A Prescription for "Dr. Doe"

Proposed Revisions to s. 13 of the *Freedom of Information and Protection of Privacy Act* in Response to the Decision in *College of Physicians of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*

A Submission to the Special Committee to Review the Freedom of Information and Protection of Privacy Act by the B.C. Freedom of Information and Privacy Association

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THE LAW FOUNDATION OF BRITISH COLUMBIA

BC Freedom of Information and Privacy Association
103 - 1093 West Broadway, Vancouver, BC V6H 1E2
Ph: 604-739-9788 • Fax: 604-739-9148 • Email: info@fipa.bc.ca • Web: www.fipa.bc.ca

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Executive Summary

Section 13 of the *Freedom of Information and Protection of Privacy Act* permits an exception from access for "information that would reveal advice or recommendations developed by or for a public body or a minister". Until recently, it had been generally believed that "advice or recommendations" was limited to documents or reports that advocated that government choose a particular course of action or make a particular decision; in effect, "we recommend that you do this", or "we advise that you do that".

In the recent "*Dr. Doe*" case, however, the Sexual Conduct Review Committee of the College of Physicians was able to withhold from an applicant experts' reports about whether or not she had been hypnotized. The Court of Appeal held that the s. 13 exception was not limited to recommendations as defined above; instead, the investigation and gathering of facts could be exempted from access pursuant to s. 13, regardless of whether or not any decision or course of action was actually recommended.

The result is a departure from the original intent of the statute. Applicants can now be denied access to a great variety of documents that would previously have been available to them. This will be the case even where the documents are about those applicants themselves and directly affect their interests.

The legislation should be amended to reflect the intention that the words "advice or recommendations" in s. 13 are limited to actually advising or recommending that government do something. A proposed draft amendment is included in this report.

I. Introduction

In 1992, the British Columbia Legislature enacted the *Freedom of Information and Protection of Privacy Act* (the "*Act*"). This new statute was lauded as the best information and privacy legislation in Canada, if not the world. It achieved two things. First, it established privacy rights for citizens whose information is held in government offices and data banks. Second, it achieved a careful balance between the right of citizens to access government information and the need for government to be able to maintain confidentiality for certain narrowly-prescribed activities. That is, while it had the stated purpose of making public bodies more accountable to the public by giving the public a right of access to records, certain specific and limited exceptions to the right of access were permitted.[1]

Despite the admitted excellence of the new statute, a provision was included in it to ensure that it would be subject to legislative review on a regular basis. This represented an implicit recognition that no statute will perfectly reflect the intention of the Legislature, in part because of the inherent imprecision of language.

> …no matter how attentive the draftsman, interpretation of legislation will always have its place if only because of the inherent imprecision of human language, as distinguished from mathematical language. Words do not have clearly defined meanings, and the draftsman must be able to count on the benign co-operation of the reader.[2]

Adding to the need for occasional review of the statute is the fact that when particular statutory provisions arise in court proceedings, lawyers for each party will urge the court to give those provisions the interpretations that are most beneficial to their client. This can sometimes produce surprising results. The risk of obtaining anomalous statutory interpretations is particularly acute in freedom of information cases since one side – the applicant – is often not represented by counsel, while governments or third party business interests invariably are represented by counsel.

In the case of s. 13 of the *Act*, which provides an exception from access for advice or recommendations to public bodies or ministers, both of these factors can now be seen to require that the *Act* be amended. That is, it now appears that the wording of the section was imprecise and open to more than one interpretation, and a court has recently adopted an interpretation that dramatically alters the accepted meaning of the section. The result is that a sweeping new exception to access to information has been created. Legislative action is required if the original intention of the Legislature and integrity of the *Act* are to be restored.

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[1] *Freedom of Information and Protection of Privacy Act*, s. 2(1)(a) and (c)

[2] Pierre A. Côté, *The Interpretation of Legislation in Canada* (Cowansville: Les Editions Yvon Blais, 1984), p. 3

II. Why An Exception for Advice or Recommendations?

Governments have to make difficult decisions. In arriving at those decisions, many factors are considered and weighed. Much of what goes into the decision-making process is fact: how many tonnes of concrete to be poured for a highway, how many books to be bought for a school, how many dollars to be earned in mineral royalties. Some of what goes into the decision-making process is opinion; it may be opinion about a subsidiary or collateral issue, or it may be opinion about the very issue government has to decide, such as the Sierra Club's opinion about whether to designate a new park or the Business Council's opinion about whether to reduce taxes.

In most cases, neither the facts nor the opinions that governments rely on in decision-making are so sensitive that they cannot be released to the public. In the rare cases where they are that sensitive, these would often be subject to exception from access to information for specific reasons set out in the *Act*, such as the exception for solicitor-client privilege or to protect law enforcement interests.

Sometimes, however, the background information relied on for government decision-making is exempted from access simply because of the fact that it is "advice or recommendations". Why is this? Two reasons are immediately apparent.

First, if a government decision is still pending, many people will wish to gain the sort of unfair advantages that would come from knowing in advance what the decision will be. Changes to property values and to share prices, for example, can frequently result from government decisions on new projects or purchasing contracts. There is nothing wrong with people attempting to weigh the type of information that is available to government and analyze what they think government is likely to do; investors and public policy analysts, in fact, do this all the time. But imagine if someone conducting such an analysis had access to advice from someone trusted and commissioned by the government decision-maker on the very issue upon which the government had to make its decision. In many cases, this would give a large and unfair advantage to someone who reasons that the government would be unlikely to disregard such advice. This is one reason why advice or recommendations about a course of action a government should take must often be exempted from access to information, at least until after the decision has been made.

A second reason for exempting advice or recommendations from public access is the converse of the first reason. That is, sometimes a government will <u>not</u> act in accordance with advice it receives about a proposed course of action, and will do exactly the opposite. This may be because the advice was prepared at an early stage and subsequently reversed, or it may be because government decides that competing policy considerations outweigh those that most heavily influenced the person giving the advice. In either event, where government has received advice that is squarely about the ultimate decision it must make, it may legitimately choose to disregard that advice. If it does, it may be unfair for it to be confronted with that advice by those who would try to embarrass it or use it out of context to influence a pending decision.

In either event, it is apparent that the need for an exception for advice or recommendations will normally arise in matters that involve major questions of public policy. As will be seen below, however, this has not prevented this exception from being successfully claimed by a professional body that did not wish to release information on a narrow topic arising from a disciplinary hearing. The unfortunate effect this has had on the *Act* will be seen.

III. Section 13 of the British Columbia *Freedom of Information and Protection of Privacy Act*

The exception from disclosure for advice and recommendations in the Act is set out in s. 13. As can be seen below, this initially sets out what appears to be a broad discretion to exempt advice and recommendations from access; that is, while s. 13 does not prevent the release of advice and recommendations, it provides a discretion as to whether to release such information or not, by saying that the head of a public body "may" release the information. It then goes on to clarify and narrow that exception further by stating that the head of a public body must not refuse to release certain types of information that might otherwise be argued to come within the "advice or recommendations" exception. It puts a further limitation on the discretion to exempt information from disclosure by providing in ss. (3) that information that has been in existence for over 10 years cannot be exempted from disclosure under this section.

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,
(b) a public opinion poll,
(c) a statistical survey,
(d) an appraisal,
(e) an economic forecast,
(f) an environmental impact statement or similar information,
(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
(h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
(j) a report on the results of field research undertaken before a policy proposal is formulated,
(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
(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.

IV. Fact and Opinion Versus Advice and Recommendations

A determination of whether or not information can be exempted from disclosure pursuant to s. 13 will be straightforward for most materials. If it clearly recommends a choice on a decision that government has to make, then there will be discretion to exempt it from disclosure. On the other hand, if the material is purely factual, there will be no discretion to exempt it from disclosure. Are there, however, types of information with regard to which it is not clear whether or not the information may be exempted from disclosure?

As will be discussed below, a recent court case has revealed confusion about the eligibility for exception from disclosure of one type of information: expert opinion. Expert opinion has always had an unusual status in court proceedings, and now it would appear that its status in access to information proceedings may also be problematic. The basic dilemma posed by expert evidence in both court proceedings and in the context of s. 13 of the *Act* is this: while the status of factual information is clear, sometimes purely objective evidence of the existence of certain facts is not available, so that it becomes necessary to rely upon expert evidence about the existence of those facts. Examples from court cases involve questions such as the speed at which an automobile was travelling when it crashed, or whether a particular gun was a murder weapon, or what caused an airplane to crash. In each of these cases, what is at issue is some objective fact – the automobile was travelling at fifty kilometres per hour, the gun was used in the murder, vibration caused a crack in the airplane's fuselage – but an objectively verifiable means of establishing that fact is not available. It therefore becomes necessary for the court to rely on an expert to give an opinion about the existence or non-existence of the facts in each case.

In the context of s. 13 of the *Act*, the question has recently arisen of whether expert opinion constitutes factual information, on the one hand, or "advice or recommendations" on the other hand. To continue with the preceding analogy, suppose, for example, that the government had objective information that the gun had been used in the murder, then that "factual material" would clearly be disclosable. But if the government only had the opinion of an expert that the gun had been used in the murder, would that still be "factual material" or would it be "advice or recommendations"? Until recently, most privacy experts would probably have agreed that the opinion was really just a surrogate for the fact, and would be disclosable. They would have said that "advice or recommendations" would be restricted to the ultimate question of whether the defendant was guilty. To put it more generally, "advice or recommendations" would be restricted to answers to the question "What should we do?"

The British Columbia Court of Appeal, however, recently found that experts' reports constituted "advice or recommendations" pursuant to s. 13 of the Act. In making that determination, the Court has created an exception to disclosure that may be broad enough to exempt not just experts' reports, but also practically any report that includes anything more than pure facts.

V. *Dr. Doe*

(a) Facts

The facts giving rise to the *Dr. Doe*[3] case are as follows. Dr. Doe is a physician. One of his employees (the "Applicant") complained to the College of Physicians that Dr. Doe had sexually harassed her and misused a medical procedure involving hypnosis on her. As part of the investigation of the complaint, the lawyer for the College obtained the opinions of four experts on hypnosis. According to a description of that evidence by the College, none of the four experts could provide a definite opinion that hypnosis had been used. On that basis, the Sexual Conduct Review Committee of the College decided not to proceed with an inquiry to determine if any disciplinary action should be taken against the physician. The Applicant then asked the College to give her access under the *Act* to any and all documentation pertaining to its investigation of her allegations of misuse of hypnosis by Dr. Doe, including the written conclusions prepared by the experts.

Since the information was specifically about the Applicant – that is, whether or not she had been hypnotized – it might reasonably be assumed that she would be entitled to that information. The College, however, refused to let her see the experts' opinions about whether or not the alleged wrongdoer, Dr. Doe, had hypnotized her. When the College refused, the Applicant requested under the *Act* that the Information and Privacy Commissioner review the College's refusal.

(b) The Commissioner's Review

The Commissioner conducted an inquiry respecting five records that disclosed the medical professional opinions obtained by the College as to whether Dr. Doe had misused hypnosis. These records fell into two categories: letters or written reports from experts to the College, and memos prepared by the College's in-house counsel of interviews of the experts. The Commissioner found that s. 14 of the Act protected legal advice provided by the College's in-house counsel in relation to five pages of one of the records, and that s. 22(1) – "unreasonable invasion of third-party personal privacy" – protected the identities of the four experts. The Commissioner found that disclosure exceptions did not exempt the balance of the information in the records from access, and he ordered them disclosed.

With respect to s. 13 of the *Act*, the Commissioner found that the information from the experts did not constitute "advice or recommendations". That portion of his decision is set out in its entirety below[4]:

> The disputed records detail expert technical, or medical, findings, opinions or conclusions, expressed by physicians or other experts, based on facts communicated to

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[3] *College of Physicians of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779

[4] Commissioner's Order 00-08, pp. 37, 43-44, Application Record, 69, 74A-74B

them by the College, as to whether a particular medical procedure was or was not used on the applicant. Each expert was asked to assess a particular set of facts and decide, applying his or her knowledge and experience, whether a particular thing happened. The expert then communicated his or her conclusions to the College. This kind of expert opinion is not, in my view, "advice or recommendations" for the purposes of s. 13(1).

In my view, the information at issue here, consisting of findings made (and expressed) by individuals, based on their knowledge and expertise, does not qualify as "recommendations" to the College within the meaning of s. 13. The experts in this case did not lay out alternatives for the SMRC to consider in deciding whether to lay MPA[5] charges. Nor did they recommend any courses of action. They provided expert findings on technical issues that the SMRC[6] could use to assess – in light of the MPA, the Rules and any relevant case law – whether the College should lay charges against Dr. Doe.

Nor does the information provided by the experts qualify as "advice" in the sense intended in s. 13. *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) defines various senses of the word "advice", as follows:

> **1** words offered as an opinion or recommendation about future action; counsel. **2** (often in *pl.*) information given; news, esp. communications from a distance. **3** formal notice of a transaction.

Of the three senses offered, the first is most appropriate, especially in light of the fact that s. 13(2)(a) excludes "factual information" from the ambit of s. 13(1).

In my view, the word "advice" in s. 13(1) embraces more than 'information'. Of course, ordinary statutory interpretation principles dictate that the word 'advice' has meaning and does not merely duplicate 'recommendations'. Still, 'advice' usually involves a communication, by an individual whose advice has been sought to the recipient of the advice, as to which courses of action are preferred or desirable. The adviser in such cases will say 'In light of all the facts, here are some possibilities, but the one I think you should pursue is as follows.'

In this case, the experts did not recommend or advise that the College choose one course of action over another. They applied their knowledge and expertise to a set of facts and drew conclusions as to whether a particular thing had, in fact, happened or not. The experts' conclusions were evidence considered by the SMRC along with a body of other evidence acquired by the SMRC. It would misperceive the role of these experts to characterize them as 'advisors' and their opinions as 'advice'.

I note in passing that this is consistent with views expressed by my predecessor and expressed in decisions under s. 13 of the Ontario *Freedom of Information and Protection of Privacy Act*. In Order No. 193 -1997, my predecessor accepted, at p. 7, the Ministry of Attorney General's argument that s. 13(1)

> … is intended to allow full and frank discussion within the public service, preventing the harm that would occur if the deliberative process were subject to excessive scrutiny.

In Order No. 116 -1996 and Order No. 140-1996, he expressed the view that s. 13(1) is intended to protect advice or recommendations made by or for a public body "and intended to be acted upon or at least considered by the public body itself".

Neither Order No. 116-1996 nor Order No. 140-1996 takes away from what was later said by the previous commissioner in the above quote from Order No. 193-1997. It is not

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[5] *Medical Practitioners Act*
[6] Sexual Misconduct Review Committee

> enough that information has been put before a public body. The information must be something that can be characterized as "advice or recommendations", bearing in mind the purposes of s. 13(1) and of the Act.
>
> Ontario's s. 13 is similar to s. 13(1) of our Act; it employs the phrase "advice or recommendations" and the section is similar in other ways. In Ontario Order 118 (November 15, 1989), the Ontario commissioner also expressed the view that the phrase "advice or recommendations" is intended to protect "the free flow of advice and recommendations within the deliberative process of government decision–making and policy–making". In Order P-411 (February 15, 1993), an inquiry officer under the Ontario legislation observed, citing Ontario Order 161, held that 'advice' or 'recommendations' refer to suggested courses of action which will ultimately be accepted or rejected by the recipient during a deliberative process.
>
> Similarly, section C.4.4 of the 'Policy and Procedures Manual', issued by the Province's Information, Science and Technology Agency for use by public bodies, states that the phrase "advice or recommendations"
>
> > … refers to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during a deliberative process. Advice must contain more than mere information.
>
> In summary, the information in dispute here is in the nature of findings, expressed by experts, in response to technical questions posed by the College. It does not, in my view, qualify as advice or recommendations under s. 13(1).
>
> I find that the College is not authorized by s. 13(1) of the Act to refuse to disclose this information to the applicant.

(c) Decision Upheld in the B.C. Supreme Court

The College then sought judicial review of the Commissioner's Order. The Supreme Court of British Columbia dismissed the College's application. It held that the information from the experts in the records did not fall under s. 13(1) because it was not provided for the purpose of advising or recommending a specific course of action or range of actions available to the College; rather, it was gathered for the primary purpose of investigating the complaint against Dr. Doe.

(d) The B.C. Court of Appeal Decision

The College then appealed to the British Columbia Court of Appeal. The Court of Appeal took a very different approach to the interpretation of s. 13. It disagreed with the Commissioner and with the B.C. Supreme Court Judge, and found that the information from the experts in the records did constitute "advice" under s. 13 of the *Act*. The Court's reasoning was that s. 13 recognizes that "secrecy fosters the decision-making process…." The Court found that "recommendations" includes not only the consideration of specific or alternative courses of action, but also "the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action."

This interpretation expands the scope of the s. 13 exception to an alarming degree. Since governments exist for practical purposes rather than as institutions of academic inquiry, a

great deal of the "gathering of facts and information" that government bodies do will, in fact, be of "facts and information necessary to the consideration of specific or alternative courses of action." It would appear that all such facts and information may now be exempted from access, in accordance with the Court of Appeal's ruling. If so, then a legislative amendment to s. 13 is urgently required in order to give effect to the original intent of the Legislature in the drafting of the section.

Such an amendment was practically invited by the Court of Appeal in its ruling, when it noted that s. 13(2) excludes many kinds of reports and information, and said:

> If the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice for the purposes of s. 13, it could have explicitly excluded them.

The Legislature should now accept this invitation and amend s. 13, as proposed below.

VI. What Would Happen If Section 13 Were Not Amended?

A practical question for MLAs is: how could the *Dr. Doe* decision be harmful for my constituents and for the quality of government generally? The answer is that by making it possible to deny access to information that has always previously been available, the Dr. Doe decision may be harmful in a myriad of ways, probably too many to be anticipated. A few examples of situations in which access to information could now be denied, however, might include the following:

- Injured workers applying for Workers' Compensation might now be unable to obtain copies of opinions concerning the level of post-injury pain that they are experiencing;
- Injured motorists seeking copies of opinions of traffic analysts who have examined their motor vehicle accident sites could be denied access to those opinions;
- Opinions on the effect of traffic patterns following road changes can now be withheld;
- Assessments of individual students developed by or for educational institutions could now be withheld from those students and their parents;
- The technical opinions of biologists and foresters about the status of endangered species and their habitat may now be kept secret;
- Opinions on whether a bidding process was properly followed could be kept secret;
- Program evaluations containing opinions as to whether or not government programs are achieving desired results can now be kept secret.

In each of these cases, members of the public can now be denied access to documents that would previously have been available to them. This will be the case even where the

documents are about the very applicants who are seeking access to those documents, and are of the utmost importance to those individuals. If the Act is not amended to correct the damage done by the *Dr. Doe* decision, MLAs should certainly expect to regularly hear from constituents who have been denied access in situations of this sort.

VII. A Proposed Solution

We propose that s. 13 be amended in such a way as to clarify that factual materials are subject to access, while recommendations about proposed or alternative courses of action are exempt from access until after the government decision on the appropriate course of action has been made. In addition, we propose that expert reports, which are really a means of establishing facts, be specifically indicated to be treated like other factual information in this regard, unless they do, in fact, make recommendations about proposed or alternative courses of action. The amended s. 13 would be as follows [changes are underlined]:

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 <u>that recommends a decision or course of action by the public body, minister or government</u>.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,
<u>(a) (i) an expert opinion, unless it recommends a decision or course of action</u>
(b) a public opinion poll,
(c) a statistical survey,
(d) an appraisal,
(e) an economic forecast,
(f) an environmental impact statement or similar information,
(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
(h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
(j) a report on the results of field research undertaken before a policy proposal is formulated,
(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
(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.

(4) Subsection (1) does not apply to information in a record that was created to provide recommendations <u>or advice about a decision or course of action after that decision has been made or course of action undertaken</u>.

VIII. Conclusions

While there is no doubt either that factual information should generally be disclosable pursuant to access requests, or that recommendations or advice about pending government decisions should generally not be disclosable, the decision of the British Columbia Court of Appeal in *Dr. Doe* indicated that it was not clear whether or not expert opinion should be disclosable. Although the Court's decision was that expert's reports should be exempt from disclosure, this is at odds with the fact-like nature of expert opinion. A legislative amendment should be made to s. 13 of the *Act* to clarify that it is intended to exempt only advice or recommendations about pending government decisions or actions.