



Order F20-32

VANCOUVER COASTAL HEALTH

Lisa Siew
Adjudicator

July 22, 2020

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Summary: An applicant requested access to records involving a certain Vancouver Coastal Health employee. Vancouver Coastal Health withheld information under ss. 13 (advice or recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The applicant only challenged Vancouver Coastal Health's decision to withhold information under s. 13(1). The adjudicator determined Vancouver Coastal Health was authorized to withhold some information under s. 13(1), but ordered it to disclose the rest of the disputed information since s. 13(1) did not apply.

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

INTRODUCTION

[1] An applicant requested Vancouver Coastal Health (Coastal Health) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to certain emails involving a named Coastal Health employee (the Employee). The applicant's request specified some keyword search terms and a date range. After some discussion with Coastal Health, the applicant later revised and narrowed his request.

[2] Coastal Health provided the applicant with only some of the information in the requested records. It withheld information in the records under ss. 13 (advice and recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of third party personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Coastal Health's decision regarding s. 13(1). The applicant did not dispute Coastal Health's decision to withhold information under ss. 14 and 22. As a result of mediation, Coastal Health revised its initial response and released additional information to the applicant. However, Coastal Health continued to withhold information from the records under s. 13(1).

PRELIMINARY MATTERS

Section 6

[4] Under s. 6(1) of FIPPA, public bodies are required to make every reasonable effort to respond without delay to each applicant openly, accurately and completely. In his inquiry submission, the applicant claimed for the first time that Coastal Health failed to make every reasonable effort to respond without delay to his access request as required by s. 6(1).¹ The applicant says the need for information is time-sensitive and it is in the public interest that requests for information are responded to in a timely fashion, which he says did not happen in this case.

[5] As described in the notice of inquiry received by both parties, the investigator's fact report sets out the issues for the inquiry and, in most cases, OIPC adjudicators will not consider issues that do not appear in the fact report.² Section 6(1) was not identified as an issue in the fact report or in the notice of inquiry.³ Previous OIPC orders have consistently said that parties may only add new issues into an inquiry if permitted to do so by the OIPC.⁴ The applicant did not seek permission to add this issue to the inquiry or explain why he should be permitted to do so at this late stage.

[6] Further, where an applicant complains that a public body has not performed a duty under FIPPA, the OIPC requires the applicant to raise the issue with the public body first to allow the public body an opportunity to respond and attempt to resolve the complaint, prior to making a complaint to the OIPC. There is no evidence that the parties first attempted to resolve this matter between themselves. Additionally, once the OIPC has accepted a complaint, it is usually investigated and resolved by a case review officer or an investigator and not at a formal inquiry.⁵

¹ Applicant's submission at para. 3.

² Order F20-24, 2020 BCIPC 28 at para. 5.

³ The applicant had another complaint regarding the OIPC's processes and that matter was forwarded to the OIPC's registrar of inquiries for a response.

⁴ See for example, Order F19-41, 2019 BCIPC 46 at para. 5.

⁵ Order F18-11, 2018 BCIPC 14 at para. 6 and Decision F08-02, 2008 CanLII 1647 (BC IPC) at para. 38.

[7] For the reasons stated above, I decline to add s. 6(1) to this inquiry. However, the applicant has the option of submitting a written complaint to the public body and allowing the public body an opportunity to resolve the complaint. If the applicant is not satisfied with the public body's response, then the applicant may seek a resolution through the OIPC's complaint process.

Section 22

[8] Section 22(1) provides that a public body must refuse to disclose personal information the disclosure of which would unreasonably invade a third party's personal privacy. When conducting an inquiry, I am always mindful of the mandatory nature of s. 22(1). However, s. 22(1) does not require a public body to withhold a third party's personal information every time it appears in the records. A public body is only required to do so when it determines the disclosure would, under the circumstances, be an unreasonable invasion of a third party's personal privacy.

[9] Coastal Health did not apply s. 22(1) to any of the information withheld under s. 13(1). However, it is clear that Coastal Health considered whether s. 22 applied to the responsive records and only applied it to a small amount of information that is not in dispute for this inquiry.⁶ Therefore, I infer Coastal Health determined that disclosing the withheld information at issue in this inquiry would not be an unreasonable invasion of a third party's personal privacy.

[10] Based on my review of the withheld information, I find Coastal Health's decision not to apply s. 22(1) to the information at issue was consistent with its obligation under s. 22(1). Under the circumstances, it is not apparent that the disclosure of the withheld information would be an unreasonable invasion of a third party's personal privacy. I, therefore, confirm that s. 22 is not an issue in dispute for this inquiry.

ISSUE

[11] The issue I must decide in this inquiry is whether Coastal Health is authorized to withhold the information in dispute under s. 13(1) of FIPPA. Under s. 57(1), the burden is on Coastal Health to prove the applicant has no right of access to all or part of the records in dispute under s. 13(1).

⁶ Information withheld from page 124 of the records. As noted, the applicant does not dispute Coastal Health's decision to apply s. 22(1) to this information.

DISCUSSION

Background

[12] The applicant and his organization were involved, along with others, in organizing a one-day conference that was later cancelled.⁷ The conference was meant to encourage dialogue and debate about a health topic with a focus on harm reduction. The applicant blames the cancellation of the conference on the actions and inaccurate statements of the Employee. The applicant claims the Employee spread misinformation about him, his company and the proposed event that convinced others to cancel the conference. The applicant says he suffered reputational and financial damage because of the Employee's actions.

[13] The applicant contacted the Employee to address his concerns. He provided information to correct and address any misinformation or untrue statements. The applicant also asked the Employee to substantiate their assertions and gave them an opportunity to apologize and retract their statements. The applicant says the Employee did not respond to his comments nor did they apologise or promise a retraction. He alleges the Employee instead made further inaccurate statements about him and the proposed conference.

[14] The applicant explains that he gave the Employee two opportunities to address and resolve the matter, but his attempts were unsuccessful. The applicant says he had no choice except to file a formal complaint with Coastal Health about the Employee. In his complaint, the applicant alleges the Employee's actions were unprofessional, unethical and contrary to the standards of conduct expected from Coastal Health staff.

[15] The applicant says the Employee later issued him an apology and also informed any relevant individuals that the statements made by the Employee were incorrect. Coastal Health also issued the applicant a further letter of apology and acknowledged there were inaccuracies with the Employee's statements. Coastal Health assured the applicant that there would be no further inaccurate statements made by the Employee.

[16] The applicant explains that his complaint to Coastal Health about the Employee was based on evidence from a limited number of emails. The applicant says he made his access request to uncover further details and emails concerning this matter.

⁷ The information presented in the background section is gathered from the parties' submissions and the responsive records.

Records and information in dispute

[17] Coastal Health is withholding information from approximately 20 out of a total 127 pages of responsive records.⁸ The records at issue are emails between the Employee and other Coastal Health employees. Some of these emails include employees of other public bodies, specifically the Ministry of Health, another health authority and a provincial health services agency.⁹ The emails arise out of certain events related to the applicant, the cancelled conference and the applicant's complaint against the Employee.

[18] Coastal Health also provided a table that lists all the records in dispute. This table identifies three records where Coastal Health applied both ss. 13 and 14 to the withheld information.¹⁰ The applicant does not dispute Coastal Health's application of s. 14 to the responsive records. Therefore, I conclude the information withheld from these three records is not in dispute for this inquiry and Coastal Health may continue to withhold that information.

Advice or recommendations – s. 13

[19] Section 13(1) authorizes a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Previous OIPC orders recognize that s. 13(1) protects "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."¹¹

[20] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. Numerous orders and court decisions have considered the interpretation and meaning of "advice" and "recommendations" under s. 13(1) and similar exceptions in the freedom of information legislation of other Canadian jurisdictions.¹² I adopt the principles identified in those cases for the purposes of this inquiry and have considered them in determining whether s. 13(1) applies to the information at issue.

[21] I note, in particular, the following principles from those decisions:

⁸ Pages 1, 25, 33-34, 39, 42, 45-46, 56-57, 59, 61, 64, 67, 72-73, 75, 84, 111, 116 and 120 of the records.

⁹ Pages 42, 64, 72, 75, and 84 of the records.

¹⁰ Information found on pp. 14, 19 and 22 of the records.

¹¹ Order 01-15, 2001 CanLII 21569 at para. 22.

¹² See, for example: *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; Order 02-38, 2002 CanLII 42472; Order F17-19, 2017 BCIPC 20 (CanLII); Review Report 18-02, 2018 NSOIPC 2 at para. 14.

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.¹³
- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.¹⁴
- “Advice” has a broader meaning than the term “recommendations.”¹⁵ Advice also includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.¹⁶
- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.¹⁷ This includes factual information 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.¹⁸

[22] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and (3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

Coastal Health’s submission

[23] Coastal Health submits that s. 13(1) applies to the information at issue because the withheld information reveals “discussions regarding the impact of decisions made by VCH staff, and open and frank discussions about a suggested course of action.”¹⁹ Coastal Health also says that the matters discussed in the emails relate to its mandate and claims s. 13 applies to “information that reflects

¹³ Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

¹⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

¹⁵ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 24.

¹⁶ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

¹⁷ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

¹⁸ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

¹⁹ Coastal Health’s initial submission at para. 12.

or impacts the mandate of the Public Body.”²⁰ In applying s. 13(1), Coastal Health says it considered s. 13(2) and s. 13(3) and decided those sections did not apply.

[24] Coastal Health further submits that “the subject matter being discussed in the records is extremely narrow in scope” and “revealing parts of the discussions would provide sufficient information such that the Applicant could make accurate inferences about the discussions surrounding advice and recommendations contained therein.”²¹

Applicant’s submission

[25] The applicant believes Coastal Health has failed to prove that s. 13(1) applies to the information at issue. The applicant says Coastal Health’s submissions are “barely 3 ½ pages of text” that merely restates the relevant law and legal authorities and asserts an opinion that s. 13(1) applies.²² The applicant also thinks Coastal Health’s submission lacks detailed argument and explanation on how each redaction contains advice or recommendations.²³

[26] Citing previous authorities, the applicant argues that the scope of s. 13(1) is limited. He says what counts as advice and recommendations has been mainly made in the context of policy decisions, specifically advice and recommendations regarding government policy.²⁴ He says “it cannot have been the intention of law makers that any communication between officials can be counted as ‘advice or recommendations.’”²⁵ Based on information disclosed to him in the responsive records, the applicant predicts the withheld information consists of beliefs and views about him and factual information that falls under s. 13(2).²⁶

[27] The applicant further claims Coastal Health is widening the interpretation of s. 13(1) in an attempt to improperly apply it to communications about him, his organization, the cancelled conference and “the subsequent fallout.”²⁷ The applicant alleges Coastal Health is using s. 13(1) to shield itself and its employees from further embarrassment.

²⁰ Coastal Health initial submission at para. 10, citing the provincial government’s FOIPPA Policy and Procedures Manual under s. 13 at Interpretation Note 1.

²¹ Coastal Health’s initial submission at para. 13.

²² Applicant’s submission at para. 10.

²³ Applicant’s submission at paras. 10-12.

²⁴ Applicant’s submission at para. 34, citing Order F10-15, 2010 BCIPC 24 (CanLII), Order 02-38, 2002 CanLII 42472 (BCIPC) and the provincial government’s “FOIPPA Policy and Procedures Manual”.

²⁵ Applicant’s submission at para. 35.

²⁶ At paras. 29-31 of his submission, the applicant discusses certain emails located on pp. 33-34, 42 and 75 of the records to illustrate how this information does not qualify as advice or recommendations under s. 13(1).

²⁷ Applicant’s submission at para. 37.

[28] The applicant also says Coastal Health's actions that led to the cancellation of the event were unreasonable and it is now unreasonably withholding relevant emails. The applicant argues s. 13(1) should not be used to hide unreasonable behaviour as this goes against the principle of holding public officials accountable for their actions.

Coastal Health's response submission

[29] Coastal Health rejects the applicant's allegations and defends its submissions. It says the "relatively short length of its initial submissions does not undermine the quality of its argument."²⁸ Coastal Health explains that it has not discussed how each redaction qualifies as advice or recommendations because it would then need to restate the content of the withheld information, thus undermining the purpose of withholding the information. Coastal Health also relies on the fact that it provided an unsevered copy of the disputed records as sufficient evidence to meet its burden that s. 13(1) applies.

[30] Coastal Health describes the withheld information as falling under two broad categories, but it does not identify what records belong to each category. It describes the first category as conversations between its public health staff and external parties regarding the applicant's organization, the conference and "how these intersected with the provincial public health framework and [Coastal Health's] public health mandate, and discussed a course of action with those parties." It says the second category "pertains to [Coastal Health's] internal discussions on how to respond to the Applicant's complaint and threats of litigation." Coastal Health says it has already released any severable "facts" to the applicant and what remains is information that is a direct part of its deliberative process and internal discussions.²⁹

[31] Coastal Health further submits that the applicant's dispute with the Employee is irrelevant for the purpose of determining whether s. 13(1) applies to the records at issue. Coastal Health says the fact that it apologized to the applicant does not mean he is entitled to information about how its public health staff determined the course of action they would take in relation to a situation that they viewed as conflicting with its public health mandate or information regarding how the decision to issue him an apology was reached. In response to the applicant's assertions that s. 13(1) should not apply to unreasonable behaviour, Coastal Health says the fact that the applicant does not agree with the course of actions taken by its public health officials does not mean that s. 13(1) was applied improperly.

²⁸ Coastal Health's response submission at para. 4.

²⁹ *Ibid* at para. 9.

Analysis and findings on s. 13

[32] Based on my review of the withheld information, I find s. 13(1) only applies to some of the withheld information. Coastal Health withheld information from an email that reveals the Employee seeking advice and input from a co-worker about a proposed response to the applicant's complaint.³⁰ Section 13(1) does not normally apply to information that only reveals a public body's request for advice and recommendations, even if it discloses the scope of the sought after advice or recommendations.³¹ However, in this case, I find s. 13(1) applies because the withheld information includes wording for a proposed email response that when compared to the actual response could allow someone to accurately infer advice or recommendations provided to the Employee by other Coastal Health employees.³²

[33] Further, contrary to the applicant's claims, s. 13(1) is not limited to decisions only about government policy. If that were the case, only government public bodies could withhold information under s. 13(1) and only for a specific category of decisions, even though there are other kinds of non-governmental public bodies designated and defined under FIPPA.³³ There is nothing in my review of FIPPA, and how this exemption has been applied by other decision makers, that interprets s. 13(1) so narrowly.³⁴

[34] However, I do not find that the rest of the information withheld in the disputed records reveals advice or recommendations developed by or for a public body for the purposes of s. 13(1). The remainder of the withheld information contains information and comments of a factual nature, personal opinions and instructions to employees that are not part of any advice or recommendations.³⁵ Based on the materials before me, I do not find any of this withheld information reveals, directly or by inference, any advice or recommendations. Further, most of the withheld information was already disclosed to the applicant or is easily inferable from the responsive records.

³⁰ Information located on page 120 of the records.

³¹ Order F17-39, 2017 BCIPC 43 (CanLII) at para. 37 and Order F15-33, 2015 BCIPC 36 (CanLII) at para. 24.

³² The Employee's email response to the applicant is located at p. 101 (duplicated on pp. 111-112) of the records.

³³ See definition of "public body" under Schedule 1 which refers to Schedule 2 (agencies, boards, commissions, corporations and other bodies) and the definition of "a local public body" which refers to "a health care body" and to Schedule 3 (governing bodies of professions or occupations).

³⁴ See, for example, Adjudicator Francis' s. 13 analysis and decision in Order F19-22, 2019 BCIPC 24 (CanLII) at paras. 15-30, which was another inquiry involving Vancouver Coastal Health.

³⁵ For example, information withheld on pp. 25 and 116 and 111 (instructions to Employee) and 120 of the records.

[35] For example, Coastal Health withheld information from a group of emails where the Employee is communicating with other Coastal Health employees, including a senior employee, and two other individuals about the conference.³⁶ As a result of those discussions, the Employee sends an email to a number of Coastal Health employees, who then respond.³⁷ I find the withheld information in these emails consists of factual information, opinions, questions and comments, an employee's personal views about whether he and other employees should attend the conference and a senior employee's decision approving a request from the Employee to take certain steps. None of this withheld information, including the senior employee's comments and decision, reveals any advice or recommendations developed by or for a public body. Instead, some of the withheld information reveals a decision made by the senior employee that, in my view, does not involve a deliberative process where advice or recommendations were sought or given.

[36] Further, it is clear to me that most of the information withheld in these email discussions about the conference is disclosed elsewhere in the records or is easily inferable from the responsive records and the surrounding circumstances. Most of the contents of the Employee's email and the senior employee's comments and their decision is apparent from information disclosed elsewhere in the records.³⁸ Coastal Health also withheld other comments, questions and opinions in the disputed records that were already disclosed to the applicant or that are apparent from the disclosed records.³⁹ I conclude Coastal Health cannot withhold any of this information under s. 13(1) because disclosing this information would not "reveal" any advice or recommendations for the purposes of s. 13(1). This conclusion is consistent with previous OIPC orders which found that information that has already been disclosed to an applicant cannot be withheld under s. 13(1).⁴⁰

[37] Coastal Health also withheld part of an email from the Employee's supervisor to the Employee and another individual where the supervisor shares some information.⁴¹ The applicant says the redacted comments postdate the cancellation of the conference and therefore cannot be part of a decision-making process.⁴² I agree that the withheld information is not a part of any decision-

³⁶ Emails located on pp. 84, 75, and 72-73 of the records.

³⁷ Employee's email located on pp. 56-57 of the records (also duplicated and withheld elsewhere in the records) and responses located on pp. 56, 59, 61, and 67 of the records.

³⁸ Employee's email located on pp. 56-57 and the same or similar information disclosed on pp. 64, 72-73, 101 and 112 of the records. Information about senior employee's decision located on pages 64, 61 and 59 of the records.

³⁹ For example, information withheld on pp. 56 (duplicated on p. 61), 72 and 75 is disclosed or easily inferable on pp. 56, 59, 61, 64, 69, 72 and 82 of the records. Coastal Health also withheld information on page 25 of the records even though that information was already disclosed to the applicant.

⁴⁰ Order F12-15, 2012 BCIPC 21 at para. 19 and Order F13-24, 2013 BCIPC 31 at para. 19.

⁴¹ Page 42 of the records.

⁴² Applicant's submission at para. 30.

making process. The withheld information only reveals a comment and some information of a factual nature that Coastal Health already disclosed elsewhere in the records. This information merely informs others of an action that has been taken which I conclude does not qualify as advice or recommendations under s. 13(1).⁴³

[38] Coastal Health also withheld the same information in two emails between the Employee and another Coastal Health employee discussing an email from the applicant.⁴⁴ The applicant's email addresses information circulated about him and his organization and the cancelled conference.⁴⁵ The applicant says the employees' redacted comments are interspersed between "the text of an email from me, and I, therefore, assume contain beliefs or views regarding my email, or alternatively factual information in rebuttal to my claims."⁴⁶ I agree with the applicant that the withheld information in this email discussion contains information and opinions of a factual nature. I find none of this withheld information was a part of any decision-making process or reveals any advice and recommendations under s. 13(1).

[39] There is also information withheld from an email header that only reveals that an email was forwarded to an individual.⁴⁷ Coastal Health does not explain how the information withheld from this email header qualifies as advice or recommendations. There is nothing about the identity of the sender and receiver or the date and subject line or any of the other withheld information that would allow someone to accurately infer any advice or recommendations. I, therefore, conclude s. 13(1) does not apply to this withheld information.

Sections 13(2) and 13(3)

[40] I conclude that none of the categories or circumstances under s. 13(2) apply to the information that I find would reveal advice or recommendations under s. 13(1). In particular, I find that s. 13(2)(a) does not apply because the information at issue does not consist of factual material that can be severed from the s. 13(1) information.

[41] I am also satisfied that s. 13(3) does not apply since the information has not been in existence for 10 or more years. The emails were sent in 2018 and the s. 13(1) information came into existence during that time. For all these reasons, I conclude that Coastal Health can withhold the information that I find would reveal advice or recommendations under s. 13(1).

⁴³ Order F15-52, 2015 BCIPC 55 (CanLII) at para. 28.

⁴⁴ Email located on pages 33-34 (information duplicated on pp. 45-46) of the records.

⁴⁵ Applicant's email located on pages 34-38 of the records.

⁴⁶ Applicant's submission at para. 39.

⁴⁷ Page 1 of the records.

CONCLUSION

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

1. I confirm in part Coastal Health's decision to refuse access to the information withheld under s. 13(1), subject to paragraph 2 below.
2. Coastal Health is not authorized by s. 13(1) to refuse to disclose the information highlighted in a copy of the records that is provided with this order.
3. Coastal Health must disclose to the applicant the information it is not authorized to withhold and must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records.

[43] Under s. 59 of FIPPA, Coastal Health is required to give the applicant access to the information it is not authorized to withhold by September 3, 2020.

July 22, 2020

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F18-76211