



Order F23-27

CITY OF KELOWNA

Jay Fedorak
Adjudicator

April 6, 2023

CanLII Cite: 2023 BCIPC 31

Quicklaw Cite: [2023] B.C.I.P.C.D. No. 31

Summary: An applicant requested copies of correspondence between the City of Kelowna (City), the Kelowna detachment of the Royal Canadian Mounted Police and the provincial government's Liquor and Cannabis Regulation Branch. The City disclosed records but withheld some information under s. 13(1) (advice and recommendations) and s. 15(1) (harm to law enforcement). The adjudicator found that the City correctly applied s. 13(1) to most but not all of the information. The adjudicator ordered the City to disclose the information to which s. 13(1) did not apply. As the City had applied s. 13(1) correctly to all of the information to which it also applied s. 15(1), the adjudicator made no finding with respect to s. 15(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 13(1), 13(2)(a), 13(2)(n), 13(3), 15(1).

INTRODUCTION

[1] The owner of a night club (applicant) requested from the City of Kelowna (City), under the *Freedom of Information and Protection of Privacy Act* (FIPPA), copies of correspondence between the City, the provincial government's Liquor and Cannabis Regulation Branch (LCRB) and the Kelowna detachment of the Royal Canadian Mounted Police (RCMP). The City responded by providing the applicant with records, while withholding information under s. 13(1) (advice and recommendations), s. 15(1) (harmful to law enforcement) and s. 21(1) (harmful to the financial interests of a third party).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the response. As a result of mediation, the City ceased to rely on s. 21(1) and disclosed additional information.

[3] Mediation failed to resolve the remaining issues and the applicant requested that the matter proceed to an inquiry.

[4] **Preliminary Issues/Matters** – The applicant raises an issue with respect to the City providing information in its submission on an *in-camera* basis. He alleges that the City has provided material on an *in-camera* basis in the body of one of the affidavits appended to its submission. He suggests that for him to respond fully to the affidavit evidence, he requires access to the entire affidavit.¹

[5] There is correspondence before me between the City and the OIPC regarding the City's application to provide information on an *in-camera* basis. The City originally requested permission to submit material in its submission and the affidavit of the deputy city clerk. An adjudicator reviewed all the proposed *in-camera* material and determined that some was not appropriately *in-camera*. The information the adjudicator did permit the City to provide on an *in-camera* basis comprises the small passages on paragraphs 30 and 31 of the initial submission and paragraphs 12 and 13 of the affidavit.

[6] As the OIPC gave the City permission to provide these small passages on an *in-camera* basis, the City had the right to do so.

[7] Section 56 of FIPPA provides the Commissioner the authority to consider *in-camera* materials during an inquiry. In general, the Commissioner will permit material to be submitted *in-camera* if it would reveal the actual information in dispute in the inquiry or it is information that a public body would be required or authorized to refuse to disclose under FIPPA. The principles of procedural fairness guide the Commissioner when making decisions about *in-camera* materials. This requires balancing a party's ability to fully present its case with the other parties' ability to know and respond to the materials being considered by the Commissioner. Fairness also requires that the Commissioner provide clear and intelligible reasons and *in-camera* materials constrain the ability to do so. For these reasons, the Commissioner exercises the discretion to accept *in-camera* material sparingly and only to the extent necessary to ensure fairness during the inquiry process.

[8] Therefore, while I note the objection of the applicant, I will consider the information that the City has provided on an *in-camera* basis.

ISSUES

[9] The issues to be decided in this inquiry are:

1. Whether s. 13(1) authorizes the City to withhold information at issue; and
2. Whether s. 15(1) authorizes the City to withhold information at issue.

¹ Applicant's response submission, paras. 25-26.

[10] Under s. 57(1), the City has the burden of proving that the applicant has no right of access to the information it withheld under ss. 13(1) and 15(1).

DISCUSSION

[11] **Background** – The applicant’s nightclub applied to the LCRB to extend its hours of operation. The LCRB invited the City to provide feedback regarding this application. An employee of the City informed the LCRB that the City had decided to opt out of the process for providing feedback. Subsequently, other officials of the City became aware of the decision to opt out and were able to reverse the decision. The City then provided a letter to the LCRB opposing the application of the applicant’s night club.

[12] **Records at issue** – The records consist of email correspondence between the RCMP and nightclub owners, email correspondence between the RCMP and the City, internal email correspondence between City officials, email and letter correspondence between the LCRB and the applicant, and email and letter correspondence between the LCRB and the City.

[13] There are 70 pages of records in total. The City has withheld information on 23 pages. This information consists of passages as short as a phrase and as long as two sentences. Many of the passages are duplicates.

Section 13(1) – advice or recommendations

[14] Section 13(1) allows a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister to protect its deliberative processes.² The parts of the provision that are relevant in this case read as follows:

- 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,
 - ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

² *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025, para 52.

- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[15] The first step in the analysis is to determine whether disclosing the information at issue would reveal advice or recommendations under s. 13(1). If it would, the next step is to decide whether the information falls into any of the provisions in s. 13(2) or whether it has been in existence for more than 10 years in accordance with s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, it cannot be withheld under s. 13(1).

Advice or Recommendations

[16] The term “advice” is broader than “recommendations” and includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact” and “expert opinion on matters of fact on which a public body must make a decision for future action”.³ “Recommendations” include suggested courses of action that will ultimately be accepted or rejected by the person being advised.⁴ Section 13(1) would also apply when disclosure would allow an individual to make accurate inferences about any advice or recommendations.

[17] The City submits that the information to which it has applied s. 13(1) consists of confidential internal discussions involving advice or recommendations developed by or for the City regarding its feedback on the LCRD Applications. The City asserts that its employees who used their expertise in licencing and planning to provide background explanation and analysis that was necessary for the City to consider in formulating its position on the LCRB applications.⁵ The City relies on affidavit evidence from the deputy city clerk to support its application of s. 13(1).

Analysis

[18] To meet its burden of proof, the City must go further than merely claiming that s. 13(1) applies. It must demonstrate how the exception applies to the specific information at issue. It must explain why the information at issue meets the definition of advice or recommendations.

[19] I have reviewed the information at issue. I find that most of the information consists of recommendations with respect to a course of action relating to the position that the City would take on the LCRB applications and related matters. It also contains information relevant to evaluating the options available to the City regarding the LCRB applications, which falls within the meaning of advice. The

³ *John Doe v Ontario (Finance)* 2014 SCC 36 [John Doe], para 24. *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 113.

⁴ *John Doe*, para 23.

⁵ The City's initial submission, paras. 20.

City has explained why this information meets the definition of advice or recommendations.

[20] There is one passage on page 69 of the records, however, that does not constitute advice or recommendations. This information is contained in a letter from the City to the LCRB regarding the applications. The passage is part of an explanation by the City as to why an error occurred with respect to its original communication regarding opting out of the liquor licence referral application. The information does not contain a recommendation. Nor does it consist of an expert opinion on matters of fact on which the LCRB or the City must make a decision. It is merely an explanation as to why something occurred. This does not fall within the meaning of advice or recommendations and for that reason s. 13(1) does not apply.

[21] Therefore, I find that, with the exception of the passage on page 69, the information at issue constitutes advice or recommendations in accordance with s. 13(1).

Section 13(2)

[22] The applicant submits that s. 13(2)(a) applies to the information in dispute. The applicant asserts that the information appears to him to be factual material subject to s. 13(2)(a). He submits further that any information at issue that refers directly to him would be factual material.⁶

[23] I have reviewed the information that I have found reveals advice and recommendations. I find that none of the information is purely factual. The passages that fall within s. 13(1) consist of recommendations or expert opinions. They do not include any factual background information about the applicant or anything else. Therefore, I find that s. 13(2)(a) does not apply to any of the information.

[24] The applicant also asserts that all of the information in dispute relates to a decision the City made in the exercise of a discretionary power that affected him, in accordance with s. 13(2)(n). He submits that the City's decision to oppose his application was made in the exercise of a discretionary power and that the City must disclose all information it used to make that decision.⁷

[25] The City replies that the decision to oppose the application was not a decision made while exercising a discretionary power. It adds that the information in dispute does not contain a decision or the reasons for a decision, it merely includes advice and recommendations shared between officials. It also notes that previous orders have clarified that s. 13(2)(n) applies only to a record of the

⁶ Applicant's response submission, para. 10.

⁷ Applicant's response submission, para. 11.

decision itself and the reasons for the decision and it does not apply to all other records relating to the decision.⁸

[26] I confirm that the information that I have found reveals advice or recommendations does not include a decision affecting the applicant. Nor does it contain reasons for any decisions. The decision made while exercising a discretionary power in this case was the decision of the LCRB. Regarding the decision of the City to write to the LCRB to oppose the applicant's application, the City has disclosed the letter to the LCRB explaining why it opposed the application. I have already found that s. 13(1) does not apply to the small passage in that letter that the City withheld.

[27] Therefore, I find that s. 13(2)(n) does not apply to the information that I found reveals advice or recommendations. I see no other provisions within s. 13(2) that might apply. Consequently, I find that s. 13(2) does not apply to any of the information that I found reveals advice or recommendations.

Section 13(3) Information in existence for more than 10 years

[29] Finally, it is clear from the face of the records that none of the information has been in existence for more than 10 years, so I find that s. 13(3) does not apply.

Conclusion, s. 13

[30] In conclusion, with the exception of the passage on page 69, I confirm the decision of the City to withhold the information at issue under s. 13(1).

Section 15 – Harm to Law Enforcement

[31] As I have found that s. 13(1) applies to all of the information to which the City also applied s. 15(1), I need not consider the application of s. 15(1).

CONCLUSION

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

1. Subject to item 2 below, I confirm the decision of the City to withhold information under s. 13(1).

⁸ The City's reply submission, para. 4; Order F20-44, 2020 BCIPC 53 (CanLII), para. 35

-
2. The City is not authorized under s. 13(1) to withhold the information on page 69.
 3. The City must give the applicant access to the information described in item 2 above.
 4. The City must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 2 above.

[33] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by May 23, 2023.

April 6, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F20-84765