Order F07-17

MINISTRY OF FORESTS AND RANGE

Catherine Boies Parker, Adjudicator

July 31, 2007

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Summary: The applicant, an employee of the Ministry, requested access to his personal records. The Ministry released some records and refused access to others, relying on s. 13(1). The records related to advice provided to the Ministry by the Public Service Agency regarding the applicant's request for accommodation. The applicant argued that the information was not advice for the purposes of s. 13(1) or, alternatively, that it fell within the exceptions to s. 13(1) set out in ss. 13(2)(a), 13(2)(d) or 13(2)(n). The Ministry is ordered to release some information which relates only to a request for advice. The Ministry is entitled to refuse access to the remaining information under s. 13(1). Because the Ministry did not demonstrate that it had exercised its discretion in refusing access under s. 13(1) taking into account all relevant considerations, it is required to reconsider its decision in that regard.

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

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-08, [2003] B.C.I.P.C.D. No. 8; Order No. 218-1998, [1998] B.C.I.P.C.D. 11; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 04-37, [2004] B.C.I.P.C.D. No. 38.

Cases Considered: *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner* 2002 BCCA 665.

1.0 INTRODUCTION

[1] By letter dated October 12, 2005, the applicant requested, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), access to his personal records held by or under the control of a specific employee of the Ministry of Forests and Range ("Ministry"). The period covered by the request

was January 1, 2005 to October 12, 2005, inclusive. The Ministry responded to the applicant's request on January 19, 2006, granting access to some records and refusing access to certain information under s. 13 of FIPPA. The applicant requested a review of the Ministry's decision to refuse access to certain information. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of FIPPA.

2.0 ISSUE

[2] The issue before me in this case is whether the Ministry is authorized to refuse access to the withheld records under s. 13(1) of *FIPPA*. Under s. 57(1) of *FIPPA*, the Ministry has the burden of proof regarding s. 13(1).

3.0 DISCUSSION

[3] **3.1 Preliminary Issue**—The applicant raises a preliminary issue regarding the sufficiency of the Portfolio Officer's Fact Report in this case. The Fact Report defines the issue as set out above. The applicant objects that the Fact Report does not include a reference to his complaint, filed with this office on January 5, 2006, that the Ministry had failed, up until that time, to respond to his request for records.[1]

[4] The Notice of Written Inquiry defines the issue in the same manner as the Fact Report. The Ministry asserts that the scope of this inquiry was set by the Notice of Inquiry. The Ministry states that if the applicant objected to the scope of the inquiry this objection should have been raised when the Notice of Inquiry was issued.

[5] This office responded to the applicant's January 5, 2006 letter in correspondence dated January 19, 2006, informing the applicant that the Ministry had stated that it had provided a response to the applicant's request on January 19, 2006. This office's letter states the following:

> As the Ministry of Forests and Range has now responded to your request, it appears there is nothing further which our office might review on the matter.[2]

[6] There is no indication in the material before me that the applicant objected to this response at the time it was received.

[7] At the time the Notice of Written Inquiry and Portfolio Officer's Fact Report were issued, the applicant did not take exception to the definition of the matter at

[1] Page 1, applicant's initial submission.
[2] Appendix B, applicant's initial submission.

issue. It is only in his initial submission in the inquiry that he suggests the Ministry's failure to respond was an issue which should be addressed.[3]

[8] In these circumstances, it is appropriate for me to confine my consideration of the issues to those set out in the Notice of Inquiry. If the applicant objected to the issues identified, the applicant should have raised that objection when the Notice of Inquiry was issued. Because the matter is not before me, I make no findings with respect to whether the timeliness of the Ministry's response raises any issue of compliance under FIPPA. I note, however, that previous orders have repeatedly emphasized the importance of public bodies responding to requests in a timely way. I also note that where the public body has provided a response, there is usually no remedial order made.

[9] The applicant, in the course of his submissions, also raises his right under s. 29 of FIPPA to correct any personal information about him held by the Ministry.[4] There is no evidence that the applicant has attempted to exercise his rights under s. 29 and that matter is not properly before me.

[10] **3.2 Background**—The applicant is an employee of the Ministry. On April 1, 2005, the applicant informed his supervisor that due to his health and family situation he might have to request stress leave. On June 24, 2005, the supervisor received an email from the applicant with a request that he be able to take one or two days off per week to recuperate from pain and exhaustion. The email was titled "Family Crisis - Request for Accommodation."[5]

[11] The supervisor was unsure how to respond to the applicant and therefore, on June 28, 2005, met with a representative of the British Columbia Public Service Agency (the "PSA") to discuss the applicant's request. Over the next few months, the supervisor and the PSA representative discussed the applicant's situation on several occasions, both by email and in meetings. On July 19, 2005, the PSA representative sent the supervisor an email which, according to the supervisor's affidavit, "posed several questions to assist in clarifying the applicant's situation, and made several recommendations to [the supervisor] regarding how the applicant might take time off in a fashion that would be agreeable to both himself and his employer."[6]

[12] On or about August 12, 2005, the supervisor met with the applicant and "discussed the options and ideas that [the PSA representative] had suggested in the July 19, 2005 email."[7] At the supervisor's suggestion, the applicant agreed to make a proposal regarding accommodation. On September 1, 2005, the applicant emailed his formal request regarding his work schedule to his

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[3] Page 1, applicant's initial submission.
[4] Para 8, applicant's initial submission.
[5] Paras. 2-4, supervisor's affidavit.
[6] Paras. 5-7, supervisor's affidavit.
[7] Para. 8, supervisor's affidavit.

supervisor. The supervisor informed the applicant that he would forward the formal request to the PSA representative in order to obtain "advice and direction" as to the course of action that the Ministry could follow. On September 9, 2005, the supervisor met with the PSA representative to discuss the options available to accommodate the applicant's request. The decision was made to provide the applicant with a letter, and the PSA representative agreed to write the first draft of the letter. The supervisor later received that draft, and, after consulting further with the PSA representative, modified it in some respects. The final letter, dated October 4, 2005, was sent to the applicant by his supervisor.[8]

[13] The October 4, 2005 letter was the subject of a complaint made by the applicant under the *Human Rights Code*. That complaint names as respondents both the Ministry and the PSA. In the body of the complaint, the applicant states that the PSA is responsible for "establishing [the] policy and procedural framework upon which the public service serves all British Columbians". The applicant states that the PSA was "actively involved" in his accommodation request and was the "directing mind" in preparing the letter of expectation. The complaint contains references to the PSA's role in developing government policy and states that if the discrimination alleged in the complaint is found to be directed by the PSA this "implicates the existence of systemic discrimination at the highest level of the B.C. public service."[9]

[14] In response to the applicant's request for records, the Ministry produced 80 responsive records which contain the applicant's personal information. It severed portions of three documents, consisting of:

(a) The July 19, 2005 email from the PSA representative to the applicant's supervisor;

(b) A September 19, 2005 email inquiry from the applicant's supervisor to the PSA representative and the response;

(c) The September 20th, 2005 draft letter of expectation, produced by the PSA representative at the request of the applicant's supervisor.

[15] The applicant requested a review of the Ministry's January 19, 2005 response on January 23, 2006, and on March 3, 2006 requested that the matter proceed to written inquiry. The Notice of Written Inquiry and the Portfolio Officer's Fact Report were issued on April 18, 2006.

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[8] Paras. 8-12, supervisor's affidavit.
[9] Appendix E, pages VI and VII, applicant's initial submission.

[16] **3.3 Advice or Recommendations**—Section 13 of FIPPA provides, in part, as follows:

> **Policy advice or recommendations**
>
> 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 …
>
> (d) an appraisal …
>
> (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.
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[17] Numerous orders have considered the interpretation of s. 13(1). I will apply here, without repeating them, the principles for interpreting s. 13(1) set out in those orders.[10]

[18] In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope 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.

[19] The purpose of s. 13 has been identified in previous orders as being 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.[11]

[20] The Ministry asserts that the withheld information constitutes advice and recommendations to the applicant's supervisor (and therefore the Ministry) concerning a course of action with respect to the request for accommodation and advice and recommendations on the wording of the letter of expectation. The Ministry describes the July 19, 2006 email as advice from the PSA on the most appropriate course of action, and background information supporting that recommendation. The Ministry states that the severed portion of the

[10] See, for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38.
[11] See, for example, Order 02-38, at para. 119.

September 19, 2005 email consists of a request for a recommendation from the Ministry and the PSA's response. The Ministry asserts that the severed portions of the September 20, 2005 draft letter contain the recommendations of the PSA to the Ministry on the wording of the letter of expectation which was provided to the applicant.[12]

[21] The applicant argues that, because of the nature and timing of the communications, they do not fall within the scope of s. 13(1).[13] In addition, the applicant argues that the documents fall within the exemptions from s. 13(1) set out in s. 13(2).[14]

The timing of the advice or recommendations

[22] The applicant asserts that the course of action which was the subject of the advice or recommendation, namely the response to the applicant set out in the October 4, 2005 letter of expectation, was complete at the time access to the requested records was refused.[15] The applicant's position is that where a course of action is complete, the Ministry cannot rely on s. 13(1) to refuse access to advice or recommendations about that course of action.

[23] It is true that the purpose of s. 13(1) is most clearly served when the decision is still being made, and that this is a relevant factor which should be taken into account when a public body exercises its discretion regarding whether to withhold a document which falls within s. 13(1). However, the language of s. 13(1) does not in any way suggest that it is limited to advice or recommendations regarding a course of action which has yet to be completed.

The nature of the advice or recommendations

[24] The applicant contends that, because the title of s.13 refers to *policy* advice, the Ministry must demonstrate that the advice which is being withheld is in the nature of the development of "policy", and not advice on "operational" issues. The applicant argues that the advice concerned only the course of action which would be taken in response to his individual request, and not the development of policy generally.[16] However, I note that in his human rights complaint form, which the applicant provided to me as part of his submission, the applicant set out the role of the PSA in providing personnel policy guidance to government.[17]

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[12] Paras. 4.15 and 4.16, Ministry's initial submission.
[13] Paras. 5 and 6, applicant's initial submission; paras. 5, 7, 8, and 9, applicant's reply submission.
[14] Paras. 6 and 7, applicant's initial submission; paras. 6, 10, 12, applicant's reply submission.
[15] Paras. 8-9, applicant's reply submission.
[16] Para. 5, applicant's initial submission; paras. 5, 8 and 9, applicant's reply submission.
[17] Appendix E, pages VI and VII; applicant's initial submission.

[25] The Ministry notes that s.11 of the *Interpretation Act* provides that the title of a provision such as s. 13(1) does not form part of the statute in which it appears. The Ministry argues that there is no requirement that it demonstrate that the severed information is "policy" as the word "policy" does not appear in s. 13(1).[18]

[26] Previous orders[19] and decisions of the courts which have considered s. 13(1) have not limited it to advice or recommendations regarding the development of policies. For example, in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*,[20] the Court of Appeal held that certain documents developed in the course of an investigation into a complaint about a specific physician were protected by s. 13(1). There is no indication in the judgement that these documents involved the development of general policy advice.

Findings with respect to the scope of s. 13(1)

[27] The applicant appears to accept that the withheld information relates to the Ministry obtaining guidance from the PSA about how to respond to his request for accommodation.[21] I find that the PSA's advice in this regard is within the scope of s. 13(1). The July 19, 2005 email from the PSA representative to the applicant's supervisor contains advice and recommendations about how to address the applicant's request for accommodation and falls within s. 13(1).

[28] The withheld portions of the draft letter also constitute advice or recommendations under s. 13(1). The final letter was before me, and comparing the two, it is clear that the withheld portions constitute advice regarding how the letter should be drafted. This was advice that the Ministry ultimately did not follow, since it changed the wording of the letter before it was sent. The disputed information is nonetheless protected by s. 13(1).

[29] With respect to the September 19, 2005 emails, the Ministry has withheld both the supervisor's request for advice and the PSA representative's reply. The Ministry has not explained why the supervisor's request would constitute or reveal "advice or recommendations developed by or for" the Ministry. While disclosing a request for advice might reveal that the Ministry received advice on a certain topic, it will not ordinarily reveal the substance of that advice. I find that the Ministry has not met its burden of demonstrating that the supervisor's request for advice falls within s. 13(1). The PSA representative's response of the same day does, however, constitute advice or recommendations and is within the scope of s. 13(1).

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[18] Para. 3, Ministry's reply submission.
[19] See, for example, Order 03-08, [2003] B.C.I.P.C.D. No. 8.
[20] 2002 BCCA 665 ("*College of Physicians*").
[21] Para. 5, applicant's reply submission.

[30] Having determined that some of the withheld information is protected by s. 13(1), I must consider the applicant's argument that they are also covered by one or more of the categories in s. 13(2) and thus cannot be withheld under s. 13(1).

Section 13(2)(a) (Factual Material)

[31] The applicant argues that the advice or recommendations, or, as the applicant characterizes them, opinions, "were in existence and therefore 'factual material'" which is excluded from the operation of s. 13(1) by s. 13(2)(a).[22] The Ministry denies that the severed material is factual information. The Ministry states that while certain sentences of the July 19, 2005 email may be factual when removed from their context, they are in fact part of the overall advice and recommendations provided by the PSA.[23]

[32] The fact that advice or recommendations are "in existence" does not make them "factual information" for the purposes of s. 13(2)(a). FIPPA deals with records of information, meaning that all advice or recommendations are "in existence" in a recorded form of some kind. If the applicant were correct, s. 13(1) would be a dead letter in all cases. That is clearly not what the Legislature intended.

[33] I agree with the Ministry that any factual statements in the July 19, 2005 email are inextricably interwoven with the PSA's advice to the Ministry and cannot reasonably be severed and disclosed to the applicant.

Section 13(2)(d) (Appraisal)

[34] The applicant argues that the draft letter and the advice or recommendations about him are in the nature of "an appraisal" about him within the meaning of s. 13(2)(d).[24] The applicant seems to be suggesting that the documents are evaluative of him as an employee, and as such constitute an "appraisal" for s. 13(2)(d) purposes.

[35] I do not agree that the disputed records constitute a personnel evaluation of the applicant. In any case, such evaluations are not within the scope of the term "appraisal" in s. 13(2)(d). An examination of other sections of FIPPA suggests that "appraisal" does not refer to assessments of an employee's skills or performance evaluations. Where FIPPA refers to such evaluations, for example, in s. 22(3)(g) and (h), the term "personnel evaluations" is specifically used.

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[22] Para. 6, applicant's initial submission.
[23] Paras. 4 and 7, Ministry's reply submission,
[24] Para. 10, 12, applicant's reply submission, para. 10, 12.

Section 13(2)(n) (Decision)

[36] The applicant argues that because the advice or recommendations of the PSA may affect his rights under the collective agreement that applies to his employment with the Ministry, and his rights under the *Human Rights Code*, they fall within s.13(2)(n).[25] The Ministry argues that the severed information is not a "decision."[26]

[37] Previous orders have determined that s. 13(2)(n) does not require the disclosure of all records which relate in any way to the exercise of a discretionary power or an adjudicative function, but only those records which contain a decision or reasons for it.[27]

[38] I make no finding on whether the October 4, 2005 letter received by the applicant, which communicated the Ministry's response to the applicant's request for accommodation, constituted a "decision" for the purposes of s. 13(2)(n). That record is not in issue here. What is relevant here is the fact that none of the withheld documents consist of a decision made in respect of the applicant's rights.

[39] **3.4 Ministry's Exercise of Discretion**—The applicant suggests that because s. 13(1) is discretionary, it cannot be used to limit his right of access to records under FIPPA.[28] As the Ministry notes,[29] the right to access is set out in s. 4(1) of FIPPA, and is, pursuant to s. 4(2), limited by the exceptions to the right of access found in Part 2 of FIPPA, including s. 13(1).

[40] The applicant suggests that the Ministry can only exercise its discretion to refuse access under s. 13 if it can demonstrate that providing access will cause harm to the government or a third party.[30] I find that the Ministry is not required to provide evidence of harm in order to refuse access.[31]

[41] It is, however, essential that the Ministry exercise its discretion in each case and that it do so taking into account relevant factors. It is well established in orders under FIPPA that public bodies should consider a variety of factors when exercising their discretion in deciding whether or not to apply the discretionary exceptions set out in FIPPA. Commissioner Loukidelis discussed the exercise of discretion thus:

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[25] Para.6, applicant's initial submission; para. 10, applicant's reply submission.
[26] Paras. 4-6, Ministry's reply submission.
[27] See, for example, Order No. 218-1998, [1998] B.C.I.P.C.D. 11.
[28] Para. 9, applicant's initial submission.
[29] Para. 9, Ministry's reply submission.
[30] Para. 7, applicant's initial submission.
[31] Order 02-38, at para. 146.

> [143] The word "may" in provisions such as s. 16 or s. 17 confers on the head of a public body a discretion to disclose information that can be withheld under one of Act's exceptions to the right of access. In Order 02-38, at para. 149, I affirmed once again that the head of a public body should always consider the public interest in disclosure of information that is technically protected from disclosure and cited some of the relevant factors in considering the public interest in disclosure. I will not repeat that non-exhaustive list of factors here.
>
> [144] The head must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations. If the head of the public body has not done so, he or she can be ordered to re-consider the exercise of discretion. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, at p. 4. The commissioner can require the head to reconsider her or his exercise of discretion if it has been exercised in bad faith, has been exercised perversely or unfairly, where irrelevant or extraneous grounds have been considered or relevant ones have not been considered. See Order 02-38, at para. 147.[32]

[42] I will not repeat the rest of those discussions but apply the same principles here.

[43] Relevant factors which the Ministry should consider in determining whether to exercise its discretion to refuse access under s. 13(1) include: the age of the record, its past practice in releasing similar records, the nature and sensitivity of the record, the purpose of the legislation and the applicant's right to have access to his own personal information.[33] In this particular case, an especially relevant factor regarding the July 19, 2005 email is the evidence of the Ministry that the contents of the email have already been discussed with the applicant in the meeting between the applicant and his supervisor on or about August 12, 2005. Also relevant is the applicant's assertion that the course of action that was the subject of the advice was completed at the time of the access request.

[44] The Ministry's submissions do not explain how or if it took any of these factors into account in the exercise of its discretion. The Ministry does not, in fact, indicate that its head or the head's delegate actually exercised that discretion. Rather, the Ministry appears to have treated s. 13(1) as a blanket exception, such that as long as the material fell within the scope of s. 13(1) and was not included in ss. 13(2) or 13(3), the Ministry was entitled to refuse access. This is similar to what occurred in Order 04-37. In the absence of any evidence that the Ministry exercised discretion under s. 13(1), much less on what grounds it was exercised, it is appropriate for me to order it to re-consider its decision to refuse to disclose information covered by s. 13(1).

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[32] Order 02-50, [2002] B.C.I.P.C.D. No. 51.
[33] See Order 02-38, para. 149; Order 04-37, [2004] B.C.I.P.C.D. No. 38, para. 23.

[45] **3.5 Applicant's Requests**—The applicant's reply submission requests disclosure of the withheld documents, and, in the alternative, an order directing the Ministry to maintain the severed information in good condition for a period of one year.[34] The applicant provided no explanation for why the alternative order sought is a necessary or appropriate remedy and I decline to do this.

4.0 CONCLUSION

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

1. Under s. 58(2)(a), I require the Ministry to give the applicant access to his supervisor's request for advice in the email dated September 19, 2005. I have prepared a re-severed copy of the September 19, 2005 email for the Ministry with the portion which I have found that the Ministry is authorized to withhold highlighted by underlining;

2. Under s. 58(2)(b), I confirm that the Ministry is authorized by s. 13(1) to refuse access to the remainder of the withheld information, but require the Ministry to reconsider its decision to refuse access to the records that I have found it is authorized to withhold under s. 13(1); and

3. Under s. 58(4) of the Act, I require the Ministry to deliver its reconsideration decision, including reasons for the decision, to the applicant and to me within 30 days, as that term is defined in FIPPA, from the date of this order.

July 31, 2007

ORIGINAL SIGNED BY

Catherine Boies Parker
Adjudicator

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[34] Para. 15, applicant's reply submission.