



Order F24-01

THE TOWN OF QUALICUM BEACH

Carol Pakkala
Adjudicator

January 3, 2024

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records relating to the investigation of claims of bullying and harassment. These claims were made by one member of the Town of Qualicum Beach's (Town) Council against other members of the Council. The Town withheld information from the responsive records under various sections of FIPPA. The adjudicator confirmed, in part, the Town's decision under ss. 13 (advice or recommendations). The adjudicator held that s. 22 (unreasonable invasion of a third party's personal privacy) did not apply to the information not properly withheld under s. 13(1). The adjudicator ordered the Town to disclose the information it was not authorized to withhold under s. 13(1) or required to withhold under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 13, and 22(1).

Introduction

[1] This inquiry is about the Town of Qualicum Beach's (Town) response to an applicant's access request for records related to bullying and harassment claims. These claims were made by one member of the Town's council about its other members. The Town withheld information from the responsive records under s.12(3)(b) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).¹

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Town's decision. Mediation resolved the s. 12(3)(b) issue. Sections 13 (advice or recommendations) and 22

¹ For clarity, unless otherwise specified, when I refer to sections in this order, I am referring to sections of FIPPA.

(unreasonable invasion of a third party's personal privacy) were added as issues during mediation.² Both parties made submissions in this inquiry.

ISSUES

[3] The issues I must decide in this inquiry are:

1. Is the Town authorized to refuse to disclose the information at issue under s. 13?
2. Is the Town required to refuse to disclose the information at issue under s. 22?

[4] Section 57 of FIPPA sets out the burden of proof. The Town has the burden of proving that s. 13(1) applies. The Town also has the burden of proving the information at issue is personal information. The applicant then has the burden of proving disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).³

DISCUSSION

Background

[5] A member of the Town's Council (Councillor) publicly announced that he was taking a medical leave of absence due to bullying and harassment within what he described as a toxic work environment. These claims were reported in the media. The Town appointed a third party investigator to investigate the Councillor's claims. The investigator issued a report (Report), some of which was made public. The applicant requested access to records concerning the findings and recommendations in the Report.

Information at issue

[6] The Report is 33 pages long and most of it was disclosed to the applicant. The Town withheld information from 2 pages of the Report under the heading "Conclusions".

[7] The Town applied both ss. 13 and 22 to the information at issue. I will first consider the Town's application of s. 13(1).

² The OIPC Investigator's Fact Report says that s. 22 was resolved in mediation but the Town said this was an error and the applicant consented to s. 22 being added to the inquiry.

³ Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9-11.

Advice or recommendations, s.13(1)

[8] Section 13(1) allows a public body to refuse to disclose information that would *reveal* advice or recommendations developed by or for a public body or a minister. However, s. 13(1) does not apply to certain types of records and information listed in s. 13(2), and s. 13(3) says it does not apply to information in a record that has been in existence for 10 or more years.

[9] The purpose of s. 13(1) is to allow for full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberate process of government decision and policy making were subject to excessive scrutiny.⁴

[10] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1) and I adopt these principles in making my decision:

- To “reveal” advice or recommendations means that s. 13(1) does not apply to information that has already been disclosed.⁵
- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.⁶
- “Recommendations” include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.⁷
- “Advice” is broader than “recommendations”⁸ and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.⁹ Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.¹⁰
- “Advice” also 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.”¹¹ This compilation of factual information and weighing the significance of matters of fact is an integral component of an expert’s advice and informs the decision-making process.

⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras 45-51.

⁵ See for examples: Order F23-41, 2023 BCIPC 59 at para 96; Order F20-32, 2020 BCIPC 38 at para 36; Order F13-24, 2013 BCIPC 21 at para 19; Order F12-15, 2012 BCIPC 21 at para 19.

⁶ Order 02-38, 2002 CanLIn42472 (BC IPC) at para 135.

⁷ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 23.

⁸ *Ibid* at para 24.

⁹ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

¹⁰ *Ibid* at para 103.

¹¹ *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

[11] The first step in the s. 13 analysis is to determine whether the information withheld would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether ss. 13(2) or 13(3) apply.

Parties' submissions, s. 13(1)

[12] The Town says the information at issue consists of advice and “a” recommendation. Specifically, the Town says the information at issue consists of:

- advice to the Town regarding how to respond to allegations that are of a similar nature as those at issue in the investigation;
- opinions and conclusions in respect of the facts;
- opinions regarding the standards to be applied in these types of situations; and
- a recommended course of action that may be accepted or rejected by the Town’s Council.¹²

[13] The Town submits that the exceptions in s. 13(2) are not applicable and that none of the information withheld constitutes factual material for the purposes of s. 13(2).

[14] The applicant did not specifically comment on whether the information at issue is advice or recommendations. The applicant does say the Town was overly broad in its redactions. The applicant says the information withheld under s. 13 could be excluded without redacting entire sentences. The applicant further says he wants access to the conclusions and recommendations in the Report.¹³

Analysis, s. 13(1)

[15] I have reviewed the information withheld under s. 13(1) from the Report and I find that information is as follows:

- general principles for conducting a workplace investigation into allegations of bullying and harassment;¹⁴
- a general legal frame of reference for reviewing allegations of bullying and harassment;¹⁵
- the investigator’s weighing of evidence and opinions on matters of fact;¹⁶ and

¹² Town’s initial submissions at paras 20-25.

¹³ Applicant’s June 21, 2023, email to OIPC.

¹⁴ First marked box under the heading “Conclusions” in the Report.

¹⁵ The first three sentences of the third marked box and the first sentence of the fourth marked box under the heading “Conclusions” in the Report.

¹⁶ Second marked box and the final sentences of the third and fourth marked boxes under the heading “Conclusions” in the Report.

- comments on the scope of the investigation and a suggested course of action.¹⁷

[16] For the reasons that follow, I find only some of this information would reveal advice or recommendations developed for a public body.

[17] To begin, I find that the Town has established that the information at issue in the Report was prepared for the Town, a public body.

[18] While the applicant expressed a desire to see any recommendations, s. 13(1) specifically authorizes the Town to withhold recommendations. The Report does contain a clear recommendation on a course of action.¹⁸ I find the Town is authorized to withhold this recommendation under s. 13(1).

[19] Some of the other marked paragraphs contain the investigator's weighing of evidence and opinion on matters of fact.¹⁹ The courts have found this type of information constitutes advice.²⁰ I make the same finding here.

[20] However, for the reasons that follow, I find that the balance of the information at issue would not reveal advice or recommendations.

[21] Consistent with past orders, I find that not all of the investigator's comments constitute advice or recommendations.²¹ For s. 13 to apply, there must be a deliberative process for which someone is providing advice or recommendations. If the withheld information reveals, or allows the reader to infer that advice or recommendations, s. 13 applies. I find that the following information would not reveal, or allow for inferences of, advice or recommendations, and is therefore not properly withheld under s. 13(1):

- General principles for conducting a workplace investigation into allegations of bullying and harassment.²²
- A general legal frame of reference for reviewing allegations of bullying and harassment.²³

¹⁷ Fifth marked box under the heading "Conclusions" in the Report.

¹⁸ Second part of the fifth marked box under the heading "Conclusions" in the Report.

¹⁹ Second marked box and the final sentence in each of the third and fourth marked boxes under the heading "Conclusions" in the Report.

²⁰ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

²¹ See for example Order F23-71, 2023 BCIPC 84 (CanLII) at para 18.

²² First marked box under the heading "Conclusions" in the Report.

²³ The first three sentences of the third marked box and the first sentence of the fourth marked box under the heading "Conclusions" in the Report.

[22] Finally, one sentence was already revealed by the Town to the applicant. This information would not “reveal” anything if disclosed because the same information has already been disclosed.²⁴

Section 13(2)

[23] The next step in the s. 13 analysis is to consider whether s. 13(2) applies to the information that I found above would reveal advice or recommendations. Section 13(2)(a) provides that the head of a public body must not refuse to disclose any “factual material” under s. 13(1). The Town says that s. 13(2)(a) does not apply in this case as none of the information withheld constitutes factual material for the purposes of this section.

[24] The term “factual material” in s. 13(2)(a) has a distinct meaning. Factual material means “source materials” or “background facts in isolation” that are not necessary to the advice provided. If the factual information is compiled and selected by the person providing the advice and is an integral component of their advice, then it is not “factual material” under s. 13(2)(a). Thus, for s. 13(2)(a) to apply, the information must be purely factual material that is not intertwined with the advice or recommendations.²⁵

[25] I find the information which I found would reveal advice or recommendations is not factual material. To the extent that this information contains facts, those facts are intermingled with, and an integral part of, the analysis, opinion, and advice and cannot be separated. Therefore, I find that s. 13(2)(a) does not apply.

[26] Neither party raises, and it is not evident from the record, that any other provision of s. 13(2) applies. Therefore, I find that s. 13(2) does not apply to any of the information which I found would reveal advice or recommendations.

Section 13(3)

[27] Section 13(3) provides that s. 13(1) does not apply to information that has been in existence for 10 or more years. I find that none of the information at issue has been in existence for 10 or more years, so that s. 13(3) does not apply.

²⁴ Exhibit “H” to the affidavit of the Town’s Deputy Corporate Administrator. This information is in the first part of the fifth marked box under the heading “Conclusions” in the Report.

²⁵ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322, paras. 91-94.

Conclusion, s. 13

[28] In conclusion, I confirm the Town's decision to withhold some of the information under s. 13(1) as noted above. The Town is not authorized by s. 13(1), however, to refuse to disclose some of the information at issue as noted.

Disclosure harmful to personal privacy, s. 22

[29] Section 22(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. I will consider whether s. 22(1) applies only to the information that I have not already found can be withheld under s. 13(1).

[30] The Town says that if any of the withheld information is not protected from disclosure by s. 13(1), the personal information must be redacted from it prior to disclosure pursuant to s. 22. The applicant says he is not looking for specific names.

Personal information

[31] Section 22(1) applies only to personal information, so the first step in a s. 22 analysis is to decide whether the information at issue is personal information.

[32] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." 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."²⁶

[33] I find that none of the remaining information at issue is about identifiable individuals, so s. 22(1) does not apply.

CONCLUSION

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

1. Subject to item 3 below, I confirm the Town is authorized to refuse access to some of the information at issue under s. 13(1).

²⁶ FIPPA, Schedule 1.

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2. The Town is not required, under s. 22(1) to refuse access to the information at issue that was not properly withheld under s. 13(1).
 3. I require the Town to give the applicant access to the information I have highlighted in yellow at page 1 of the copy of the records, which is provided to the Town with this order.

[35] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **February 14, 2024**.

January 3, 2024

ORIGINAL SIGNED BY

Carol Pakkala
Adjudicator

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