRODUCTION

[1] This decision arises out of a request by the applicant, the Freedom of Information and Privacy Association ("FIPA"), for records of stakeholders' comments on proposed amendments to the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The public body, the Ministry of Labour and Citizens' Services ("Ministry") provided a number of records from which it severed information under ss. 13(1), 14 and 22 of FIPPA. FIPA requested a review by this Office of the Ministry's decision to apply s. 13(1).[1] It said that in the past it had received full copies of records from FIPPA legislative reviews.[2] FIPA also pointed out that, in this case, the Ministry had disclosed some stakeholders' comments in full but had disclosed others in severed form. FIPA said that, even if the records were "policy advice", which it disputed, s. 13 should be applied consistently.[3]

[3] Mediation did not resolve the s. 13(1) issue and the matter proceeded to an inquiry under Part 5 of FIPPA. After the inquiry had closed, the Ministry disclosed a few more items of information to the applicant, saying it had reconsidered its decision to apply s. 13(1).[4]

2.0 ISSUE

[4] The issue here is whether the Ministry is authorized to refuse access to information under s. 13(1). Under s. 57(1) of FIPPA, the Ministry has the burden of proof regarding s. 13(1).

3.0 DISCUSSION

[5] **3.1 Records in Dispute**—FIPA requested the following records:

> 1] The most recent and fullest list of FOIPP amendment possibilities and advice sent out to about 27 "stakeholders" for the George MacAuley review for them to comment upon.
>
> 2] Copies of all 27 "stakeholder submissions received at IPPB (to Jan 23/06) in response to proposed FOIPP Act amendments."
>
> 3] Copies of any other advice on FOIPP Act reform received by government since March 1, 2004 … for inclusion in the May 2004 legislative review report.[5]

[6] The material before me indicates that the Ministry disclosed the "amendment possibilities" and complete copies of a number of "stakeholder submissions". The Ministry also disclosed severed copies of other "stakeholder submissions" and these are the records in dispute in this case.

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[1] FIPA did not dispute the Ministry's application of ss. 14 and 22. It confirmed this in its initial submission at page 2. In its initial request to the Ministry and its request for review by this Office, FIPA asked that the Ministry apply s. 25 (the public interest override) to the records. During mediation, FIPA agreed not to pursue s. 25.
[2] Letter of November 16, 2006.
[3] Letter of March 7, 2007.
[4] Ministry's letter of April 25, 2008, with enclosures.
[5] Letter of April 21, 2006.

[7] The severed records are, according to the Ministry, "the advice and recommendations provided by stakeholders to the Ministry" in 2006 during one of a series of consultations with stakeholders that the Ministry carried out on potential FIPPA amendments between 2002 and 2007. The Ministry said that the records are notes of verbal "comments" that some stakeholders provided at meetings and "written comments" that stakeholders provided later.[6]

[8] The severed records, copies of which the Ministry included with its initial submission,[7] indicate that the Ministry invited "input" from stakeholders[8] on at least 120 proposed FIPPA amendments, one subset of which is referred to as a "wish list".[9] The severed records also show that the Ministry disclosed the following: the names of the stakeholders (for example, ICBC, BC Hydro, Fraser Health Authority, "Crowns"[10]); introductory or closing remarks in any letters or emails; any references to the wording of FIPPA as it existed at the time of the consultations; a few brief comments; FIPPA section numbers; and the wording of any proposed amendments on which stakeholders were commenting. The Ministry withheld most of the stakeholders' "comments" or "input" on the proposed amendments.

[9] **3.2 Application of Section 13(1)**—The relevant parts of s. 13 of FIPPA read 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.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> (b) a public opinion poll,

[10] 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. A number of orders have considered the interpretation of s. 13(1) and I apply here, without repeating them, the principles set out in those orders.[11]

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[6] Paras. 4.03-4.05, initial submission.
[7] As Appendix "A".
[8] Para. 7, Plater affidavit.
[9] One stakeholder says it understood that the government was not seriously considering the proposed "wish list" amendments; see ICBC's comments, as disclosed at item 2.
[10] That is, Crown corporations.
[11] See, for example, Order 01-15, [2001] B.C.I.P.C.D. No. 16, and Order 02-38, [2002] B.C.I.P.C.D. No. 38.

[11] **3.3 Does Section 13(1) Apply?**—FIPA argued that the aim of s. 13(1) and similar provisions in other jurisdictions is

> … to allow for the unfettered discussion and development of policy within government by public servants for decision by their political masters.
>
> …
>
> Clearly the intent of the legislature in the design of s. 13 was to protect the legitimate interest of society in allowing public servants to freely provide advice or recommendations to decision makers in government without fear of premature disclosure.[12]

[12] In FIPA's view, however, s. 13 was not intended as "a blanket that could be thrown over any information used in the deliberative process". FIPA argued that the legislature foresaw the potential for abuse by adding to s. 13(2) "an extensive list of types of information that could not be withheld" under s. 13(1), even though these types of information form "much of the basis for the advice or recommendation".[13] Moreover, FIPA said, the submissions of the 27 organizations "were widely circulated and not the subject of an embargo or confidentiality agreement".[14] FIPA provided no evidence in support of this latter assertion.

[13] FIPA also argued that, while the BC Court of Appeal decision, *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*,[15] has governed interpretation of s. 13(1) since 2002, other jurisdictions have rejected its interpretation of what the words "advice or recommendations" mean in s. 13(1). FIPA cites *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* in support of this argument.[16] FIPA "respectfully submitted" that, for a number of reasons, *College of Physicians* "was wrongly decided"[17] and that

> … this case is perhaps the most extreme example of what can go wrong when public authorities (including the BCCA) misinterpret what should be a very limited exemption for a limited but legitimate public purpose.
>
> The fact that these records relate to the freedom of information regime itself makes the Ministry's refusal to release them all the more ironic.

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[12] Page 3, initial submission.
[13] Page 4, initial submission.
[14] Page 1, initial submission.
[15] 2005 BCCA 665.
[16] [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564.
[17] Page 8, initial submission.

> [If s. 13 is found to apply] the consequences will be that virtually any expression of views or opinions to the government will be exempt from disclosure. Subsection (2)(a) will have been effectively repealed and British Columbia will stand alone as a jurisdiction where public servants decide on a whim what may or may not be released, despite the clear intent of the elected representatives of the people.[18]

[14] In FIPA's view, the records do not fall under s. 13(1) but rather under s. 13(2)(a) or (b),

> … They are not legal, medical or similar expert opinions about a particular set of facts [like the records in *College of Physicians*]. They are opinions about possible changes to legislation.
>
> Rather than advice or recommendations, these records can be more accurately described as submissions to a semi-public consultation. The closest analogy would be to a focus group or public opinion polling.[19]

[15] FIPA also noted that other government ministries, such as the Ministry of Attorney General, carry out web-based public consultations on government initiatives, including draft legislation, as does the federal government. The public's comments, similar in nature to the information in dispute here, FIPA argued, are posted on government websites for all to see with no suggestion that s. 13 (or the federal equivalent) applies to them. FIPA also noted that the Ministry of Attorney General's web-based consultation papers contain a "proviso" that freedom of information legislation may require the Ministry to disclose the public's responses to consultations, whereas the Ministry of Labour and Citizens' Services does not appear to have provided a similar warning to stakeholders during the consultations in this case. In FIPA's view, the Ministry's refusal to disclose the information FIPA requested is inconsistent with the practices of other ministries.[20]

[16] The Ministry countered that its approach to applying s. 13 is entirely consistent with that of other ministries, that is, like other ministries, it makes a decision on whether to apply s. 13 based on the circumstances of each case.[21] The Ministry also disputed FIPA's "novel claim" that its consultation process in this case was similar to focus groups or public opinion polling. In the latter situation, the Ministry said, polling companies select members of the public at random to find out what the public as a whole feels about something. By contrast, in these consultations, the Ministry said it sought advice from experts, not at random, but because of their experience and expertise in

[18] Pages 11-12, initial submission.
[19] Page 9, initial submission. FIPA reiterated this point at p. 1 of its reply submission.
[20] Pages 2-3, reply submission.
[21] Letter of May 21, 2008.

administering FIPPA and that these "experts" exercised skill and judgement in providing their advice to the Ministry.[22]

[17] Moreover, said the Ministry, it is clear from the records themselves that they were created for the purpose of giving the Minister "advice relating to which courses of action in relation to amending the Act were preferred", advice which Ministry officials were free to accept or reject, and that the withheld information therefore falls under s. 13(1). It does not matter who created the advice or recommendations, the Ministry argued, and s. 13(1) can therefore apply to advice or recommendations provided by a public body employee or a private citizen.[23]

[18] The Ministry added that some of the severed information consists of the implications or consequences of the options for amending or not amending FIPPA, a necessary component of giving advice. This type of information also qualifies as advice, as the Commissioner acknowledged in Order 02-38, the Ministry said. Advice is broader than advice concerning future actions, the Ministry argued, and can be applied to "an opinion about existing circumstances". None of the information falls under s. 13(2) or 13(3), in the Ministry's view.[24]

[19] I agree with the Ministry that in Order 02-38 the Commissioner found s. 13(1) to apply to information describing the implications of options. However, this was because, in that case, disclosure of the implications would allow the drawing of accurate inferences about the underlying advice or recommendations, which he concluded fell under s. 13(1).[25] In other words, not all information related to the implications or consequences of options under consideration constitutes "advice or recommendations".

Analysis

[20] I will deal first with FIPA's suggestions that the information in dispute is analogous to a public opinion poll or focus group information and that s. 13(1) therefore does not apply to it.

[21] The Ministry's "consolidated list of stakeholder submissions" indicates that it consulted ministries, self-governing professions, crown corporations, municipal police, universities and health authorities, as well as organizations such as the

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[22] Para. 2, reply submission.

[23] Paras. 4.15-4.18, initial submission. The Ministry referred to Order 03-22, [2003] B.C.I.P.C.D. No. 22, at para. 18, for support of this last argument. I agree with it on this last point.

[24] Paras. 4.19-4.24, initial submission. The Ministry submitted a few words of argument on an *in camera* basis in para. 4.20 as it would reveal information in dispute in one of the severed records. As for its s. 13(3) argument, I agree with the Ministry that this section does not apply here.

[25] See para. 135, Order 02-38.

Canadian Bar Association. I agree with the Ministry's argument that the consultations in this case were not a "public opinion poll".

[22] As for the "focus group" argument, this type of information is not listed in s. 13(2) as an exception to s. 13(1). In any case, I do not consider the stakeholders to have been a "focus group", a term which I understand to refer to a representative group of individuals brought together for moderated discussions aimed at determining their attitudes, for example, for purposes of market or social sciences research.[26]

[23] FIPA also argued that s. 13(2)(a) applies to the withheld information. This suggests that the stakeholders' "input" and "comments" were "factual information". They are not.

[24] The stakeholders frequently express simple agreement or support (or lack thereof) for certain proposed amendments. Disclosure of these comments would, in this case, reveal implicit advice or recommendations to government to proceed or not proceed with those proposed amendments. In some cases, the stakeholders also express their views or opinions on the positive or negative implications of certain proposals or on the consequences of past FIPPA amendments which stakeholders want addressed. Disclosure of these implications and consequences would, in this case, allow the drawing of accurate inferences about the underlying advice or recommendations to government as to whether or not to amend FIPPA. In a handful of other cases, stakeholders also provide explicit recommendations in the form of suggested alternative wording or ideas for proposed amendments. I find that all of these types of information fall under s. 13(1).

[25] In other cases, however, stakeholders request, or comment on the need for, clarification of a proposal, without commenting on it. Stakeholders frequently also stated that they had "no comment" or "no opinion" respecting certain proposed amendments. I do not consider that, in providing these types of comments, the stakeholders were "weighing the significance of matters of fact", providing "expert opinion on matters of fact" or presenting "factual information" to "provide background explanations or analysis for consideration in making a decision". Such neutral comments do not in my view constitute advice or recommendations and I find that s. 13(1) does not apply to these types of withheld information.

[26] **3.4 Exercise of discretion**—FIPA pointed out that s. 13(1) is discretionary and argued that the Ministry had improperly used its discretion to refuse disclosure. In its view, a number of factors favour disclosure, such as:[27]

[26] http://en.wikipedia.org/wiki/Focus_group.
[27] Page 11, initial submission.

- FIPA received copies of public submissions made in 1999 and 2004 to the special legislative committee reviewing FIPPA without having to make an access request; the records here are similar in scope and purpose and so the Ministry should show why routine release is not applicable

- FIPA made its request in 2005 and it is now 2008; the government has brought forward at least one set of FIPPA amendments since then; given the special committee issued its report in 2004, "there has to be some question about whether or not these records are not strictly of historical interest"

- there are a number of shortcomings in FIPPA's current structure and operation; public confidence in government accountability partly depends on confidence in FIPPA's operation and "submissions from organizations seeking to influence the process should be made public"

[27] FIPA questioned the appropriateness of the Ministry seeking "consent" from stakeholders in this case, adding that the wording the Ministry used was "clearly designed to solicit a negative response from respondents". FIPA noted that nonetheless it had received complete copies of some submissions.[28] It suggested the Ministry does not consider this latter set of submissions to be "advice or recommendations", although there is no indication of what test the Ministry applied to determine this, except for the stakeholders' "vague reactions" to "a leading question".[29]

[28] The Ministry argued that disclosure of the information in this case would "lead to the stakeholders in question refusing to provide the [Ministry] with full and frank advice in the future when the [Ministry seeks] advice from them concerning proposed amendments". The Ministry based this conclusion on the follow-up it did with stakeholders

> 10. … to determine whether they had any concerns about the release of the advice or recommendations they provided to the Branch. The reason such input was sought was to determine whether or not the release of any advice or recommendations provided by the Stakeholders would negatively impact their willingness to provide the Branch with full and frank advice concerning the Act in the future.
>
> 11. In order to respond to the Request, the Ministry advised the Stakeholders of the request and asked for input as to "how the potential for disclosure would impact your organization's willingness to participate in full and frank discussion on similar issues in the future".

[28] Pages 3-4, reply submission.
[29] Page 4, reply submission.

> 12. In response, a number of the Stakeholders expressed concern about the release of the advice they provided the Branch concerning potential amendments to the Act.
>
> 13. … the Stakeholders stated that it [*sic*] would have to reconsider the advantages and disadvantages of attending consultation meetings in relation to potential amendments to the Act in the future if the advice they provided was released by the Ministry under the Act.[30]

[29] The Ministry said that, if it discloses the withheld information, it risks being deprived of invaluable advice that the stakeholders are "uniquely placed to be able to provide the Branch…about the practical implications of any proposed amendments". Where stakeholders expressed concerns, therefore, the Ministry said its head exercised her discretion to withhold their "advice or recommendations".[31]

Analysis

[30] The Ministry did not provide any direct evidence from the stakeholders about their concerns over disclosure of their comments. Nor did it say why the stakeholders felt they would have to "reconsider the advantages and disadvantages" (whatever this means) of participating in future consultations. The Ministry also did not mention having considered any other factors in exercising its discretion. The only factor it says it did take into account—after-the-fact speculation on the potential effects on future consultations—does not, in my view, support the Ministry's claim that it considered the circumstances of this case in applying s. 13.[32] I do not find this contention persuasive.

[31] I am troubled by the Ministry's apparent failure to consider other relevant factors in its exercise of discretion with regard to the records, as it is bound to do,[33] notably these:

- the purpose of the legislation—*i.e.*, to make public bodies more accountable—as here, in a legislative amendment process which had the potential to affect significantly the public's information and privacy rights, noting strictly as an aside that there is some irony in the Ministry's use of FIPPA to withhold stakeholders' comments on potential amendments to FIPPA itself

[30] Affidavit of Sharon Plater, Director, IM/IT Privacy and Legislation.
[31] Paras. 4.25-4.26, initial submission; Plater affidavit.
[32] The Commissioner also commented negatively on this factor in Order 02-38 at para. 148, where it was one of a number of factors the public body considered.
[33] See Order 02-38, at para. 149.

- promotion of public confidence; the selective withholding of stakeholders' comments based on unspecified speculative concerns is not in my view conducive to the promotion of public confidence in the Ministry's operations

- the nature and sensitivity (or lack thereof) of the information; many of the comments are brief and innocuous, as I have noted; even the more substantive comments are not controversial or earth-shattering

- the passage of time, including changes in circumstances since the request, such as the introduction of amendments to FIPPA; I acknowledge that, at the time of the request, these factors may not have been present, as the consultations with stakeholders had taken place only a few months before; however, as FIPA pointed out, by the time of this inquiry, two years of mediation with this Office had taken place and the Legislature had also passed a number of amendments to FIPPA; it is entirely appropriate, and makes sense, for public bodies to take into account any decrease in the sensitivity of withheld information and any material changes in circumstances since a request was made or an inquiry took place;[34] the minute amounts of additional information that the Ministry disclosed in April 2008 (after this inquiry took place) do not in my view adequately take into account the changes in circumstances since FIPA made its request

[32] In failing to consider additional relevant factors, I conclude that the Ministry has not exercised its discretion properly in deciding to withhold information under s. 13(1). I therefore order it below to reconsider its decision to withhold the information that I found falls under s. 13(1).

4.0 CONCLUSION

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

1. Subject to para. 2 below, I confirm that the Ministry is authorized to withhold the information it withheld under s. 13(1).

2. I require the Ministry to give the applicant access to the following types of information, wherever it withheld them under s. 13(1): where stakeholders said they had no comment or no opinion on proposed amendments; any requests, or comments on the need for, clarification of a proposal.

3. I require the Ministry to reconsider its decision to withhold the information described in para. 1 above and to provide the applicant and me with its decision, together with its reasons, including an account of the factors it considered in exercising its discretion.

[34] See, for example, para. 18, Decision F08-08, [2008] B.C.I.P.C.D. No. 26.

4. I require the Ministry to give the applicant access to the information described in para. 2 above, together with any additional information it decides to disclose after reconsidering its decision under para. 3 above, within 30 days of the date of this order, as FIPPA defines "day", that is, on or before March 10, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records it is disclosing.

January 27, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File: F06-30322