Office of the Information & Privacy Commissioner for British Columbia

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Order F19-22

VANCOUVER COASTAL HEALTH AUTHORITY

Celia Francis
Adjudicator

May 13, 2019

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Summary: An employee of the Vancouver Coastal Health Authority (VCHA) requested access to emails which mention his name. VCHA disclosed emails which the employee had received or sent or on which he had been copied. It withheld other emails under s. 13(1) (advice or recommendations) and s. 17(1) (harm to financial or economic interests). The adjudicator found that s. 17(1) did not apply to any of the information and that s. 13(1) also did not apply to some of the information. The adjudicator found that s. 13(1) applied to the rest of the information and confirmed VCHA's decision to withhold this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 13(3), 17(1), 17(1)(f).

INTRODUCTION

[1] In July 2017, an employee of the Vancouver Coastal Health Authority (VCHA) requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to emails of four named VCHA managers which mentioned his name. The requests covered various periods from 2014 to 2017. VCHA disclosed emails which the employee had sent or received or on which he had been copied. However, VCHA refused to disclose the rest of the requested emails under s. 17(1)(harm to financial or economic interests) of FIPPA.

[2] The employee requested a review of VCHA's decision by the Office of the Information and Privacy Commissioner (OIPC). Mediation did not resolve the parties' dispute and the applicant requested the matter proceed to inquiry. Just

before the OIPC issued the notice of inquiry, VCHA added s. 13(1) (policy advice or recommendations) to refuse access to the records. The OIPC received submissions from VCHA and the employee.

ISSUES

[3] The issues before me are whether VCHA is authorized under ss. 13(1) and 17(1) to withhold the information in dispute. Under s. 57(1) of FIPPA, VCHA has the burden of proving that the employee has no right of access to the information.

DISCUSSION

Records in dispute

[4] VCHA retrieved 98 pages of responsive emails, of which it disclosed 32. VCHA is refusing to disclose any part of the remaining 66 pages and they are the records in dispute.

Harm to financial or economic interests – s. 17(1)

[5] VCHA relied on ss. 17(1) and 17(1)(f) to withhold all 66 pages. The relevant provisions read as follows:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> ...
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[6] Past orders have held that, even if information fits within subsections (a) to (f), a public body must also prove the harm described in the opening words of s. 17(1), i.e., harm to the financial or economic interests of the public body or the ability of the government to manage the economy.[1] Therefore, the overriding question is whether disclosure of the information could reasonably be expected to harm the financial or economic interests of VCHA.

[1] See, for example, Order F18-51, 2018 BCIPC 55 (CanLII) and Order F18-49, 2018 BCIPC 53 (CanLII).

Standard of proof for harms-based exceptions – s. 17

[7] Section 17 is a harms-based exception. A public body must, therefore, demonstrate that there is a reasonable expectation of harm on disclosure of withheld information. The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground ... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or consequences" ... [2]

[8] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[3] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[9] I have applied these principles in considering the arguments on harm under s. 17(1).

Discussion and analysis

[10] VCHA said that the records relate to ongoing arbitration proceedings that relate to grievances the employee filed against VCHA. It said that the emails are conversations between its staff and the employee's supervisors about the grievances and that disclosure of the emails could harm VCHA's negotiating position in the arbitration. Thus, in its view, s. 17(1) and s. 17(1)(f) apply to the withheld emails.[4]

[11] The employee countered that disclosure of the emails would not harm VCHA in any way. He says that the records he requested do not pertain to any

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[2] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94.
[3] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.
[4] VCHA's initial submission, para. 5.

outstanding grievances. He said the emails would not "violate or interfere with any union investigations or grievances."[5]

[12] VCHA provided no background information to set its argument in context. For example, it did not explain what the grievances or arbitrations were about. Apart from saying the grievance process was still ongoing, VCHA also did not explain what its status is or what relation the information in the emails might have to that process. VCHA also did not point to specific portions of the emails whose disclosure could, in its view, reasonably be expected to harm its negotiating position in the grievance process. It also did not explain how disclosure of the emails might have this result. For example, it did not say how disclosure of the withheld information would weaken its bargaining position in any arbitration or grievance negotiations with the employee or how that could cause VCHA financial harm.

[13] Much of the withheld information in the emails consists of discussions among VCHA managers about administrative details concerning the employee's medical leave, his return to work, his applications for jobs and his duties and qualifications. Some of the information repeats conversations with the employee or is in emails which the employee sent or on which he was copied. Several portions concern the VCHA managers' attempts to arrange meetings or telephone calls. The emails contain a few references to grievances in the emails. While they appear to involve the employee, it is not clear what the grievances are about or what their status was. The employee is, of course, aware of the subject matter of any grievances in which he was involved and is presumably also aware of the status of any grievance process. Without more background on what the grievances were about and their status, I do not see how disclosure of any of this information, which are now some years old, could reasonably be expected to harm its negotiating position in any ongoing grievance or arbitration. VCHA did not explain how it might.

[14] VCHA's brief submission has not persuaded me that disclosure of the withheld information in the emails could reasonably be expected to result in harm under s. 17(1). It has not shown a clear connection between disclosure of the withheld information and a reasonable expectation of the alleged harms contemplated by s. 17(1). It has not, in my opinion, provided "evidence 'well beyond' or 'considerably above' a mere possibility of harm." It has not met its burden of proof in this case. I find, therefore, that s. 17(1) does not apply to the withheld information in the emails.

Advice or recommendations – s. 13(1)

[15] VCHA applied s.13(1) to all 66 pages of the withheld emails as well. Section 13(1) is a discretionary exception which says that a public body "may

[5] Employee's response submission.

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 must not refuse to withhold certain types of information under s. 13(1).

[16] The process for determining whether s. 13(1) applies to information involves a number of steps. First, the public body determines whether disclosure of the information would reveal advice or recommendations developed by or for the public body. If it would, the public body must then consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).[6] 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 or by s. 13(3), the public body must then decide whether to exercise its discretion to refuse disclosure.[7]

Principles for applying s. 13(1)

[17] The courts have said that the purpose of exempting advice or recommendations is "to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice,"[8] recognizing that some degree of deliberative secrecy fosters the decision-making process.[9] They have interpreted the term "advice" to include an expression of opinion on policy-related matters[10] and expert opinion on matters of fact on which a public body must make a decision for future action.[11] They have also found that advice and recommendations include policy options prepared in the course of the decision-making process.[12] Previous orders have found that a public body is Authorized to refuse access to information, not only when it directly reveals is advice or recommendations, but also when it would enable an individual to draw accurate inferences about advice or recommendations.[13]

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[6] Order F16-30, 2016 BCICP 33, para. 18.
[7] Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.
[8] *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*], at paras. 34, 43, 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. In Order 01-15, 2001 CanLII 21569 (BC IPC), former Commissioner Loukidelis said 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.
[9] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*], para. 105.
[10] *John Doe*, para. 46.
[11] *College of Physicians*, para. 113.
[12] *John Doe*, para. 35.
[13] 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).

[18] 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 to the emails?

[19] VCHA said that the emails contain advice and recommendations from its staff to the employee's supervisors regarding the arbitration proceedings. It said the grievance process is still ongoing, so the emails should be withheld under s. 13(1).[14]

[20] The employee disputed VCHA's submission, saying there are no outstanding grievances that pertain to his FIPPA requests which, he said, are a separate issue.[15]

[21] It appears from the contents of the emails that there is some kind of labour relations matter underway involving the employee. This is not clear, however, and, as noted above, VCHA provided no background information on this case. It also did not explain what the grievances or arbitrations it alludes to were about or what their status is. It also did not point to specific portions of the emails whose disclosure would, in its view, reveal advice or recommendations, either directly or indirectly.

[22] In some places, the information reveals the managers' deliberative process regarding the employee. In these portions of the emails, VCHA managers are seeking or giving advice or making recommendations to each other about how to handle the employee's case, together with options, pros and cons of the options, implications and considerations. In my view, this withheld information consists of advice or recommendations developed by or for a public body.

[23] Other portions concern VCHA managers' attempts to coördinate meetings or telephone calls. Still others convey instructions or recount a conversation or an email exchange with the employee. These portions do not contain advice or recommendations as past caselaw has interpreted these terms. I find that s. 13(1) does not apply to this information.

[24] There are also some statements of fact, including about the employee himself. These statements do not contain advice or recommendations. Nor would their disclosure enable the drawing of an accurate inference of such information. The information in these statements is not intertwined with the information to which I found s. 13(1) applies and is not integral to the advice or recommendations in the emails. The purpose of these statements of fact is, in my view, to provide background or context about the employee's situation. There is

[14] VCHA's initial submission, para. 7.
[15] Employee's response submission.

no judgement, evaluation or weighing of the significance of these facts. I find that s. 13(1) does not apply to this information either.[16]

Section 13(2)

[25] Neither party made submissions on s. 13(2). I have considered whether the information that I find reveals advice and recommendations falls within any of the circumstances described in s. 13(2) and, in my view, s. 13(2) does not apply.

Section 13(3)

[26] Section 13(3) states that s. 13(1) does not apply to information in a record that has been in existence for more than 10 years. VCHA did not address this issue.

[27] The emails date from 2014-2017 and are clearly not older than 10 years. Therefore, I find that s. 13(3) does not apply to the advice or recommendations in these records.

Conclusion on s. 13(1)

[28] I found above that some of the information reveals advice or recommendations. I also found that ss. 13(2) and (3) do not apply to it. Therefore, I find that s. 13(1) applies to the withheld advice or recommendations.

Exercise of discretion

[29] Section 13 is discretionary. This means that the head of a public body must properly exercise its "discretion in deciding whether to refuse access to information, and upon proper considerations."[17] If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where "the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations."[18]

[30] The parties did not specifically address the exercise of discretion. VCHA said that the grievance process is still ongoing, so I infer that it considered this factor in deciding to withhold the 66 pages. VCHA did not say if it considered any other factors. However, there is no evidence that it exercised its discretion

[16] Order F19-15, BCIPC 2019 17 (CanLII), arrived at a similar conclusion regarding factual information.
[17] Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144.
[18] *John Doe*, at para. 52; see also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.

improperly or in bad faith. I am satisfied that VCHA exercised its discretion properly in this case.

CONCLUSION

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

1. Under s. 58(2)(a), subject to item 2 below, I require VCHA to give the employee access to the information it withheld under s. 13(1) and s. 17(1). I require VCHA to give the employee access to this information by June 25, 2019. VCHA must concurrently copy the OIPC Registrar of Inquiries on its letter to the employee, together with a copy of the records.

2. Under s. 58(2) (b), I confirm the VCHA's decision to withhold some of the information it withheld under s. 13(1). For convenience, I have highlighted this information in pink on a copy of these records which accompanies VCHA's copy of this order.

May 13, 2019

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File Nos.: F17-72339
F17-72340
F17-72341
F17-72342