



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F09-01

OFFICE OF THE PREMIER

Celia Francis, Senior Adjudicator

January 22, 2009

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Summary: The applicant sought briefing materials for the Premier for Question Period during a specified legislative session. Section 13(1) authorizes the Office of the Premier to withhold the information as advice to the Premier.

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

Authorities Considered: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-15, [2001] B.C.I.P.C.D. No. 16.

1.0 INTRODUCTION

[1] The New Democrat Official Opposition Caucus, the applicant in this case, requested from the Ministry of Labour and Citizens' Services, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), "all records relating to Premier Campbell's Question Period briefing materials from the recent session of the Legislature." It was over four months before the Ministry responded on behalf of the Office of the Premier ("Premier's Office"), disclosing 44 almost entirely blank pages, from which, as the Premier's Office noted, "substantial information" was withheld under s. 13(1) of FIPPA.

[2] The applicant asked this Office to review the decision to refuse to disclose information. As mediation was not successful, a written inquiry was held under Part 5 of FIPPA.

2.0 ISSUE

[3] The only issue here is whether s. 13(1) of FIPPA authorizes the Premier's Office to refuse to disclose information. Under s. 57(1), the Premier's Office has the burden of establishing that s. 13(1) authorized it to do this.

3.0 DISCUSSION

[4] **3.1 Description of the Records**—The 44 pages of records in issue have a series of headings, which appear at the top and bottom of each page. The Premier's Office disclosed these headings to the applicant. There are many headings, including these:

- Labour Record
- The Economy – Jobs and Employment
- The Economy – Earnings and Migration
- The Economy – Economic Growth
- The Economy – Confidence and Investment
- The Economy – Forestry; Mining, Oil & Gas
- Budget 2005 – New Spending; Economic Policies; Health System Achievements
- Key Messages – Skills Shortage

[5] **3.2 Section 13(1)**—The relevant provisions read as follows:

Policy advice, recommendations or draft regulations

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, ...

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

[6] The purpose of s. 13(1) is to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations. A number of orders have considered the interpretation of s. 13(1) and I apply here without repeating them the principles set out in those orders.¹

[7] The Premier's Office said it withheld "advice relating to a course of action"² and that its purpose was to provide "advice to the Premier regarding how to respond if

¹ See, for example, Order 01-15, [2001] B.C.I.P.C.D. No. 16, and Order 02-38, [2002] B.C.I.P.C.D. No. 38.

² Para. 4.05, initial submission.

various issues were raised in the Legislative Assembly”,³ advice which the Premier was free to accept or reject.⁴

[8] In its view, the advice includes the following:

- opinions about an existing set of circumstances
- the investigation and gathering of facts and information necessary to the consideration of specific or alternate courses of action
- the opinion of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, that is, deliberations concerning how to respond to various questions raised in the Legislative Assembly
- an expert exercising skill and judgement to weigh the significance of matters of fact⁵

[9] The Premier’s Office also drew parallels between this case and the one the Commissioner considered in Order 02-38,⁶ arguing that

...all of the information in dispute in this case, including the factual information, would, if released, clearly disclose advice provided to the Premier as to how to respond to various issues should those issues be raised in the Legislative Assembly. Because the disclosure of any of the factual information at issue in this case would directly disclose advice and recommendations to the head of the public body, that information does not fall within s. 13(2)(a) of the Act.⁷

[10] Jay Schlosar, then Director of Issues Management in the Premier’s Office, deposed that he was responsible for preparing “briefing materials on emerging political issues and policy considerations for use by Premier [*sic*] for...activities within the Legislative Assembly”⁸ and that he compiled and prepared these materials with support from colleagues in his office, with no other government agencies directly contributing to their preparation.⁹ Jay Schlosar also deposed that the disputed records were created for the Premier’s “quick response” use in Question Period in the Legislative Assembly, to “respond to an array of political issues that may emerge.”¹⁰ He said the government has “no prior information about what questions will be asked”, leaving him to

... make a professional assessment of the probably [*sic*] angles and approaches that the Opposition may use on a given issue, and prepare materials that reflect the array of potential recommended responses based upon that assessment.¹¹

³ Para. 4.11, initial submission.

⁴ The Premier’s Office also referred to the purpose and interpretation of s. 13(1) as discussed in a number of relevant orders and case law; paras. 4.01-4.15, initial submission.

⁵ Para. 4.12, initial submission.

⁶ [2002] B.C.I.P.C.D. No. 38; para. 4.16, initial submission.

⁷ Para. 4.17, initial submission. The Premier’s Office also argued that s. 13(3) does not apply here as the requested records were prepared in 2005.

⁸ Schlosar affidavit, para. 3.

⁹ Schlosar affidavit, para. 3.

¹⁰ Schlosar affidavit, para. 6.

¹¹ Schlosar affidavit, para. 6.

[11] The following passages from Jay Schlosar’s affidavit also speak to the context for the preparation, and nature, of the records:

11. The ability to access multiple issues areas and supporting information is essential for the particular needs of Premier [*sic*] during Question Period.
12. A distinction between the Premier and Cabinet Ministers is that the latter will have to deal with questions relating to their portfolio, whereas the Premier will be asked to respond to questions concerning any issue across the government. As a result, the potential responses the Premier must be able to provide are not confined to information sourced from a particular branch or ministry of government, but must instead reflect a wide breadth of potential responses that span all government ministries.
13. The documents must also be structured to facilitate the immediate access of multiple pages. The Premier has to deal with issues “on his feet” during Question Period, i.e. often between 30 and 60 seconds. This means that the content of the Records must reflect a format and framing that is particular to his individual needs and approach when it comes to synthesizing information in a short period of time.
14. The Records are also by necessity designed to accommodate the context of a potential question being raised. For each issue anticipated within the Records, there are a variety of responses or narrative approaches to choose from. That choice is made based on the context of the question, the background and record of the questioner, and other relevant factors on any given day. For example, for a question with respect to homelessness, a response could deal with income assistance, social housing, the state of the economy or other issues, depending upon the context of the question.
- ...
16. My role is to provide advice concerning the type of policy responses that the Premier may choose on a given topic area. The Premier may or may not follow the recommended messaging, and will often supplement that advice with further information of his own choosing. In order to permit this flexible and selective use, the format must be such to accommodate his personal style of understanding and managing written information.
- ...
21. Finally, I have to exercise my professional judgment in determining which information to include in light of the larger political objectives of government. In other words, through these documents, I am asked to recommend which information government should provide on a given issue that will most effectively illustrate the policy of the government in contrast to the Opposition. The Information effectively forms the framework for a larger “narrative” for government’s past, present and future policy. Providing this political context to information is a role that is exclusive to my position and prior experience.
- ...

23. Put differently, because the Information reflects what I, in my professional capacity, deem to be the “best of the best” of recommended responses and policy advice for the Premier’s Question Period Strategy, it also constitutes strategic advice developed by me concerning the nature of policy responses required for certain issues, and in doing so necessarily recommends particular approaches to those policy questions. By extension, that same information can be used to inform new policy established by the Premier in those statements.

[12] The applicant speculated on the nature of the withheld passages based on the wording of the headings and suggested that there is “no universal basis in law” for withholding communications advice.¹² The applicant acknowledged that advice, and even factual information, may be properly withheld where their disclosure could disrupt the decision-making process.¹³ It expressed doubt that the withheld information constitutes “expert opinion”¹⁴ and suggested that the Schlosar affidavit indicated that some of the information is factual and thus falls under s. 13(2)(a).¹⁵ The applicant also asked me not to decide against disclosure “simply on the basis that the information is configured as advice and recommendations as to how the Premier might communicate in the Oral Question Period.” It argued that, in any case, the Premier’s participation in Question Period, and his mental process of deciding what to say, are not deliberative or decision-making processes that s. 13(1) is designed to protect, “particularly if this participation consists of reciting or alluding to the already published results of completed deliberations.”¹⁶

[13] The applicant also argued that the Premier’s Office had not exercised its discretion reasonably in withholding virtually all of the information¹⁷ and that the exercise of discretion under s. 13 must balance the public’s right to records with “the legitimate needs of the deliberative process.”¹⁸ In its view, relevant factors in the exercise of discretion in this case are:

- where disclosure would not endanger the deliberative process and
- whether the decision to which the advice relates has already been made.¹⁹

¹² The Premier’s Office responded that, in Order 02-38, the Commissioner found that s. 13 applied to communications advice; para. 7, reply submission.

¹³ Para. 32, reply submission. I do not agree that “factual information” *per se* can be withheld, including in view of s. 13(2)(a).

¹⁴ Paras. 38, 44-46, reply submission. The Premier’s Office rejected this argument, saying that the individual in question has expertise in the area of issues management; paras. 10-11, reply submission; see also Jay Schlosar’s second affidavit in which he describes his education and past work experience as a minister’s assistant and in issues management.

¹⁵ Paras. 1-7, 13-46, reply submission.

¹⁶ Paras. 26-35, initial submission; paras. 15, 20-22, 31, reply submission. The Premier’s Office reiterated in response that the “deliberative process” in question was “the process leading to the provision of advice to the Premier by his experts concerning how to deal with various questions that could be raised in the Legislative Assembly”; paras. 8-9, reply submission.

¹⁷ Paras. 1-7, 13-46, reply submission.

¹⁸ Paras. 20-21, initial submission.

¹⁹ Paras. 6-24, initial submission. The applicant also drew my attention to the purpose and interpretation of ss. 13(1) and (2) as discussed in previous orders and case law.

[14] In reply to the applicant's comments about its exercise of discretion,²⁰ the Premier's Office said it had considered the following factors in "properly exercising discretion":

- The wording of s. 13 and the interests it "attempts to balance", *i.e.*, "to permit frank and unmediated policy discussion between parties within a public body"
- The records "reflect a compilation of information intended to be used in a non-linear fashion so that ideas can be mixed and supplemented with further personal knowledge"; even to disclose parts of the records "would be to undermine the overall strategic value of the documents"
- There has been no previous practice of disclosing these types of records
- The records reveal personal, strategic advice on the Premier's question period strategy and by the nature of the forum, *i.e.*, the Legislative Assembly, that advice also reflects larger government policy and communications strategy, past and future; the nature of the record is "very sensitive" to the Premier's Office and disclosure of the information would harm its deliberative process
- The records were "created for a specific use within a specific narrow set of activities (Question Period)"; since the severed information is only a "partial reflection of what policy responses may be given (as the Premier supplements information with prior knowledge), to release it would be only a partial characterization of government policy that may create unintended consequences amongst the public that would erode public confidence in government operations"
- The records were created in 2005
- The Premier's Office knows of no sympathetic or compelling need to release the severed information; the Opposition has "ample opportunity to seek answers to questions through the processes of the Legislation [*sic*] Assembly, which has been enhanced since 2005 with the extension of Question Period to 30 minutes daily (from 15 previously)"
- A previous order of the Commissioner found that "recommended responses" can be severed under s. 13
- "The information at issue will inform future government policy decisions, as well as decisions by the Premier as to how to respond to various questions that could be raised during Question Period in the future"

[15] The Premier's Office added that the disputed records are still "live" in the sense that they are "continually being refined and updated" for future use. It also pointed out that s. 13 does not incorporate a "harms test".²¹

²⁰ At para. 4 of its reply submission.

²¹ Paras. 5-6, reply submission.

Analysis

[16] The Commissioner discussed the interpretation of “advice or recommendations” in s. 13(1) at some length in Order 02-38,²² regarding records dealing with public relations. He concluded that the information in question, which was advice or recommendations on communications issues, while “not of any particularly earth-shattering quality”, did fall under s. 13(1).

[17] The records in dispute here are similar in nature to those the Commissioner considered in Order 02-38. The evidence shows that the material was compiled, worded and organized for the purpose of advising the Premier on how to respond to questions raised in the Legislature about a wide range of issues. While the records contain factual information, the way these factual materials are assembled constitutes advice or recommendations to the Premier as to a “strategical approach” to compiling and framing his responses in a given case, including in a way that promotes the government’s position.

[18] I acknowledge the applicant’s concern over receiving virtually no information in this case and its fears of a “wholesale application” of s. 13(1) to the information in dispute, simply on the basis that it is communications advice or recommendations. The withheld information is however not of the types the applicant speculated. Moreover, the fact remains that a public body is entitled to withhold advice or recommendations, regardless of the topic or the innocuous nature of the information.

[19] I have also reviewed the factors that the Premier’s Office said it considered in deciding whether to withhold or disclose the records in question. I see no basis on which to interfere with its exercise of discretion in this matter.

4.0 CONCLUSION

[20] For the reasons given above, under s. 58 of FIPPA, I confirm the Premier’s Office’s decision to refuse the applicant access to the information it withheld under s. 13(1).

January 22, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

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²² [2002] B.C.I.P.C.D. No. 38, at paras. 101-127.