



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F15-13

MINISTRY OF HEALTH

Hamish Flanagan
Adjudicator

March 18, 2015

CanLII Cite: 2015 BCIPC 13
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 13

Summary: The applicant requested records from the Ministry of Health relating to the regulation of raw milk in BC. The Ministry disclosed some records to the applicant. The Ministry withheld some records under ss.13 (policy advice), 14 (solicitor-client privilege), and 22 (third party personal information) of FIPPA and some others on the basis that they are outside the scope of FIPPA under s. 3(1)(j). The adjudicator ordered disclosure of the information withheld under s. 3(1)(j) and some of the information withheld under ss. 13, 14 and 22. The remaining information was required to be withheld under s. 22 or authorized to be withheld under ss. 13 or 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(j), 13, 14, 22

Authorities Considered: B.C.: Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *R. v. B.*, 1995 CanLII 2007 (BCSC); *Solosky v. The Queen*, [1980] 1 S.C.R 821; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *John Doe v. Ministry of Finance* 2014 SCC 36 (CanLII).

INTRODUCTION

[1] The applicant is an advocate for reform of British Columbia's laws regarding unpasteurized milk, commonly referred to as raw milk. He requested the following from the Ministry of Health ("Ministry"):

- copies of communications and records related to the drafting and implementation of s. 7 of the *Public Health Act Transitional Regulation*;¹
- reports about human illness derived from consumption of raw cow or goat's milk;
- records which contain the name of the applicant;
- records related to a named dairy farm; and
- records collected from the internet by the Ministry of Healthy Living and Sport related to raw milk.

[2] The Ministry made a series of disclosures of the responsive records to the applicant including a further disclosure after the applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") conduct an inquiry regarding the withheld information. At the time of this inquiry, the Ministry continues to withhold some records under ss. 3(1)(j), 13, 14, and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[3] The Ministry provided initial and reply submissions to this inquiry. The applicant also provided initial and reply submissions, but they do not directly address the issues in this inquiry, which are whether the above sections of FIPPA apply to the withheld records.

ISSUES

[4] The issues in this inquiry are whether:

1. some of the records are outside the scope of FIPPA because they are available for public purchase (s. 3(1)(j));
2. the Ministry is authorized to withhold information under s.14 of FIPPA because it is protected by solicitor-client privilege;
3. the Ministry is authorized to withhold information because it would reveal advice or recommendations developed by or for a public body under s. 13 of FIPPA; and
4. the Ministry is required to refuse to disclose personal information because it would be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

¹ B.C. Reg. 51/2009.

[5] Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of any personal information would not be an unreasonable invasion of third-party personal privacy under s. 22 of FIPPA. The Ministry's submissions acknowledge it has the burden of proof in relation to ss. 3(1)(j), 13 and 14.

DISCUSSION

[6] **Records at issue**—The records at issue are emails (and related attachments) and letters from third parties and BC Government employees related to the issue of raw milk.

[7] **Section 3(1)(j)**—Section 3(1) sets out circumstances when records fall outside the scope of FIPPA. The relevant portion of s. 3(1) for this inquiry provides:

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(j) a record that is available for purchase by the public;

[8] The Ministry submits that s. 3(1)(j) applies to media articles contained in some emails. For each of these emails, the Ministry has disclosed the email including who the email is to and from and the subject line of the email but it is withholding the media article or articles contained in the email.²

[9] Section 3(1)(j) applies to records that are available for purchase. Here, the records in issue are emails, a component of which (albeit in many instances, the major component) is a media article or media articles. The entire emails are the relevant records and those emails are not available for purchase. Therefore s. 3(1)(j) does not apply to the records and they must be disclosed.

[10] **Legal Advice – s. 14**—Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. This provision encompasses both legal advice privilege and litigation privilege.³ The Ministry's submission is that legal advice privilege applies to the information withheld under s. 14, which comprises emails and email attachments.

² At pp. 58-59, 84-85, 88-89, 142-143, 155-160 and 179-181. The Ministry's submissions also refer to s. 3(1)(j) applying to records at p. 61, but there is no indication in the records that p. 61 is being withheld. If it were, I would find that s. 3(1)(j) does not apply to the record at pp. 61-62.

³ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.

[11] For legal advice privilege to apply, the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[12] If these four conditions are satisfied, then the communication and the records relating to it are privileged.⁴

[13] The Ministry submits that the information it withheld under s. 14 meets the above test, and it refers to the affidavit of a lawyer at the Ministry of Justice in support of this position.

[14] All the documents above meet the first requirement for s. 14 to apply, since they are written communications in the form of emails and email attachments. However, some information withheld under s. 14 is not directly related to the seeking, formulating, or giving of legal advice. This includes emails between BC Government employees that do not reveal advice or instructions to or from legal counsel.⁵ It also includes emails that are between a lawyer and one or more BC Government employee that in my view are not directly related to seeking, formulating, or giving of legal advice⁶ because they relate either to administrative matters or are communications (stated in the emails themselves) as being for information only. This information may not be withheld under s. 14.

[15] I am satisfied the remaining information withheld under s. 14 meets the requirements for legal advice privilege. Some of the withheld records comprising emails and attachments have been forwarded to multiple individuals, but these emails remained confidential because they were only shared between legal counsel and BC Government employees or amongst BC Government employees. Based on my review of the emails and the surrounding context, I am satisfied that these emails are confidential communications between BC Government employees and their lawyers, which are directly related to the seeking, formulating and giving of legal advice.

[16] One email withheld at page 286 is a duplicate of a record at page 347 that has already been disclosed to the applicant by the Ministry in response to his

⁴ For a statement of these principles see also *R. v. B.*, 1995 Can LII 2007 (BCSC), para. 22 and *Solosky v. The Queen*, [1980] 1 S.C.R 821, p. 13.

⁵ The first email at p. 201, pp. 203-4, 205, 339, 402, the 2nd email appearing on p. 423, p. 468.

⁶ Records at pp. 202, 358-361, 369-371 and 374-5.

request for records. As the Supreme Court of Canada in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*⁷ stated:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.⁸

[17] On the basis of consistency, I find privilege over the duplicate email has been waived.

[18] In summary, with the exception of the email at page 286 and the records at pages 202, 358-361, 369-371 and 374-5, I find that the Ministry may continue to withhold the information withheld under s. 14 of FIPPA.

[19] **Advice or recommendations— s. 13**—The Ministry is withholding some information under s. 13, including information the Ministry describes as legal advice which I have determined it is authorized to withhold under s. 14. I will now consider whether s. 13 applies to the legal advice information to which I found s. 14 did not apply and to the other information withheld under s. 13.

[20] Section 13(1) states:

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.

[21] The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether the disclosure of the information “would reveal advice or recommendations developed by or for a public body or a minister” in accordance with s. 13(1). If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA, as a public body must not refuse to disclose information under s. 13(1) if a provision in s. 13(2) applies.

[22] **The Purpose and Scope of s. 13(1)**—The purpose of s. 13(1) is to allow for the full and frank discussion of advice or recommendations on a proposed course of action by a public body. This helps to protect public bodies from the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. The principle underlying this

⁷ 1983 CanLII 407 (BC SC), [1983] B.C.J. No. 1499.

⁸ Order F13-15, 2013 BCIPC No. 18 (CanLII) at para. 22.

exception has been the subject of many orders, including Order 01-15 where former Commissioner Loukidelis said:

This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[23] Section 13 relates to “advice or recommendations”. The British Columbia Court of Appeal stated in *College of Physicians of B.C. v. British Columbia* that “advice” is not necessarily limited to words offered as a recommendation about future action. As Levine J.A. states in *College of Physicians*, “advice” includes “expert opinion on matters of fact on which a public body must make a decision for future action.”⁹

[24] Previous orders have also found that a public body is authorized to refuse access to information that would allow an individual to draw accurate inferences about advice or recommendations.¹⁰ Section 13 can encompass information about policy issues, possible options for changes to policies and considerations for these various options, and discussions about implications and possible impacts of different options.¹¹ Further, in *John Doe v. Ministry of Finance*¹² the Supreme Court of Canada determined that the word “advice” in s. 13(1) of the Ontario FIPPA includes policy options, whether or not the advice is communicated to anyone.

[25] The Ministry claims s. 13 applies to records they describe as containing:

- legal advice prepared by legal counsel in the Ministry of Justice for the Ministry of Health;¹³
- advice, the nature of which was described by the Ministry *in camera*;¹⁴
- advice on the implications for BC of an Ontario court case about the distribution of raw milk;¹⁵

⁹ 2002 BCCA 665 (CanLII) at para. 113.

¹⁰ This was also at the heart of the concern in the decision in *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII) – see paras. 52 and 66.

¹¹ See Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII) at para. 23; Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 102-127; Order F06-16, 2006 CanLII 25576 (BC IPC) at para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA).

¹² 2014 SCC 36 (CanLII).

¹³ Records at pp. 199-249, 252-254, 260-307, 309-345, 358-360, 362-275, 376-450, 455 and 464-478. As noted above, I have found s. 14 applies to much of this information.

¹⁴ Records at pp. 132, 133, 149, 151 and 167.

¹⁵ Records at pp. 132, 142, 144, 148, 149, 150, 151 and 167.

- advice on the implications and legality of distributing raw milk through cow-share or farm-share programs;¹⁶ and
- a discussion paper containing advice relating to the regulation of raw milk and public statements about the regulation of raw milk.¹⁷

[26] I find that some of the information the Ministry characterizes as legal advice comprises advice or recommendations for the purposes of s. 13, including emails containing general advice about matters arising in the course of engaging with the applicant on the issue of raw milk.

[27] Putting aside the information the Ministry characterizes as legal advice, with two exceptions (on pages 192 and 193), I find that s. 13 applies to the information because it contains advice or recommendations from BC Government employees.

[28] Section 13 does not apply to information withheld at page 192 of the records where a Government media advisor is soliciting advice and information from the Ministry. Nor does it apply to the information withheld at page 193 of the records where a media advisor summarizes the Government's position on an issue because the summary is not in the context of providing advice or recommendations, and it does not reveal any advice or recommendations.

[29] There is no evidence from my review of the records, nor any argument in the parties submissions, that any information falls within any of the categories of information listed in s. 13(2) of FIPPA. Therefore, s. 13(2) does not apply to any of the information to which I found s. 13(1) applies.

[30] **Unreasonable invasion of third party personal privacy — s. 22**—The Ministry is withholding some information in correspondence it received from third parties on the basis that the disclosure would be an unreasonable invasion of a third party's personal privacy under s. 22. The Ministry describes the information as:

- the home email addresses of a third party;
- third party employee leave information;
- names and other identifying information of third parties who provided information to the Ministry; and
- personal health information of a BC Government employee.

¹⁶ Records at pp. 133, 149, 151 and 167.

¹⁷ Records at pp. 173, 192 and 193.

[31] Apart from noting that the withheld email addresses are of more than one third party, I find that the above description of the information withheld under s. 22 is accurate.

[32] Section 22 of FIPPA requires public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22(4) lists circumstances where disclosure is not unreasonable. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, public bodies must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

Personal Information

[33] Section 22 of FIPPA only applies to personal information. FIPPA defines personal information as “recorded information about an identifiable individual other than contact information”.¹⁸ Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”¹⁹ I find that the information withheld under s. 22 is personal information because it is information about identifiable individuals and is not contact information.

Section 22(4)

[34] Subsection 22(4) of FIPPA specifies circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. In this case, neither of the parties suggests that s. 22(4) applies. Further, based on my review of the materials, I find that none of the circumstances in s. 22(4) apply to the withheld information.

Section 22(3)

[35] Subsection 22(3) provides the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. It states in part:

- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

¹⁸ Schedule 1 of FIPPA defines “contact information” as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual”.

¹⁹ Schedule 1 of FIPPA.

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
- ...
- (d) the personal information relates to employment, occupational or educational history

[36] The Ministry submits that the presumption in s. 22(3)(a) applies to an employee's personal health information on page 308. Having reviewed the relevant information, I agree the information relates to the medical history of a BC Government employee and that s. 22(3)(a) applies.

[37] The Ministry says that some of the information withheld under s. 22 comprises employee leave information. Having reviewed the records, I agree this information²⁰ discloses information about BC Government employees' leave history and that it therefore falls within the presumption in s. 22(3)(d).

[38] The Ministry does not identify any other presumptions in s. 22(3) as relevant to the information it withheld under s. 22. Further, based on my review of the materials, I find that none of the other presumptions in s. 22(3) apply to the withheld information.

[39] **Section 22(2) Factors** —Section 22(2) requires that public bodies must consider all relevant factors, including those listed in s. 22(2), in determining whether disclosure of personal information is an unreasonable invasion of personal privacy. This means that the presumptions that apply to some of the withheld information under s. 22(3) can be rebutted.

[40] Section 22(2)(f) provides that whether personal information was supplied in confidence is a factor to consider in determining whether disclosure of personal information is unreasonable. The Ministry submits that s. 22(2)(f) is a relevant factor in favour of withholding information supplied by third parties to the Ministry that contains the names and other identifying information of third parties.²¹ The Ministry says it is reasonable to conclude that a third party who provides their personal views to a public body should be presumed to have an expectation that such information will be treated in a confidential manner by the public body. The Ministry adds that public bodies are required to protect this type of personal information under Part 3 of FIPPA, which sets out various obligations of public bodies regarding the collection, use and disclosure of personal information.

²⁰ At pp. 30, 32, 46, 49-50, 52, 53, 186-7 of the records. Also information at p. 165 which is withheld in the records but not referred to in the Ministry submission.

²¹ Identified by the Ministry as information at pp. 48, 55, 250, 251, and 459-463.

[41] I accept that, in the context here, s. 22(2)(f) is a factor in favour of withholding the names and other identifying information, including home addresses and personal email addresses of third parties supplied to the Ministry. The withheld information identifies the third parties with information in their correspondence with the Ministry about their family members, their personal habits and their philosophies, including regarding raw milk. On balance, I believe these parties would not expect this type of personal information to be disclosed to the world at large. I have also identified some information on page 462 and 463 not withheld by the Ministry under s. 22 that in my view also identifies a third party who supplied information in confidence to the Ministry and, therefore, s. 22(2)(f) is also a factor in favour of withholding that information.

[42] **Section 22(1) Factors**— Section 22 requires a public body to refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy.

[43] For the information where disclosure is presumed to be an unreasonable invasion of third party personal privacy, I conclude that the presumption has not been rebutted. There are no factors in favour of rebutting the presumption. Therefore, the information must be withheld under s. 22(1).²²

[44] For information that is not subject to a presumption, I find that disclosing this information is an unreasonable invasion of the identified third party's privacy, particularly because of s. 22(2)(f).²³ This includes identifying information about third parties such as names and email addresses supplied by the third parties where they appear in correspondence with the Ministry. Some information that has previously been disclosed by the Ministry to the applicant must be withheld because disclosure of the information would likely identify third parties who corresponded with a public body, and in the context, disclosure will unreasonably invade their personal privacy.²⁴

[45] An exception to my finding that disclosure of third party identifying information is unreasonable is where it is clear based on the context, information already disclosed in the records, and the general knowledge of the applicant, that the third party is already publicly connected to the issues discussed in this correspondence and, therefore, the third party's identity is known. Where this is the case, I find that disclosure of the information would not unreasonably invade the named third party's personal privacy.²⁵

²² Information at pp. 30, 32, 36, 49, 50, 52, 53, 165, 186-7, 308.

²³ Identifying information withheld at p. 48, the information withheld at p. 250, the email address and identifying information at p. 251.

²⁴ Information highlighted in yellow at p. 462-3.

²⁵ Information highlighted at p. 55.

[46] I also find it is not an unreasonable invasion of third party personal privacy to disclose some information because it can be severed from the identifying information of third parties and therefore disclosed without identifying the third parties. An example is some information in third party correspondence that in my view would not identify the third party author of the correspondence. I have highlighted that information in pink in the copy of the records accompanying the Ministry's copy of this Order.²⁶

CONCLUSION

[47] For the reasons given above, under s. 58 of FIPPA, I order that the Ministry is:

- 1) required to disclose the information withheld under s. 3(1)(j) of FIPPA; and
- 2) required to or may refuse to disclose the information it has withheld under ss. 13, 14 and 22, except for the information highlighted in pink in the records accompanying the Ministry's copy of this order; and
- 3) required to refuse to disclose under s. 22 the information highlighted in yellow at pages 462-3 of the records accompanying the Ministry's copy of this order.

[48] I require the Ministry to give the applicant access to the information required to be disclosed by May 1, 2015. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 18, 2015

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F13-54378

²⁶ Information highlighted at pp. 48, 251, 459-462.