Order F23-42

THE MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Daphne Loukidelis
Adjudicator

June 1, 2023

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Summary: The applicant requested records from the Ministry of Public Safety and Solicitor General related to the estimated costs for implementing the *Community Safety Act*. The Ministry provided access to some records, but withheld information under ss. 12(1) (Cabinet confidences), 13(1) (policy advice or recommendations), 14 (solicitor-client privilege) and 16 (intergovernmental relations) of FIPPA. The adjudicator found that the Ministry was authorized to refuse access in part under ss. 13(1) and 14, but not under s. 16, and that it was not required to refuse access under s. 12(1), except for two portions to which ss. 12(1), 13(1) and 16 are yet to be determined. The adjudicator rejected the applicant's argument that s. 25(1)(b) (public interest override) applies. The adjudicator ordered the Ministry to disclose to the applicant the information that it is not authorized or required to refuse to disclose under ss. 12(1), 13(1), 14, and 16(1)(a)(ii). The adjudicator also ordered the Ministry, under s. 44(1)(b), to produce two pages of the records in dispute to the Information and Privacy Commissioner for the purposes of adjudicating the other exceptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 12(1), 13(1), 14, 16(1)(a)(ii), 25(1)(b).

INTRODUCTION

[1] The BC Civil Liberties Association (the applicant) submitted a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Public Safety and Solicitor General (Ministry) for access to records about the estimated costs for implementing the *Community Safety Act* (CSA).

[2] The Ministry identified records and disclosed portions of them to the applicant, while withholding some information under ss. 12(1) (Cabinet confidences), 13(1) (policy advice or recommendations), 16(1)(a)(ii) (harm to intergovernmental relations or negotiations), and 17 (harm to financial or economic interests of a public body) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the issues, and the applicant requested that they proceed to inquiry.

[4] During the inquiry, the Ministry decided to disclose additional information and withdrew its reliance on s. 17 to deny access. At the same time, the Ministry added a claim of s. 14 of FIPPA (solicitor-client privilege) to some information, and the applicant did not object. The applicant subsequently asked and was permitted to add s. 25(1)(b) (public interest).

[5] During the inquiry, I wrote to the applicant because its submissions suggested that it may have narrowed the information and issues in dispute to specific budget information withheld under s. 12. In response, the applicant clarified that it was continuing to pursue access to all undisclosed portions of the records withheld under ss. 12, 13, 14 and 16. The Ministry also subsequently clarified that it had denied access under s. 16 based on s. 16(1)(a)(ii).[1] I have proceeded on this basis, noting that the applicant has provided submissions only on s. 12(1) and 25(1).

ISSUES

[6] The issues to be decided are as follows:

1. Is the Ministry required to disclose the disputed information pursuant to s. 25(1)(b)?

2. Is the Ministry authorized to refuse to disclose the disputed information under s. 14(1)?

3. Is the Ministry required and/or authorized under ss. 12(1), 13(1) or 16(1)(a)(ii) to refuse access to the disputed information?

[7] Section 57 of FIPPA places the burden on the Ministry to establish that it is authorized under ss. 12(1), 13(1), 14 and 16 to refuse to disclose the information in dispute. Although FIPPA does not specify the burden of proof for s. 25(1), I agree with previous OIPC orders observing that, practically speaking, it is in the interests of both parties to provide whatever evidence and argument they have to assist the adjudicator in making the s. 25 determination.[2]

[1] Applicant's and Ministry's January 16, 2023 emails. The Fact Report and Notice of Inquiry both also included reference to ss. 16(1)(a)(iii) and 16(1)(c).
[2] Orders F18-24, and Order 02-38, 2002 BCIPC 42472 at para 39.

DISCUSSION

Background

[8] Reflecting a trend in other Canadian jurisdictions of enacting "community safety" legislation to enable the investigation of civilian-driven complaints about problem properties, the BC government passed the *Community Safety Act* (CSA) in March 2013. The CSA established a regime under which civil remedies could be imposed on the owner or occupant of a property where specific criminal activities habitually occur, following a public complaint filed with and investigated by a new provincial authority.[3] The CSA was intended to be brought into force by regulation, but this did not happen.

[9] In 2017, the Ministry returned its attention to the CSA, both in terms of amending the law and implementing it. As part of this effort, Ministry staff prepared an estimate of costs to operationalize the statute.[4] The *Community Safety Amendment Act* was subsequently passed in 2019 to address publicly-voiced concerns about the legislation.[5] The updated plan to implement the scheme of the CSA was to involve drawing on the function and resources of the Ministry's Community Safety Unit (CSU), which had been created in 2018/19 to support compliance and enforcement measures related to the *Cannabis Control and Licensing Act*.[6] However, the scheme of the CSA has still not been implemented.

[10] Arguing that the justification for and financial basis of the CSA lacked transparency from the very beginning, the applicant sought records from the Ministry that it believed would satisfy the public's interest in ensuring financial accountability in the legislative process.

Records

[11] The information in dispute is contained in a PowerPoint presentation (slide deck),[7] a draft Budget 2018 Key Priority Paper #4 (draft budget paper),[8] Word documents,[9] and correspondence (emails).[10] The Ministry identified 80 pages of

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[3] This would have been the Public Safety Investigation Unit, or PSIU.
[4] The Ministry's evidence included an affidavit from AB, the Acting Executive Director, Policy, Legislation and Modernization Division, Policing and Security Branch, who deposed to her involvement in this matter at the relevant time (the AB affidavit), paras 2, 10.
[5] The *Community Safety Amendment Act* received Royal Assent on October 31, 2019. For ease of reference in this order, I use the term CSA for both the original and the amended statutes.
[6] SBC 2018, c 29. Ministry's initial submission at paras 24-25.
[7] Pages 14-21 of a 29-page slide deck.
[8] Pages 33-39, duplicated at pages 74-80.
[9] Pages 41 and 44-46, duplicated at pages 71 and 65-67.
[10] Pages 40, 42-43, 48-49, 50-51, duplicated at pages 70, 62-63, 60-61, 54-55 respectively. Also, pages 52-53, 56, 68 and 73.

responsive records and withheld portions of 47 pages. Some of these pages are duplicates, and my findings on one instance necessarily applies to the others.

Public interest override – s. 25(1)(b)

[12] Section 25(1)(b) requires public bodies to disclose — without delay — information when it is clearly in the public interest. If s. 25(1)(b) applies, a public body must disclose the information, even if other provisions in FIPPA would otherwise require or authorize it to be withheld.

[13] Because s. 25 overrides all of FIPPA's exceptions to disclosure, including the mandatory exceptions to disclosure found in Part 2 and the privacy protections contained in Part 3, it applies only in serious situations justifying such mandatory disclosure.[11] The disclosure must be "not just arguably in the public interest, but *clearly* (i.e*.,* unmistakably) in the public interest."[12]

[14] The applicant argues that s. 25(1)(b) applies because the systemic legislative changes contemplated by the CSA would apply province-wide and have been the subject of widespread debate, both in the Legislature and in the public, particularly with respect to the costs of the scheme.[13] The applicant refers to legislative debates in 2013 where MLAs raised concerns about the CSA's passage without it being costed out. The applicant says that questions about costs continued when the government introduced the 2019 amendments to the CSA, and refers to questions posed to the Minister in the Legislature that remain unanswered.[14] The applicant states that media attention to the costs appeared in newspaper columns and included statements by the then-Solicitor General and Justice Minister in 2016 that the CSA's implementation had been suspended due to high costs. The applicant says that public comments by the current Solicitor General suggest that the implementation of the legislation remains a priority. The applicant also says that since a dollar figure for implementing the CSA is not included in any provincial budget between 2013 and the present (2022) or in any published debate, media report or document, disclosure of the requested information will meaningfully contribute to public discourse about the level of financial disclosure required to ensure accountability within the legislative process, and the appropriateness of the allocation of public monies in this instance.[15]

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[11] Orders F15-27 and F18-24.
[12] Order 02-38, *supra*, at para 45, italics in original. Notably, former Commissioner Elizabeth Denham later concluded in Investigation Report F15-02 that, contrary to the holding in Order 02-28, there need not be an element of temporal urgency to find that s. 25(1) applies.
[13] Applicant's submission at paras 30-32. The applicant cites concerns expressed about program costs and after-the-fact budgeting in legislative debates in March 2013 (Hansard citations omitted).
[14] Applicant's submission at para 33 (Hansard citations omitted).
[15] Applicant's submission at para 40.

[15] The applicant submits that since the CSA is intended "to fulfill a province-wide need to address public safety concerns such as gang and gun violence and the opioid crisis," the costs attached to implementing it across the province on an indefinite basis is not a "one-off" or isolated issue, but rather a significant systemic issue that clearly engages the public interest.[16] The applicant argues that the fact that the legislation may never come into force is irrelevant, because "it is antithetical to transparent governance that legislation can be passed without meaningful prior and subsequent debate concerning how much it would cost."[17]

[16] In response, the Ministry argues that since the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e., unmistakably) in the public interest,"[18] the very high threshold for disclosure under s. 25(1)(b) is not met respecting the Ministry's efforts in respect of the CSA. Referring to former Commissioner Denham's articulation of the threshold in Investigation Report F15-02, the Ministry says that s. 25(1)(b) will apply "where a disinterested and reasonable observer, knowing the information and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[19] The Ministry argues that, given the "difference between information that has piqued the interest of the public, and information the knowledge of which is in the public interest," it is plain and obvious in this case that s. 25(1)(b) does not apply.

Analysis and findings

[17] Based on my review of the circumstances, the records, and the parties' submissions, I find that there is not a clear and compelling case for the application of s. 25(1)(b).[20] While I accept that disclosure of the information in dispute may benefit the public, I am not persuaded that its disclosure meets the required threshold under s. 25(1)(b) of being *clearly and obviously* in the public interest.

[18] The fact that the public may have an interest in what the information in dispute reveals about an issue does not by itself elevate that information to the level of its disclosure being "clearly" in the public interest. As former Commissioner Denham also said in Investigation Report F15-02:

> A public body should, when deciding whether information "clearly" must be disclosed in the public interest, consider the purpose of any relevant access

[16] Applicant's submission at paras 37 and 38.
[17] Applicant's submission at para 43.
[18] Order 02-38, *supra*, at paras 45-46.
[19] Investigation Report F15-02, 2015 BCIPC 30 pp. 26 and 27. (Both parties' submissions mistakenly refer in some places to this report as Investigation Report F16-02.)
[20] Although the Ministry refused to produce the information it withheld on the basis of the solicitor-client privilege exception in s. 14 in this inquiry, the other evidence provided was sufficient for me to determine the application of s. 25(1)(b).

> exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure). In addition, the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is "clearly in the public interest".[21]

[19] I accept that the nature of the applicant's interest in the CSA is not a private one and that it does not reflect an isolated interest, since the law, if implemented, would apply across the province. This would tend to support the existence of a systemic issue engaging the public interest. I have also considered whether the disclosure of the information in dispute will contribute to the education of or debate amongst the public on an issue that is topical. The applicant directed me to debates in the Legislature evidencing the concern of some MLAs with the "after-the-fact budgeting" for the CSA, as well as media attention to the implementation costs that alludes to at least some of the information in dispute — the projected funding required for the program. But while the applicant provided links to newspaper articles and columns demonstrating a certain level of interest by the public in these matters, the most recent of these is from 2019, which does not appear to me to support the existence of a *clear* public interest.

[20] Even acknowledging that there are no published estimates of the funding required to implement the CSA, the most recent budget cost estimates in the records are from October 2017, and pre-date both the 2019 CSA amendments and the formation of the CSU (after the legalization of cannabis in 2018), which was the unit designated to carry out the CSA's scheme, according to the most recent evidence on this point.[22] The CSA is still not in force. Other events — provincially and worldwide — have intervened. In my view, the existence of ongoing, widespread and unresolved debate about the CSA is not established on the evidence before me.

[21] The reasons for invoking s. 25(1)(b) must be of sufficient gravity to warrant overriding all other provisions of FIPPA, including the exceptions found in Part 2 of FIPPA.[23] Based on my consideration of the evidence, I find that disclosure of the information in issue is not clearly and obviously in the public interest and that s. 25(1)(b) does not apply. I will now consider whether the exceptions claimed by the Ministry apply to the information in dispute, beginning with s. 14.

Solicitor Client Privilege – s. 14

[22] Section 14 of FIPPA authorizes the head of a public body to refuse to disclose information that is subject to solicitor client privilege. Section

[21] Investigation Report F15-02, 2015 BCIPC 30, at pp 28-29.
[22] AB affidavit at para 15.
[23] Order F15-64, 2015 BCIPC 70 (CanLII).

14 encompasses legal advice privilege and litigation privilege,[24] and the Ministry relies on the former to withhold portions of the slide deck, a Word document and emails.[25] Legal advice privilege is also referred to as solicitor-client privilege and I use that term in my reasons below.

[23] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[26] In order for information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.[27]

[24] Not every communication between a solicitor and their client is privileged, but if the conditions above are satisfied, then legal advice privilege will apply.[28] Solicitor-client privilege captures more than just communications in which legal advice is given or received, since it also captures "the continuum of communications" described in *Balabel v. Air India*.[29]

[25] The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[30]

Evidentiary basis for deciding the Ministry's solicitor-client privilege claim

[26] The Ministry did not provide me with the records it withheld under s. 14.[31]

[27] When a public body makes a claim of privilege over records, but does not provide them to the OIPC, the laws and practice respecting privilege claims in civil litigation guide the adjudication of the issue during the inquiry.[32] Past

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[24] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) (*College of Physicians*) at para 26.
[25] The relevant page numbers are pages 18 (slide deck), 41 (Word document), 43, 46 and 68 (emails). Pages 41, 43 and 46 are duplicated at pages 71, 63 and 67, respectively.
[26] *College of Physicians, supra,* at para 31.
[27] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at p 837 (*Solosky*).
[28] *Solosky*, *ibid*, at p 829.
[29] [1988] 2 W.L.R. 1036 at 1046: "Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach."
[30] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 34 (*University of Calgary*).
[31] The Ministry also claims (variously) other exceptions in ss. 12(1), 13(1) and 16(1)(a)(ii) over the same records.
[32] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 76 (*Minister of Finance*).

decisions of this office and the courts have discussed the evidence required to establish s. 14 in the absence of the records: there must be a clear description of the records that should include the date it was created, the nature of the communication and the author and recipient. In most cases, there is additional evidence that usually includes an affidavit provided, ideally, by an affiant with direct knowledge of the disputed records. It is helpful, even preferable, for the affidavit evidence to be provided by a lawyer, who is an officer of the court and has a professional duty to ensure that privilege is properly claimed.[33]

[28] In this case, the Ministry's submissions on s. 14 are accompanied by affidavit evidence from NC, a lawyer with the Legal Services Branch of the Ministry of Attorney General. The Ministry argues that the OIPC's role in reviewing its claim of solicitor client privilege is limited to confirming that the Ministry has asserted solicitor client privilege in the manner required in the context of civil litigation which, it submits, it has done in this case.[34]

[29] Section 44(1) of FIPPA gives the Commissioner the power to order production of records over which solicitor client privilege is claimed. However, given the importance of solicitor client privilege, and in order to minimally infringe on that privilege, the Commissioner will only order production when absolutely necessary to adjudicate the issues in inquiry.

[30] In this case, I am satisfied that the affidavit provided, which was sworn by a lawyer who has reviewed all of the records over which solicitor-client privilege is claimed, provides a sufficient evidentiary basis on which to determine whether the Ministry properly applied s. 14. This would normally mean that ordering production of the records is not required. However, I explain below why I need to order production of two pages of the records in dispute so that I can determine whether the other claimed exceptions apply to it.

Submissions

[31] The Ministry describes the purpose of section 14 as being "to ensure that what would at common law be the subject of solicitor-client privilege remains protected" under FIPPA.[35] According to the Ministry, the information it has withheld under s. 14 "includes information which reveals communications involving the Ministry and legal counsel NC," of the Legal Services Branch of the

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[33] *Minister of Finance, ibid*. See also Order F20-16, 2020 BCIPC 18 at paras 8-10, citing *Anderson Creek Site Developing Limited v Brovender*, 2011 BCSC 474 at paras 113-114.
[34] Ministry's initial submission at para 94, relying on *University of Calgary, supra*, at paras 68-70, and *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para 74.
[35] Ministry's initial submission at para 95, relying on *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para 31 (*British Columbia (Attorney General)*).

Ministry of Attorney General.[36] The Ministry explains that its staff are the "client"[37] and that they sought and received legal advice from NC in relation to the information in the records.[38]

[32] The Ministry also argues that solicitor client privilege captures more than just communications which give or receive legal advice, and claims that although the withheld portions are not direct communications between legal counsel and Ministry staff, some of them refer to confidential legal advice already sought by Ministry staff and received from legal counsel and their disclosure would reveal internal discussions about the legal advice.[39] The Ministry also says that other withheld information includes references to the Ministry's intention to seek legal advice on certain issues, which Ministry staff later did.[40]

[33] As noted, the Ministry provided an affidavit from NC; he attests that he began acting as solicitor for the Ministry on September 1, 2017 and that he provided legal advice to the Ministry on the proposed implementation of and potential changes to the CSA from then until April 2018.[41] NC states that he understands from review of the file that the *Community Safety Act* was assented to on March 14, 2013 but never brought into force, and he indicates that "[t]his occurred prior to my involvement advising the Ministry on matters related to the *Community Safety Act.*"[42]

[34] NC describes the basis of the s. 14 claim over the records as follows:

- The withheld slide (at page 18) contains a summary of his legal advice;
- The withheld portions of the emails at pages 41 and 46 include references to an intention to seek legal advice that correspond to legal advice that he later provided to the Ministry; and
- The withheld portions of the emails at page 43 and 68 consist of discussion of the cost of legal services provided by Legal Services Branch to the Ministry respecting the Community Safety Unit.[43]

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[36] Ministry's initial submission at para 108.
[37] Ministry's initial submission at para 106: for the purpose of s. 14 of FIPPA, Ministry staff represent "Her Majesty the Queen in right of British Columbia, also known as the government of British Columbia", pursuant to s. 29 of the *Interpretation Act*, RSBC 1996, c 238. The Ministry's submission pre-dates the death of Her Majesty, Queen Elizabeth II.
[38] Ministry's initial submission at para 108.
[39] Ministry's initial submission at paras 109-110, relying on Order F16-26 at para 32 and Order F16-06 at paras 23-25. The Ministry also relies on *British Columbia (Attorney General)*, *supra* at para 50, and *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para 12.
[40] NC affidavit at para 9.
[41] NC affidavit at paras 2 and 7.
[42] NC affidavit at para 6.
[43] NC affidavit at para 8.

[35] NC summarizes by stating that the records reflect legal advice he provided to the Ministry at the Ministry's request and references to the Ministry's intention to seek legal advice on certain issues, which he subsequently provided. NC states that he treated his legal advice as confidential and believes that Ministry staff who received it understood it to be confidential. The Ministry submits that privilege in the communications has not been waived, intentionally or unintentionally, and that severance under s. 4(2) of FIPPA is not possible without risk of revealing legal advice or making the advice reasonably ascertainable.[44]

Analysis and findings

[36] As stated, the Ministry did not provide me with the information withheld from the slide deck, emails and one of the Word documents under s. 14. Based on the evidence provided by the Ministry, including NC's affidavit, and my review of the records as a whole, I find that legal advice privilege has been established for some but not all of the information withheld under s. 14.

[37] As the Ministry acknowledges, none of the information withheld under s. 14 involves direct communications between solicitor and client. I have therefore considered the sufficiency of the evidence as to whether the withheld information would nonetheless reveal, if disclosed, a confidential communication between solicitor and client related to the seeking or providing of legal advice. I have the evidence of NC, who submits that the withheld portions of the slide deck, Word document and emails either reflect legal advice he provided to the Ministry at the Ministry's request or consist of references to the Ministry's intention to seek legal advice on certain issues that he subsequently provided.

[38] The Ministry withheld part of page 41, an email from November 2017, claiming that it refers to an intention to seek legal advice on a specified issue. The Ministry's position on page 41 is supported by the affidavit of NC, who is a practicing lawyer with Legal Services Branch, and was in a solicitor-client relationship with the Ministry in relation to the CSA at the time the email was sent. I accept that legal advice was ultimately sought and obtained from NC on the particular issue discussed by Ministry staff in that communication. I find that disclosure of the withheld portion of page 41 referring to the need to seek legal advice would reveal the legal advice that was sought and ultimately provided, and that s. 14 applies.

[39] The Ministry claims that the withheld portions of the emails at pages 43 and 68 consist of discussion of the cost of legal services provided by the Legal Services Branch to the Ministry regarding the Community Safety Unit. The emails are from September 2017, and one is a subsequent version of the other. In the first (earlier) version, found at page 68,[45] a senior Ministry staff member is asking

[44] Ministry's initial submission at paras 112-113.
[45] Sent September 29, 2017 at 6:09 pm.

questions that are answered by another staff member in the subsequent version of the email at page 43.[46] The Ministry applied s. 14 to brief, but *different,* portions of pages 43 and 68.

[40] I have considered the Ministry's evidence on the portion of page 43 withheld under s. 14, where staff are responding to a question posed about the cost of legal services. Based on the submissions and the evidence of NC, including the fact that the exchange between Ministry staff falls within the period of time NC was advising the Ministry on the CSA, I am satisfied that NC's legal advice would be reasonably ascertainable if the severed response were to be disclosed, and I find that s. 14 applies to it.

[41] As I stated above, the information withheld from page 68 — the earlier, initiating email where senior Ministry staff poses questions — differs from that withheld on page 43. I found s. 14 applied to page 43 for what is clearly a response to a question about the cost of LSB legal services. However, on page 68, the Ministry withheld under s. 14 only two lines that I am reasonably certain consist of the question originally posed, which was not withheld under s. 14 where it appears on page 43. I accept NC's evidence that the question posed, although treated differently by the Ministry in its severance of pages 43 and 68, is one on which his legal advice was sought. In this context, I am satisfied that a finding that s. 14 applies to the specific question posed where it is withheld from page 68 is appropriate, and I make this finding. In any event, given my finding below on the full email, which was concurrently withheld under s. 13(1), the result would be the same: the Ministry is authorized to refuse access to the two lines it withheld under s. 14 on page 68.

[42] However, I find the Ministry's evidence on s. 14 about the slide at page 18 and the single line withheld from the Word document at page 46 difficult to reconcile with other evidence before me, as I will now explain.

[43] NC says that the slide withheld by the Ministry under s. 14 contains a summary of his legal advice. The Ministry provided no date for the slide deck in its Table of Records. However, in AB's evidence on s. 13(1), she indicates that the slide deck was prepared to brief senior Ministry executives on the CSA *before* she began working in the Ministry's Policing and Security Branch in 2014.[47] On my review of the slide deck as a whole, it seems clear enough that it was created in 2013 when the CSA was initially passed.[48]

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[46] At pages 42-43 of the records, sent October 2, 2017 at 12:22 pm.
[47] AB affidavit at paras 2 and 29.
[48] Disclosed portions of the slide deck support it having been prepared sometime in 2013. For example: page 5 says, in part, "This new legislation is an important component of Justice Reform and the BC Policing and Community Safety Plan", page 27 refers to a Ministry-Stakeholder Report — Proposed Strategy for dealing with Drug Production Properties in BC – dated January 31, 2013, and page 28 provides brief comment on gaps and barriers identified by the report.

[44] According to NC, the part of the Word document at page 46 withheld under s. 14 reflects an intention on the part of the Ministry to seek legal advice that "corresponds to legal advice" that he later provided to the Ministry. The Ministry also did not provide a date for the Word document in its Table of Records. On my review of the complete Word document (pages 44-46), however, I can draw a conclusion about its approximate age from other information, such as reference to it in the email to which it is attached, as well as its content.[49] Specifically, it appears (from disclosed portions) to set out research gathered by the Ministry in 2012 to respond to a Treasury Board analyst's questions about the CSA before the (original) statute was passed in 2013.

[45] NC attests that he was in a solicitor-client relationship with the Ministry respecting the CSA from September 2017 to April 2018 and that the previous work on the CSA, after it was passed in 2013, took place prior to his engagement as legal counsel to the Ministry in 2017.[50] As I set out above, the evidence strongly suggests that these records were created four or five years before NC began to act as solicitor for the Ministry in 2017. As NC was not in a solicitor-client relationship with the Ministry about the CSA at the relevant time, he would appear not to have the direct knowledge of the disputed records that is preferable for establishing s. 14.[51] In sum, it is difficult to see how disclosure of a document prepared in 2012 or 2013 could somehow reveal confidential legal advice about the CSA from an individual who did not serve in the capacity of solicitor to the Ministry until 2017. As the courts have confirmed, there is a strong preference for evidence to come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication, as well as the intentions of the parties to the communication.[52] That type evidence is lacking in respect of the slide and Word document excerpt in this case.

[46] I also acknowledge that the courts have been clear that some deference is owed to lawyers claiming privilege, given their professional obligation to properly claim it.[53] However, in this situation, I am not persuaded that NC's evidence, and the Ministry's evidence relying on it, are sufficient to meet the Ministry's burden to establish on a balance of probabilities that the withheld portions of the slide and Word document satisfy all three parts of the test for privilege. While I accept that s. 14 will apply to internal records of a public body that do not involve a lawyer, if disclosure would reveal (internal discussions about) legal advice, I have not been provided with sufficient evidence to establish that disclosure of the slide and Word document would reveal actual confidential communications about legal advice provided to the Ministry by its solicitor. Nor has the Ministry provided an

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[49] AB's evidence on the two Word documents addresses only one of them (page 41).
[50] NC affidavit at para 6.
[51] Order F22-04 at para 17, relying on *Minister of Finance, supra,* at para 76. This can be contrasted with the description of the evidence found to be satisfactory under s. 14 in Order F20-48 at para 57.
[52] Order F20-16 at para 10.
[53] *Minister of Finance, supra,* at para 86.

alternative satisfactory explanation or justification for the legal advice privilege basis of these severances. Based on the insufficient evidence that s. 14 applies to the withheld content of the slide at page 18 and the Word document page 46, I find that s. 14 does not apply.

[47] Since I found above that the Ministry is authorized to withhold information in the emails at pages 41, 43 and 68 under s. 14, there is no need to consider whether any other FIPPA exceptions apply to the information in those records.

[48] However, as I have concluded that s. 14 does not apply to the withheld information in the slide deck and Word document, there are other issues left to be determined in relation to them. In addition to the one line the Ministry withheld from page 46 under s. 14, the Ministry withheld the entire page under section 12(1). The Ministry also claims that s. 13(1) applies to most of the slide at page 18, and that s. 16(1)(a)(ii) also applies to some of it. Again, the Ministry did not provide an unsevered copy of the slide or the (second) Word document to the OIPC and as a result, I am not able to review the particular information in dispute there under ss. 12(1), 13(1) and 16(1)(a)(ii). Accordingly, I have had to consider whether ordering their production under s. 44(1) is required.

[49] Order F10-18 dealt with similar circumstances. In that order, the adjudicator considered whether a school district was authorized to withhold a report under s. 14, as well as various other FIPPA exceptions. The school district did not provide the report to the OIPC. When the adjudicator decided that s. 14 did not apply to the report, he relied on s. 44(1)(b) to order the school district to produce the report to the OIPC for the purposes of adjudicating the other exceptions.

[50] The relevant parts of s. 44 state:

> 44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
> …
>
> > (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.
>
> …
>
> (2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1). …

[51] In this case, I have decided to adopt the approach taken in Order F10-18, because I am not satisfied that I can determine whether ss. 12(1), 13(1) and 16(1)(a)(ii) apply to the slide or the Word document on the basis of the affidavit evidence, without reviewing the actual information in dispute. In my view, ss. 12(1), 13(1) and 16 require a line-by-line analysis that cannot be conducted without reviewing the disputed information in the slide and Word document .[54]

[52] Accordingly, I order the Ministry under s. 44(1)(b) to produce to the OIPC pages 18 and 46 of the records for the purpose of adjudicating the other exceptions claimed under ss. 12(1), 13(1) and 16(1)(a)(ii).

[53] In summary then, I have found that s. 14 applies to the disputed information on pages 41, 43 and 68 but not the information on pages 18 and 46.

Cabinet confidentiality – s. 12(1)

[54] The Ministry claims that the mandatory exception in s. 12(1) applies to portions of the draft budget paper, Word documents and emails.[55] Section 12(1) of FIPPA says:

> The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees including any advice, recommendations, policy considerations, or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[55] The relevant Cabinet committee in this case is Treasury Board which, the Ministry submits and I accept, is a committee of Cabinet for the purposes of s. 12(1).[56]

[56] Past decisions have accepted the purpose of s. 12(1) described by the Supreme Court of Canada in *Babcock v. Canada (Attorney General),* namely that "[t]hose charged with the heavy responsibility of making government decisions

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[54] This is consistent with past orders such as Order F22-04 at para 66.
[55] The claim is made for 24 pages in total. Section 12(1) is also applied to 14 additional pages (pages 65-68, 70-71, 73-80), much of it consisting of content duplicated from earlier pages. The third page of the second Word document, page 46, is not part of my analysis under s. 12(1) in this section, given my decision to order production of it for the purpose of conducting a full analysis of the Ministry's claim.
[56] Ministry's initial submission at para 29; ss. 12(1) and 12(5) of FIPPA, and *Committees of the Executive Council Regulation*, BC Reg. 229/2005 OC 463/2005 and BC Reg. 156/2017 OC 238/2017.

must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny."[57] The importance of maintaining Cabinet confidentiality is reflected by the mandatory nature of the s. 12(1) exception.

[57] The BC Court of Appeal decision in *Aquasource*[58] established that "substance of deliberations" in s. 12(1) refers to the body of information that Cabinet or one of its committees considered (or would consider in the case of submissions not yet presented) in making a decision."[59] The test for the application of s. 12(1) is whether the information sought to be disclosed forms the basis for the deliberations. The Ministry submits that s. 12(1) requires it to withhold information in this case because its disclosure would allow the drawing of accurate inferences about Treasury Board deliberations, thereby indirectly revealing the substance of the deliberations.[60]

[58] The Ministry's Acting Executive Director, Policy, Legislation and Modernization Division, Policing and Security Branch (AB) states in her affidavit that she believes that all the identified records "were considered by Treasury Board in its decision-making process."[61] Although the Ministry's submissions focus on the draft budget paper, it also says that the emails and the Word documents are related to the development of the options presented in the draft budget paper. As background, the Ministry explains that its policy staff prepared the draft budget paper at the request of the Ministry's Corporate Management Services Branch (CMSB), which liaises between Ministry program areas and Treasury Board staff, to help CMSB prioritize the Ministry's anticipated Treasury Board submissions.[62] The Ministry says the draft budget paper includes an initial estimate of costs to operationalize the CSA. The Ministry describes how, why and when such budget priority papers are prepared in the usual course, noting that they permit Treasury Board staff to see across government what the financial impact of anticipated Treasury Board submissions could be and whether the submissions fall within existing ministry and government mandates. The Ministry explains that if, after submitting a budget paper to Treasury Board staff, the Ministry is invited to go to Treasury Board, the relevant Ministry staff will prepare a formal Treasury Board submission. The Ministry does not say that a Treasury Board submission was prepared in this case.

[59] The Ministry does say that a subsequent version of the draft budget paper, with "substantially the same content as the draft that appears in the Records"

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[57] *Babcock v. Canada (Attorney General),* 2002 SCC 57 (CanLII) (*Babcock)*. See also Order 02-38 at para 69.
[58] *Aquasource Ltd. v The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia,* (1998), 111 BCAC 95 (*Aquasource*), at para 48.
[59] *Aquasource*, *ibid,* at para 39; Ministry's initial submission at para 47.
[60] Ministry's initial submission at paras 40, 51.
[61] AB affidavit at para 24.
[62] AB affidavit at paras 19.c-20.

was submitted to Treasury Board staff.[63] The Ministry did not provide a copy of this subsequent version for comparison. Affidavit evidence from the individual (GE) who was the Executive Director of Treasury Board Staff (Performance Budgeting Office) at the relevant time states that the subsequent version of the paper dated October 28, 2017 was signed by the Solicitor General and "taken to the Chair of Treasury Board on December 18, 2017 for the Chair's consideration."[64] The Ministry argues that, as the subsequent version of the paper was submitted to Treasury Board staff, the disclosure of the information withheld from the draft budget paper would "reveal the content of information that was deliberated on by Treasury Board, either directly or by implication," permitting the drawing of accurate inferences about the substance of Treasury Board deliberations.

[60] The applicant agrees with the Ministry on the test to be applied under s. 12(1), but disputes how the test has been applied in this case to deny access, particularly to the cost estimates. The applicant argues that information is not automatically required to be withheld under section 12(1) simply because it was provided to Cabinet (or Treasury Board). Remarking that portions of the draft budget paper and correspondence between Ministry staff about preparing the paper have already been disclosed, the applicant maintains that "there is no principled distinction between information about the cost of the program, and information about the purpose and structure of the program" already released.[65] The applicant argues that disclosure of the cost estimates would not reveal Treasury Board deliberations because there is no way to infer from them what Treasury Board may have discussed, including which options were considered, even if the estimates are considered in conjunction with information already disclosed.[66] The applicant asserts that the withheld cost estimates represent the cost of implementing the CSA and disclosing them would not reveal anything new about what has already been disclosed. The applicant adds that if the program were to be implemented, the costs would necessarily become public knowledge, a fact that Treasury Board would have presumed when it engaged in its deliberations.[67]

[61] The applicant also submits that the cost estimates do not reveal any options, impacts, recommendations, or other matters for deliberation, and argues that they instead represent background analysis about the implementation of the program as contemplated by s. 12(2)(c), particularly when the term "background

[63] AB affidavit at paras 22-23.
[64] GE affidavit at paras 6-7.
[65] Applicant's submission at para 15.
[66] Applicant's submission at paras 18-19.
[67] Applicant's submission at para 44.

explanations or analysis" is interpreted with consideration of the types of releasable information listed in section 13(2) of FIPPA.[68]

[62] In reply, the Ministry maintains that since the program is not operational and the applicant is "an assiduous vigorous seeker of information," it could infer significant details about Treasury Board's deliberations if the withheld information were disclosed. The Ministry argues that, although the budget paper at issue is a draft, it is "substantially similar to the subsequent draft that was signed by [the] Minister … and was submitted to Treasury Board for review".[69]

[63] The Ministry also disputes the applicant's characterization of the withheld information as background explanations or analysis for the purpose of s. 12(2)(c). The Ministry says it has released that type of information already. It submits that "the projected cost of the program and the amount of funding requested goes to the heart of the information deliberated by Treasury Board in considering whether to approve or reject the option recommended by the Ministry." The Ministry argues in the alternative that any withheld information that might be background explanation is so intertwined as to not be amenable to severance and disclosure.[70]

Analysis and findings

[64] Under s. 12(1), the Ministry has withheld most of the draft budget paper and two Word documents, as well as parts of emails, arguing that disclosure would allow the drawing of accurate inferences about Treasury Board deliberations, thereby indirectly revealing the substance of the deliberations.

[65] Applying *Aquasource* in this case, the "substance of deliberations" in s. 12(1) would refer to the body of information that Treasury Board considered (or would consider in the case of submissions not yet presented) in making a decision.[71] But the pertinent question in this case, in my view, is how, or even if, the withheld information formed the basis for Treasury Board deliberations. Having considered whether the withheld information would, if disclosed, permit the applicant (or any reader) to draw accurate inferences about the substance of specific Treasury Board deliberations, I find gaps in the evidence significant enough to reject the Ministry's position that it is required to refuse to disclose the withheld information on the basis of s. 12(1) of FIPPA.

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[68] Applicant's submission at para 24, citing Order No. 48-1995 at 11 and 12, and relying specifically on the mandatory exceptions in ss. 13(2)(i) (cost estimate of a policy or project) and 13(2)(m) (information publicly-cited as the basis for making a decision).
[69] Ministry's reply submission at para 17, referring to AB's affidavit at paras 25-26 and GE's affidavit at paras 6-7; this submission highlights an inconsistency in the Ministry's evidence that I address below.
[70] Ministry's reply submission at paras 19 and 20.
[71] *Aquasource*, *supra,* at para 39.

[66] To recount the evidence, I understand that the draft budget paper was intended to help CMSB prioritize budget funding requests. That is, budget papers like this one are given by Ministry program areas to CMSB to help it prioritize and prepare for submissions that program areas are planning to advance to Treasury Board. According to AB, the development of the draft budget paper (using a CMSB template) was only a first step towards the Ministry advancing a Treasury Board submission to seek the additional funding required to implement the CSA.

[67] The Ministry does not argue that the Word documents or emails themselves went before Treasury Board, nor even that the draft budget paper specifically did. Rather, it says a subsequent version of the budget paper, one that is substantially similar to the draft one before me, was brought to the Chair of the Treasury Board on December 18, 2017 for the Chair's consideration. In my view, the evidence provided by the Ministry, which is inconsistent on important points, precludes certainty in determining when or how Treasury Board itself considered the information.

[68] AB describes the draft budget paper as having been developed by Ministry staff and says that a "subsequent draft of the Paper was submitted to Treasury Board Staff for its consideration."[72] AB's affidavit later states that "the subsequent draft of the Paper was submitted for Treasury Board review."[73] AB conveys her belief that the Word documents and emails were reflective of the information in the draft budget paper that was "considered by Treasury Board in its decision-making processes."[74] The basis of this belief is not provided; nor are more specific details about when Treasury Board considered the withheld information. This can be contrasted with the particularity of AB's evidence about the legislative proposal to amend the CSA (developed concurrently with the budget paper).[75]

[69] The Ministry relies on GE's affidavit in submitting that the later version of the draft budget paper went before Treasury Board, but my reading of what GE says does not necessarily support that conclusion. GE indicates that he reviewed the draft budget paper, as well as the subsequent version signed by the Solicitor General on October 28, 2017, which is the version GE says went to the Chair of Treasury Board on December 18, 2017 "for the Chair's consideration". GE does not say in his affidavit that the draft budget paper (or its subsequent version) went to Treasury Board as a whole. GE attests that he "…reviewed both the excel spreadsheet of records which itemized all Budget 2018 submissions as well as the Ministry of Public Safety and Solicitor General's budget submission itself and our TBS analysis."[76] However, GE's affidavit does not address the

[72] AB affidavit at para 23.
[73] AB affidavit at para 26.
[74] AB affidavit at para 24.
[75] AB affidavit at para 12.
[76] GE affidavit at para 5.

question raised by a reading of this evidence, which is whether the CSA budget-ask or any information contained in the draft budget paper was included in Budget 2018 submissions or a Treasury Board submission at all.

[70] I find significant what GE's evidence (and the Ministry's other evidence) does not say. Beyond establishing that a subsequent "substantially similar" version of the draft budget paper was provided to the Treasury Board Chair "for his consideration", the evidence identifies neither a Treasury Board submission related to the information in the draft budget paper, nor any particular Treasury Board meeting where the information in the draft budget paper was deliberated upon.

[71] Nor does the Ministry's own evidence about the purpose of budget papers assist it much in establishing that the information in dispute would reveal the substance of Treasury Board's deliberations. Ministry program areas provide budget papers to CMSB to give an overview of the program's anticipated funding requirements. CMSB then provides the finalized versions of the budget papers to Treasury Board staff to use to decide if they will invite the Ministry to prepare a "formal" Treasury Board submission to present to Treasury Board for its consideration. To be clear then, a Treasury Board submission, not a budget paper, is the form of document required to be put before Treasury Board proper when asking it to apportion money to a specific budget-ask.

[72] In this situation, the Ministry's evidence at most supports a conclusion that the draft budget paper and related information in the Word documents and emails were created as one step on the path to Treasury Board. When the subsequent version of the draft budget paper went to Treasury Board staff and Treasury Board Chair, this was solely to see if the Ministry would be "invited" to make a formal Treasury Board submission; Treasury Board staff and its Chair were not considering or deliberating on whether to grant the CSA budget-ask.

[73] Section 12(1) may in fact apply to records that did not themselves go before Cabinet or one of its committees. However, there must be satisfactory evidence linking the withheld information with specific Cabinet or Cabinet committee consideration. Following *Aquasource,* "substance of deliberations" in s. 12(1) must refer to the body of information that Treasury Board actually considered in making a decision. The evidence does not satisfy me that the information withheld under s. 12(1) went before Treasury Board itself or that it formed the basis for Treasury Board deliberations. The evidence at most supports a conclusion that the withheld information went to Treasury Board *staff*, and that the *subsequent version* (not before me) of the draft budget paper made its way to the Chair of Treasury Board. But, as suggested above, the Chair of Treasury Board as an individual is not the same as Treasury Board, the relevant Cabinet committee for the purpose of s. 12(1), and it is important not to conflate the two. In sum, the evidence does not persuade me that the withheld

information was submitted or prepared for submission to Treasury Board or that its disclosure would directly or indirectly reveal the deliberations of Treasury Board.

[74] The Ministry has also not persuaded me that disclosure of the withheld information could reveal or permit accurate inferences about the body of information that Treasury Board "would consider in the case of submissions not yet presented"[77] in making a decision about operationalizing the CSA. There is simply no persuasive inferential evidence or other surrounding circumstances that the withheld information in these records (some of it dating back to 2012)[78] will eventually be presented to Treasury Board for its consideration at some determinate point in the future.[79] Indeed, it is difficult to see how the 2017 estimates for funding the PSIU could now be put forward as "a body of information" for Treasury Board deliberations, because at this point, five-plus years on, the budget needs for implementing the CSA would necessarily require revision. In my view, these initial estimates from 2017 would be impacted not only by the passage of time, but also with consideration of how enforcing the scheme of the CSA would fit within the operation of the CSU formed by the province following the legalization of cannabis in 2018.[80,81] In these circumstances, I am not persuaded that the applicant would be able to accurately infer the substance of the deliberations of Treasury Board when, or if, the implementation of the CSA next comes up for consideration.

[75] In light of my finding that s. 12(1) does not apply, I do not need to consider whether s. 12(2)(c) would apply to any of the withheld information to require its disclosure. However, some of the same information withheld under s. 12(1) of FIPPA is also being withheld on the basis that other exceptions to disclosure apply. I will now consider these other provisions beginning with s. 13(1).

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[77] *Aquasource*, *supra*.

[78] As stated above, the date of the Word document at pages 44-46 appears clear, given reference to it in the top email exchange on page 42, the (disclosed) title of the document and its content. However, as I also stated above, I make no finding on page 46 yet, given that it is subject to my order for production to fully decide the Ministry's exception claim in relation to it.

[79] Orders F09-26, 2009 BCIPC 66965; F10-23, 2010 BCIPC 23, and F14-20, 2014 BCIPC 34.

[80] AB affidavit at paras 15-17.

[81] British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl, 4th Sess, No 269 (7 October 2019), Hon. M. Farnworth: " … The act will be enforced by the current community safety unit, which is now fully operational within my ministry. R. Coleman: … How much does the unit cost? Hon. M. Farnworth:…. Any incremental cost for the unit associated with the act will be part of the Budget 2020 process. R. Coleman: So you're saying that the budget has not been established yet, and it'll be in the 2020 budget. … Hon. M. Farnworth: Currently, because it's been set up in this budget year, it's accessing contingencies. But next year, it would be Budget '20-21, and that would be going through the Treasury Board process..."

Advice or Recommendations – s. 13(1)

[76] The Ministry relies on s. 13(1) to deny access to portions of the slide deck, the draft budget paper, the emails and one of the Word documents.[82] There was considerable overlap between the Ministry's ss. 12(1) and 13(1) claims.

[77] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Previous orders recognize that s. 13(1) protects "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."[83]

[78] Determining whether s. 13(1) applies is a two-step process. The first step requires deciding whether the disclosure of the withheld information "would reveal advice or recommendations developed by or for a public body or a minister" in accordance with s. 13(1). If it does, I must then consider whether ss. 13(2) or (3) apply. Section 13(2) lists types of information and records that public bodies cannot withhold under s. 13(1), and s. 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

[79] Section 13(1) can encompass information about policy issues, possible options for changes to policies and considerations for these various options, and discussions about implications and possible impacts of different options.[84] The term "advice" includes "expert opinion on matters of fact on which a public body must make a decision for future action."[85] In *John Doe v. Ministry of Finance*, the Supreme Court of Canada held that the word "advice" in s. 13(1) of Ontario's FIPPA, which is equivalent to s. 13(1) of BC's FIPPA, includes policy options, whether or not the advice is communicated to anyone.[86]

[80] The Ministry argues that disclosure of the withheld information would reveal the deliberative process protected by s. 13(1) or permit the drawing of accurate inferences about it in this situation. According to the Ministry, the withheld portions consist not only of advice or recommendations, but also reflect "the investigation and gathering of facts and information necessary to the

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[82] Pages 14-21 (slide deck), 33, 36 (paper), 41 (71) (Word document), and 42-43 (62-63), 48-51 (60-61, 54-55), 52-53, 56, 68 and 73 (emails). Page numbers in brackets represent duplicates. Page 18 (slide deck) is not part of my analysis under s. 13(1) here, given my decision to order production of it for the purpose of deciding the Ministry's claims to ss. 13(1) and/or 16(1)(a)(ii).
[83] Order 01-15, 2001 BCIPC 21569 at para 22.
[84] Order 02-38, *supra,* at paras 102-127, Order F06-16, 2006 BCIPC 25576 (CanLII) at para 48, Order F15-33, 2015 BCIPC 36 (CanLII) at para 18, and *College of Physicians, supra.*
[85] *College of Physicians* at para 113.
[86] 2014 SCC 36 at para 51; Ministry's initial submission at para 72.b).

consideration of specific or alternative courses of action."[87] The Ministry adds that the information in dispute includes discussion of the implications of any option presented, which may be accepted or rejected,[88] and opinions on matters of fact (and their significance) where that opinion is communicated through the exercise of an employee's professional expertise, skill and judgment.[89]

[81] AB describes the basis of the Ministry's s. 13(1) claim for each specific record, as follows:

- the slide deck was developed to brief senior executive decision-makers at the Ministry by explaining the purpose of the CSA and setting out funding options for operationalizing the CSA once it was brought into force;
- the draft budget paper was developed by Ministry staff to assist with assessing potential Treasury Board submissions that the Ministry was considering advancing. The withheld information consists of two options for decision-makers to consider including a recommended option and the implications, impacts and risks of not approving funding for the CSA;
- the Word document consists of information gathered by Policy staff with the Ministry's Policing and Security Branch to respond to questions posed by a Treasury Board staff analyst; and
- emails exchanged between Policing and Security Branch staff who helped prepare the preliminary cost analysis for operationalizing the CSA and CMSB staff, that further discusses the options set out in the paper, as well as information shared in emails between Policing and Security Branch Staff for the purpose of responding to questions posed by Treasury Board staff.[90]

[82] The Ministry also refers to the standard for determining the potential for accurate inferences to be drawn as a "hypothetical reader [who] is considered to be an assiduous, vigorous seeker of information,"[91] a submission I take to be suggesting that the applicant is such a reader.

[83] The Ministry argues that none of the exceptions in ss. 13(2) or 13(3) applies and it explains, in particular, why the exception in s. 13(2)(a) for "factual

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[87] Referring to *College of Physicians* at para 106.
[88] The Ministry cites Order 02-38, para 135, and Order F13-01, para 14, at para 72.c) of its initial submission.
[89] Relying on *College of Physicians* at para 112-113; Ministry's initial submission at paras 72.d), e) and 79.
[90] AB affidavit at paras 30-35.
[91] Ministry's initial submission at para 75, relying on *Insurance Corp. of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025, para 66, where the Court stated this principle, referred to *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203 at para 30, and quoted with approval *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para 37.

material" does not apply. The Ministry characterizes "factual material" as the building block of factual information because such "material exists prior to its use in service of a particular goal". According to the Ministry, it is the selection of the factual material by a public servant in the exercise of their skill and judgment that is relevant in the development of the advice or recommendation that changes "factual material" under s. 13(2)(a), which must be released, into factual information that may be withheld under s. 13(1).[92] The Ministry submits in the alternative that if any of the withheld portions are found to be "factual material" for the purpose of s. 13(2)(a), this material is interwoven with or forms an integral part of the advice or recommendations, and it cannot reasonably be severed and disclosed under s. 4(2).

[84] The Ministry also maintains that it properly exercised its discretion to withhold portions of the records under s. 13(1), noting that it reconsidered the exception's application and released a "considerable amount" of new information to the applicant before providing its submissions during the inquiry.

[85] As noted, the applicant did not provide submissions on s. 13(1), except insofar as it proposes ss. 13(2)(i) and (m) are interpretive tools for s. 12(2)(c).

Analysis and findings

[86] As I said above, s. 13(1) is designed to protect a public body's internal decision-making and policy-making processes, especially while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[87] I find that s. 13(1) applies in part to the slide deck, given its development to brief senior Ministry executive on the CSA's purpose and proposed funding models. Specifically, section 13(1) applies to the information withheld from pages 14-17, 19 and 21 of the slide deck because it consists of discussion of possible options for funding the CSA, including relevant considerations and implications for the various options identified by Ministry staff for decision-makers at the relevant time. In making this finding, I adopt the reasoning of past orders such as Order F20-32 that s. 13(1) may extend to factual or background information that is a necessary and integrated part of the advice.[93]

[88] However, I find that s. 13(1) does not apply to the withheld portion of page 20 because disclosing this information would not reveal, directly or indirectly, any advice or recommendations for the purposes of s. 13(1). The withheld portion

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[92] Ministry's initial submission at para 84, relying on *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322, paragraphs 93–95 (*Provincial Health Services Authority*), among others.

[93] Order F20-32, 2020 BCIPC 38 (CanLII) at para 21, citing *Insurance Corporation of British Columbia v. Automotive Retailers Association*, *supra,* at paras 52-53.

merely consists of a comment and some information of a factual nature that is readily inferable from information the Ministry disclosed elsewhere in the records.[94]

[89] From the draft budget paper, the Ministry has withheld the two presented options, including the recommended option and its implications, as well as the "impacts and risks of not approving funding for the CSA" from pages 33 and 36. However, I find that this information would not reveal, directly or by inference, any advice or recommendations. The recommended option identified on pages 33 and 36 is discussed elsewhere in released portions of the records or is readily inferable from the information already disclosed to the applicant, as is the discussion of the options on page 36.[95] I agree with past orders that have held that information already disclosed to an applicant cannot be withheld under s. 13(1).[96] Additionally, some of the withheld information merely reflects comments or statements of a factual nature, such as the first bullet of the recommended option on page 36. Therefore, I find that disclosing the information withheld from the budget paper would not reveal any advice or recommendations for the purpose of s. 13(1), and that the Ministry is not authorized to refuse to disclose it on this basis.

[90] According to the evidence provided by the Ministry,[97] it has withheld a paragraph from the Word document at page 41 under s. 13(1) that consists of a response prepared by Ministry staff to a question from Treasury Board staff about the impact of postponing funding for the PSIU to the next budget process. As with my finding above about the budget paper, I find that disclosure of this paragraph would not reveal advice or recommendations for the purpose of s. 13(1). The withheld text of this response has already been disclosed or is easily inferable from the records and the surrounding circumstances. I find that s. 13(1) does not apply to this portion of page 41.

[91] The Ministry also withheld under s. 13(1) portions of emails amongst Policing and Security Branch staff and with CMSB staff regarding the options in the budget paper.[98] I uphold s. 13(1) in part, having considered the Ministry's evidence for the emails, particularly AB's affidavit, and the actual communications related to staff's preparation to support the anticipated

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[94] This finding is consistent with past orders such as F20-32 at para 36.
[95] For example, in the disclosed portions of the Summary of Request and text below Table 1 on page 33.
[96] See, for example, Orders F20-32, F12-15 and F13-24.
[97] AB's affidavit at para 33, referring to page 41, lists the other questions posed by Treasury Board staff as relating to the possibility of another funding option, whether legal advice was received, and whether businesses would be subject to the CSA. The Ministry's written submission describes the content of page 41 more generally as reflecting the options set out in the Budget Key Priority Paper and implications of those options.
[98] Although CMSB liaised in turn with Treasury Board staff, none of the emails are directly with Treasury Board staff.

implementation of the CSA at the relevant time. I find that s. 13(1) has been established for and applies to the withheld portions of pages 42-43, 48-51, and 68, as well as the final severance on page 56, because disclosure would reveal the Ministry's internal decision-making and the free flow of the advice or recommendations of public servants found in iterative discussions about the CSA, including its funding.[99]

[92] However, I find that s. 13(1) does not apply to the withheld portions of pages 52 and 53, specifically a line item in two successive drafts of a table of operating costs for Ministry initiatives, the total operating costs for all five initiatives and a reference to the particular initiative. The Ministry disclosed the budgeted operating costs related to four other initiatives from both drafts of the table, including the CSA-related budget numbers, but has not explained the reasoning behind severing this other information under s. 13(1). On my review of it, the information does not itself consist of advice or recommendations; it is factual and the Ministry's evidence does not satisfy me of a connection between it and any relevant deliberative process that might somehow permit the drawing of accurate inferences about advice or recommendations.

[93] I also find that the withheld content in the middle of page 56 (excluding the final severed portion) does not qualify as advice or recommendations, because it merely reflects statements of fact summarizing the basis of the cost estimates, one aspect of which I note has already been released to the applicant elsewhere in the records. I find that s. 13(1) does not apply to the middle portions of page 56.

[94] Finally, I find that s. 13(1) does not apply to the withheld portions of the email at page 73 because these reflect information from the disclosed parts of the records, or is information that is readily inferable from the disclosed information.[100]

[95] I have considered whether any of the provisions in s. 13(2), including ss. 13(2)(a), (i) or (m) as mentioned by the parties, may apply to require the disclosure of the information in the slide deck and emails to which s. 13(1) applies, and I find that none do.[101]

[96] Section 13(2)(a) says that the head of a public body must not refuse to disclose under s. 13(1) any factual material. As it is used in s. 13(2)(a), "factual material" has a distinct meaning from factual "information" in that the compilation

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[99] Above, I found that s. 14 applies to information withheld on that basis from page 43, based on the evidence provided.

[100] The Ministry withheld part of one line of Appendix 2 under s. 12(1) and I found above it did not apply.

[101] With the exception of the slide at page 18, which I have ordered produced to the OIPC (along with page 46) to allow for determination of the Ministry's exception claims. I make no finding on this slide in this order.

of factual information and weighing the significance of matters of fact is an integral component of advice and informs the decision-making process.[102] On my review of the information withheld under s. 13(1), I find that any facts found in the slide deck and emails are not a body of distinct facts set apart from and independent of the opinions and advice of the public servants who created them. Specifically, I am satisfied that the information in the slide deck was compiled by Ministry staff using their expertise and judgment to provide context for the opinions and advice communicated in the slide deck, thereby distinguishing it from "factual material" that must be disclosed under s. 13(2)(a). Similarly, I find the parts of the email exchanges and discussion to which s. 13(1) applies are not "factual material" under s. 13(2)(a) because their content is also reflective of the interweaving of facts into the advice or recommendations through the exercise of the professional judgment of Ministry staff, such that s. 13(2)(a) does not apply.

[97] According to s. 13(2)(i), a public body must not refuse to disclose under s. 13(1) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body. The applicant argues that "the fact that cost estimates are generally an enumerated type of information that is releasable under s. 13(2) weighs in favour of releasing the cost estimates in this case." This argument, made under s. 12(2)(c), also does not persuade me that s. 13(2)(i) applies to the advice or recommendations in this case.[103] The withheld information in the slide deck and emails clearly does not consist of a feasibility or technical *study* relating to a policy or project of the Ministry, and I find s. 13(2)(i) does not apply.

[98] Section 13(2)(m) says that the head of a public body must not refuse to disclose under s. 13(1) "information that the head of the public body has cited publicly as the reason for making a decision or formulating a policy." The applicant refers to a 2016 government decision not to implement the CSA due in part to the "fiscal realities of this kind of program".[104] I find the applicant's argument unpersuasive. The Minister did not refer to any specific information in the slide deck or emails as the basis for making the decision not to proceed with implementing the CSA at that time. It is also difficult to see how s. 13(2)(m) could apply to the advice or recommendations in the emails about the draft budget paper, given that these were sent between Ministry staff more than a year after the head referred in the house to "the fiscal realities of the program" as part of the reason for not implementing the CSA. For these reasons, I find that s. 13(2)(m) does not apply.

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[102] *Provincial Health Services Authority*, *supra,* at paras 91-94.
[103] Applicant's submission at para 25. In any event, the cost estimates are to be disclosed to the applicant, given my finding that s. 12(1) does not apply to them,
[104] Applicant's submission at para 26, quoting the Honourable Mike Morris, then-Minister for Public Safety and Solicitor General: British Columbia, Legislative Assembly, Official Report of Debates (Hansard) 40th Parl, 5th Sess, Vol 40 No 2 (16 May 2016) Proceedings in the Douglas Fir Room at 1705 (Hon. M. Morris).

[99] Finally, I also considered whether s. 13(3) applies. It says that s. 13(1) "does not apply to information in a record that has been in existence for 10 or more years". The Ministry provided no date for the slide deck. AB indicates that the slide deck was prepared before she began working in the Ministry's Policing and Security Branch in 2014. Above, I concluded that the slide deck most likely dates back to 2013 when the CSA was initially passed.[105] On the whole, there is insufficiently persuasive evidence before me that s. 13(3) applies in the circumstances, and I find it does not.

Relations with Other Governments – s. 16(1)(a)(ii)

[100] The Ministry claims that s. 16(1)(a)(ii) applies to information it withheld from the slide deck at pages 14-19 and 21 and the Word document at page 46.[106] However, the Ministry also withheld the same portions of the slide deck under s. 13(1) and I upheld that exception claim above, so I will consider the application of s. 16 only in relation to the one line on page 46 withheld on that basis. The slide at page 18, which is subject to an order for production under s. 44(1)(b) is also excluded from this analysis.

[101] Section 16(1)(a)(ii) is harms-based and authorizes a public body to withhold information if its disclosure could reasonably be expected to harm relations between the BC government and the council of a municipality or the board of a regional district or any of their agencies. The "reasonable expectation of harm" standard lies between "that which is probable and that which is merely possible."[107] The Ministry is required to provide evidence "well beyond" or "considerably above" a mere possibility of harm resulting from disclosure of the withheld information.[108]

[102] The Ministry submits that establishing section 16(1)(a)(ii) does not require it to prove actual harm with disclosure, or that the harm be significant or substantial, only that there is a reasonable expectation of the harm.[109] According to AB, when the Ministry was considering implementation of the CSA in 2013, one of the options it considered for funding the CSU was municipal property taxes. However, the Union of BC Municipalities (UBCM) sought assurance that

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[105] Disclosed portions of the slide deck support it having been prepared sometime in 2013; see fn. 48.

[106] The Ministry withheld a different line on page 46(67) under s. 16 than the one I considered above under s. 14, although I have ordered production of the complete page in order to decide whether s. 12(1) applies, as the Ministry did not provide the OIPC with the content severed on that basis.

[107] Ministry's initial submission at para 118; for this, the Ministry relies on Order F16-05, which addresses the proof of harm requirement under s. 17.

[108] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (*Community Safety*) at para 54, with reference to *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

[109] Ministry's initial submission at para 116.

the Province itself would fund the CSA instead of relying on property tax revenues.[110] AB attests that when the Ministry consulted the UBCM in 2019 about the proposed amendments to the CSA, UBCM representatives again wanted confirmation that the Province would fund the enforcement unit and she personally confirmed for the UBCM that the intention was for the CSA to be enforced by a provincially-funded unit. The Ministry submits that disclosure of the information withheld under s. 16(1)(a)(ii) would "on the face of the Records more likely than not harm the conduct of the Province's relationship with the UBCM and the municipalities the UBCM represents."[111]

Analysis and findings

[103] In considering whether the Ministry has met the threshold for establishing s. 16(1)(a)(ii) of a reasonable expectation of harm to relations between the BC government and the council of a municipality or the board of a regional district or any of their agencies, I must be satisfied that there is a "clear and direct connection" between disclosure of the specific information on page 46 and the alleged harm.[112]

[104] The Ministry has not established a reasonable expectation of harm with disclosure of the withheld information on page 46, which consists of part of one line in the 2012 Word document setting out Ministry research into the use of similar legislation in other provinces. The Ministry's evidence does not satisfactorily explain how disclosure of this one line could reasonably lead to the relational harm s. 16(1)(a)(ii) seeks to avoid. Leaving aside the question of whether s. 16(1)(a)(ii) could even include harm to "the Province's relationship with the UBCM and the municipalities the UBCM represents", I find the Ministry's arguments about a reasonable expectation of harm with disclosure of the particular information on page 46 remote and speculative. On my own review of it, I consider this information to be merely factual. As the Ministry's evidence does not reach the threshold of establishing an expectation of harm with disclosure that is "considerably above" a mere possibility, I find s. 16(1)(a)(ii) does not apply to the information withheld from page 46 on this basis.

Conclusion

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

1. I confirm in part the Ministry's decision to refuse access to the information withheld under ss. 13(1) and 14. In particular, the Ministry is authorized by

[110] AB affidavit at paras 38-39.
[111] Ministry's initial submission at para 120.
[112] Order F07-15, 2007 CanLII 35476 (BC IPC) at para 17, referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII).

s. 13(1) to refuse to disclose the information withheld from pages 14-17, 19 and 21, 42-43, 48-51, 68 and the final severed portion on page 56 on that basis. The Ministry is also authorized by s. 14, to refuse to disclose the information it withheld from pages 41, 43 and 68 on that basis.

2. The Ministry is not required to withhold the information in dispute under ss. 12(1) or 16(1)(a)(ii), subject to item 3 below.

3. The Ministry must disclose to the applicant the information that it is not required or authorized to withhold and must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records. However, in addition to the information identified in item 1, above, the Ministry should also not disclose to the applicant pages 18 and 46, which are subject to the order for production described below.

[106] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with paragraph 105 above by July 14, 2023.

[107] Under ss. 44(1)(b) and 44(3) of FIPPA, by June 15, 2023, the Ministry is required to produce to me, through the registrar of inquiries, pages 18 and 46 in their entirety so I can decide if ss. 12(1), 13(1) and 16(1)(a)(ii) apply.

June 1, 2023

ORIGINAL SIGNED BY

Daphne Loukidelis, Adjudicator

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