



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F17-07

MINISTRY OF FINANCE

Celia Francis
Adjudicator

February 21, 2017

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Summary: A journalist requested records related to the business case for the replacement of the Massey Tunnel with a bridge. The Ministry of Finance disclosed the responsive records in severed form. It argued at the inquiry that ss. 12(1) (Cabinet confidences) and 13(1) (advice or recommendations) apply to the withheld information. The adjudicator found that s. 13(1) applies to all of the withheld information and confirmed the Ministry's decision to withhold it. It was not necessary to consider s. 12(1).

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

Authorities Considered: **B.C.:** Order F07-17, 2007 CanLII 35478 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F15-60, 2015 BCIPC 64 (CanLII); Order F16 32, 2016 BCIPC 35 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII).

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *John Doe v. Ontario (Finance)*, 2014 SCC 36; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322.

INTRODUCTION

[1] In the fall of 2013, a journalist made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of Finance ("Ministry") for the following: records related to the business case for the

replacement of the Massey Tunnel with a bridge, including cost estimates; and any reports recommending or authorizing funding for preliminary communications, environmental, engineering and site preparation.¹ In May 2014, the Ministry disclosed the responsive records in severed form, withholding information under s. 12(1) (Cabinet confidences) and s. 17(1) (harm to financial interests of public body) of FIPPA. The Ministry also removed some information from the records on the grounds that it was “Not Responsive” to the request.

[2] The journalist requested a review by the Office of the Information and Privacy Commissioner (“OIPC”) of the Ministry’s decision to deny him access to information. He also cast doubt on the “legitimacy” of the Ministry’s claim that some of the information was “not responsive” to his request. In mid-2016, as a result of mediation by the OIPC, the Ministry disclosed some of the previously withheld information. It also removed the “not responsive” markings and instead applied ss. 12 and 17 to the remaining withheld information.

[3] Mediation did not otherwise resolve the request for review and the matter proceeded to inquiry. After the OIPC had issued the notice for this inquiry, the Ministry requested and received permission from the OIPC to add s. 13(1) (advice or recommendations) to the withheld information. In its initial submission, the Ministry said it had abandoned s. 17(1) but maintained that ss. 12(1) and 13(1) still apply to the withheld information.

ISSUES

[4] The issues before me are whether the Ministry is required by s. 12(1) and authorized by s. 13(1) of FIPPA to deny the journalist access to information. Under s. 57(1) of FIPPA, the Ministry has the burden of proving that the journalist has no right of access to the withheld information.

DISCUSSION

Background

[5] Every fiscal year, Treasury Board Staff (“TB Staff”), who are part of the Ministry of Finance, work with staff from BC ministries to update a cross-government 10-year Capital Plan for presentation to Treasury Board. As part of this process, TB Staff receive capital budget submissions from the various ministries with their capital spending forecasts for the Capital Plan. These include supporting narratives, estimated costs and cash flow timelines for current and emerging priority projects, as well as updates of this information. Among other things, TB Staff analyze the information to see if it fits within the Government’s current capital spending and debt targets. They then advise

¹ The date range of the request was January 1, 2013 to October 11, 2013.

Treasury Board of the fiscal and service implications of the updated Capital Plan. Treasury Board uses that information in making decisions on the Capital Plan.

[6] For the 2014 Capital Plan update, ministries made “Capital Plan Submissions” to TB Staff on their respective priorities and projects. They also provided information on key milestones for their projects. TB Staff used this information to prepare a Treasury Board submission which was submitted to Treasury Board in December 2013.²

Records in dispute

[7] The eight records in dispute in this case are as follows:

1. **Ministry of Transportation Capital Submission – TB Staff Review Summary** (pp. 1-6). This record contains information about the Ministry of Transportation’s projects under these headings: accommodation strategy, \$ Amount, TB Staff Analysis/Comments.
2. **Election Commitments and Priorities with Potential/Confirmed Impacts on the Capital Plan** (pp. 7-9). This record contains information on several ministries, including the Ministry of Transportation’s Massey Tunnel Replacement Project (“MTRP”), under headings such as Potential New Infrastructure Priorities, Ministry, Policy Implications, Capital Cost, Key Risks.
3. **Updated Ministry of Transportation and Infrastructure Capital Plan Submission – Narrative Description, October 18, 2013** (p. 10). This record contains information related to the MTRP.
4. **Ministry of Transportation and Infrastructure Capital Plan Submission – Appendix A – Summary of Changes to Capital Plan** (p. 11). This record contains information on the Ministry of Transportation’s projects over several budget periods, as well as related dollar figures.
5. **Ministry of Transportation and Infrastructure Capital Plan Submission – Appendix A – Updated Key Project Milestones and Estimated Completion Dates** (p. 12). This record contains information on the Ministry of Transportation’s projects under headings such as Confirmed Government Priority, Concept Plan, Business Plan, Contractor Term Sheet, Construction/Commissioning.
6. **Recently Confirmed Government and Ministry Priorities – Confirmation of Within Plan or Not in Plan document** (p. 13). This

² Ministry’s initial submission, paras. 4.01-4.05; Affidavit of Bradley Manderville, Strategic Advisor, Treasury Board Staff, paras. 15-18.

record contains information under headings related to various ministries' priorities (projects), including the MTRP, for several fiscal years.

7. **Draft Ministry of Transportation and Infrastructure Capital Plan Submission – Appendix A – Narrative Plan Description, October 18, 2013** (p. 14). This record is a draft of Record 3.
8. **Ministry of Transportation and Infrastructure Capital Plan Submission – Appendix A – Draft Key Project Milestones and Estimated Completion Dates** (p. 15). This record is a draft of Record 5.³

[8] The Ministry disclosed the eight records in severed form, disclosing instructions, headings, ministry names, names of ministry projects, some text and some dollar figures. It withheld other dollar figures and most of the information under the headings.

Advice or recommendations – s. 13(1)

[9] The Ministry argued that the withheld information consists of advice or recommendations for the purposes of s. 13(1).⁴ Section 13(1) is a discretionary exception which says that 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.” Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). Numerous orders have considered the application of s. 13 of FIPPA, for example, Order F07-17,⁵ which stated that:

In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope [of] s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

[10] Many orders and court decisions have considered the purpose and interpretation of s. 13(1). The Supreme Court of Canada has stated that the term “advice” includes an expression of opinion on policy-related matters and that

³ The material before me indicates that TB Staff prepared Records 1, 2 and 6 and that Ministry staff prepared the others.

⁴ Ministry's initial submission, paras. 4.07-4.08, 4.40-4.41, 4.46-4.55, 4.66-4.70; Manderville affidavit. The Ministry provided some *in camera* examples of passages disclosure of which, in its view, would reveal advice or recommendations, either directly or by inference.

⁵ Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.

policy options prepared in the course of the decision-making process fall within the meaning of “advice or recommendations.”⁶ The leading case in BC on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*,⁷ which found that “advice” includes expert opinion on matters of fact on which a public body must make a decision for future action. The BC Court of Appeal also recognized that some degree of deliberative secrecy fosters the decision-making process.

[11] In Order 01-15,⁸ former Commissioner Loukidelis expressed the view that the purpose of s. 13(1) is 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. Previous OIPC orders have added that a public body is authorized to refuse access to information not only when it directly reveals advice or recommendations but also when it would enable an individual to draw accurate inferences about advice or recommendations.⁹

[12] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

Does s. 13(1) apply?

[13] The withheld information consists of options, expert opinions, implications and policy considerations regarding the funding and scheduling of several ministries’ capital projects, as follows:

- TB Staff’s analysis of the Ministry of Transportation’s proposed funding changes in its Capital Plan Submission, including factors TB Staff considered¹⁰
- TB Staff’s comments on the implications and considerations for certain options for carrying out several ministries’ projects¹¹
- Proposals, budget estimates, assumptions and considerations regarding the Ministry of Transportation’s projects¹²

⁶ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at paras. 34, 46, 47. The Supreme Court of Canada also approved the lower court’s views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), that there is a distinction between advice and factual “objective information”, at paras. 50-52.

⁷ 2002 BCCA 665.

⁸ 2001 CanLII 21569 (BC IPC), at para. 22.

⁹ See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2016 BCIPC 35 (CanLII). Order F15-52, 2015 BCIPC 55 (CanLII), also discusses the scope and purpose of s. 13(1).

¹⁰ For example, the withheld information in Record 1, on pp. 3 and 6.

¹¹ For example, the withheld information in Record 2.

¹² For example, the withheld information in Records 3, 4, 5, 7 and 8.

[14] I am satisfied that Ministry of Transportation staff and TB Staff used their expertise, skill and judgement to develop these opinions, options and other information for Treasury Board, as part of the deliberative process involved in updating the BC government's 10-year Capital Plan. In my view, disclosure of the withheld information would reveal advice or recommendations for the purposes of s. 13(1). I therefore find that s. 13(1) applies to all of the withheld information.

Does s. 13(2) apply?

[15] The journalist argued that ss. 13(2)(a), (i) and (m) apply to the withheld information.¹³ These provisions state that s. 13(1) does not apply to the following: factual material; a feasibility or technical study, including a cost estimate, of a project of the public body; and information the head of the public body has cited publicly for making a decision or formulating a policy. The journalist did not explain how he thinks these provisions apply and I see no basis for their application to the withheld information.

[16] First, any factual information is intertwined with the expert opinions, options, considerations and other information, such that its disclosure would reveal advice or recommendations, either directly or by inference. As such, it is not "factual material" for the purposes of s. 13(2)(a) but rather falls under s. 13(1). As the BC Supreme Court said:

... if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body or if the expert's advice can be inferred from the work product it falls under s. 13(1) ...¹⁴

[17] Moreover, the records are not a "study" for the purposes of s. 13(2)(i). Nor is there any evidence that the head of the public body publicly cited any of the withheld information as a basis for a making decision or formulating a policy, for the purposes of s. 13(2)(m).

Exercise of discretion

[18] The journalist argued that the Ministry did not exercise its discretion properly in this case.¹⁵ The Ministry said it had no discretion to disclose more information, given that, in its view, s. 12(1), a mandatory exception, applies to the withheld information.¹⁶

¹³ Journalist's response submission, paras. 27-31.

¹⁴ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322, at para. 94.

¹⁵ Journalist's response submission, para. 27.

¹⁶ Ministry's reply submission, p. 2

[19] I express no opinion on whether or not s. 12(1) applies to the withheld information. It is however clear that the Ministry conducted a line-by-line severing of the records. The Ministry also disclosed a small amount of information that it could technically have withheld under s. 13(1). I am therefore satisfied that it exercised its discretion properly in this case.

CONCLUSION

[20] For reasons given above, under s. 58(2)(b) of FIPPA, I confirm the Ministry's decision to refuse the journalist access to the information it withheld under s. 13(1). In light of this finding, I need not consider whether s. 12(1) applies to the same information.

February 21, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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