Order 02-38

OFFICE OF THE PREMIER & EXECUTIVE COUNCIL OPERATIONS and MINISTRY OF SKILLS DEVELOPMENT & LABOUR

David Loukidelis, Information and Privacy Commissioner
July 26, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 38
Document URL: http://www.oipc.bc.ca/orders/Order02-38.pdf
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: The applicant requested records related to the government's decision to delay implementation of the WCB's proposed regulation on smoking in the workplace. His request cited s. 25(1) as possibly requiring disclosure in the public interest. Section 25(1) does not require either public body to disclose information in the public interest. The Premier's Office is required to withhold information under s. 12(1) and the Ministry is authorized to withhold information under ss. 13 and 14. Each of them must, however, disclose some of the information withheld under s. 13(1) and the Premier's Office must disclose some withheld under s. 12(1).

Key Words: public interest – risk of significant harm – public health or safety – clearly in the public interest – Cabinet confidences – substance of deliberations – background explanations or analysis – policy advice – advice or recommendations – developed by or for a public body or a minister – legal advice – solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1) & (2), 13(1) & (2), 14, 25(1)(a) and (b); *Constitution Act*, ss. 9-13; *Interpretation Act*, s. 29 definitions of "Executive Council", "Lieutenant Governor" and "Lieutenant Governor in Council".

Authorities Considered: B.C.: Order No. 33-1995, [1995] B.C.I.P.C.D. No. 4; Order No. 162-1997, [1997] B.C.I.P.C.D. No. 20; Order No. 165-1997, [1997] B.C.I.P.C.D. No. 22; Order No. 182-1997, [1997] B.C.I.P.C.D. No. 43; Order No. 185-1997, [1997] B.C.I.P.C.D. No. 46; Order No. 246-1998, [1998] B.C.I.P.C.D. No. 40; Order No. 309-1999, [1999] B.C.I.P.C.D. No. 22; Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37; Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 01-14, [2001] B.C.I.P.C.D. No. 15; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-17, [2001] B.C.I.P.C.D. No. 18; Order 01-20 [2001] B.C.I.P.C.D. No. 21**;** Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order 01-28, [2001] B.C.I.P.C.D.

No. 29; Order 01-47, [2001] B.C.I.P.C.D. No. 49; Order 02-19, [2001] B.C.I.P.C.D. No. 19. **Alberta:** Order 2000-013, [2000] A.I.P.C.D. No. 32. **Ontario:** Order 94, [1989] O.I.P.C. No. 58; Order 118, [1989] O.I.P.C. No. 81; Order P-241, [1991] O.I.P.C. No. 35; Order P-398, [1993] O.I.P.C. No. 8, Order P-529, [1993] O.I.P.C. No. 239, Order P-604, [1993] O.I.P.C. No. 314; Order P-1205, [1996] O.I.P.C. No. 234, Order P-1147, [1996] O.I.P.C. No. 118; Order P-1190, [1996] O.I.P.C. No. 203; Order P-1570, [1998] O.I.P.C. No. 112.

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] S.C.J. No. 43, 2002 SCC 42; *Tromp* v. *British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 761; *Babcock* v. *Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57; *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927; *O'Connor* v. *Nova Scotia*, [2001] N.S.J. No. 360, 2001 NSCA 230 (leave to appeal denied June 12, 2002, [2001] S.C.C.A. No. 582 (S.C.C.)); *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 1030 (S.C.); *Baker* v. *Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193; *3430901 Canada Inc.* v. *Canada (Minister of Industry)*, [2002] 1 F.C. 421, [2001] F.C.J. No. 1327 (leave to appeal denied June 13, 2002, [2001] S.C.C.A. No. 537); *Re Regina and Vanguard Hutterian Brethren Inc.* (1970), 97 D.L.R. (3d) 86 (Sask. C.A.); *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 148 D.L.R. (4th) 385; *B.* v. *Canada*, [1995] 5 W.W.R. 374, [1995] B.C.J. No. 41 (S.C.); *Idziak* v. *Canada (Minister of Justice)*, [1992] 3 S.C.R. 631.

TABLE OF CONTENTS

		Page No.
1.0	INTRODUCTION	2
2.0	ISSUES	5
3.0	DISCUSSION	6
3.1	*In Camera* Materials	6
3.2	Duty to Assist the Applicant	7
3.3	Records in Dispute	8
3.4	Burden of Proof and Section 25	9
3.5	Substance of Cabinet Deliberations	19
3.6	Advice or Recommendations	29
3.7	Solicitor Client Privilege	41
4.0	CONCLUSION	43

1.0 INTRODUCTION

[1] By a letter dated August 31, 2001, the applicant requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"), the "immediate routine release" of records in the custody or under the control of the Office of the Premier & Executive

Council Operations ("Premier's Office"), Ministry of Skills Development and Labour ("Ministry"), Ministry of Attorney General, Ministry of Finance and Ministry of Health Services. The operative part of his request reads as follows:

> 1. Any briefing/issue notes, without any information severed, related directly or indirectly to:
>
>   (a) the appointment of a caucus committee to recommend how best to implement environmental tobacco smoke regulations in the workplace;
>
>   (b) the request to the Worker's [*sic*] Compensation Board ("WCB") that they extend the timetable for their environmental tobacco smoke regulation beyond its scheduled September 10th, 2001 implementation date;
>
>   (c) WCB's response to that request to extend the implementation timetable; or
>
>   (d) the direction to WCB to extend the implementation timetable to April 30th, 2002.
>
> 2. Any correspondence, including attachments, without any information severed, involving the above referenced public bodies and the WCB with respect to items 1(a)-(d) above.
>
> 3. Any e-mails, without any information severed, with respect to items 1(a)-(d) above
>
> The records referred to above may address a range of topics and issues, including, *but not limited to*, health cost, financial, employment, economic, legal, or legislative implications of the proposed workplace smoke ban. [original emphasis]

[2] The request also suggested that s. 25(1) of the Act – which contains what is commonly known as a public interest override – might apply to the requested records, as the following passage from p. 2 of the applicant's request indicates:

> In order to facilitate immediate access you may wish to invoke Section 25(1) of the *Act* – the Public Interest Override – with respect to the requested records.
>
> Regarding the risk of significant harm to the health or safety of a group of people (S.25(1)(a)), I refer you, for example, to the comments of Dr. Richard S. Stanwick, Medical Health Officer for the Capital Health Region contained in the August 28th, 2001 edition of the Times Colonist, the August 30th, 2001 edition of the Times Colonist, and the web site www.worksafebc.com.
>
> The clear public interest in immediate and close public scrutiny of the above course of action (S.25(1)(b)) should also be self-evident. This seemingly unprecedented course of action could well have immediate and significant health, health cost, financial, employment, economic, legal and legislative implications for directly

> affected groups of the public (employees and employers) or the public at large. It is my intention to make these records available to interested members of the public.

[3] The applicant, Rob Botterell of Victoria, asked me to name him in the "style of cause" for this proceeding. As my practice is to identify orders by number and the public body involved, I have instead accommodated his wish to be identified by naming him.

[4] The Premier's Office responded to the applicant's request on October 23, 2001. It severed and withheld some information that it decided was outside the scope of the applicant's request and withheld information from some of the records under s. 12(1) of the Act (s. 13(1) was later applied to one sentence in a portion of the records that the Premier's Office originally withheld but later disclosed in part). The response of the Premier's Office prompted the applicant to request a review, under Part 5 of the Act, on November 15, 2001.

[5] In his request for review of the decision of the Premier's Office, the applicant indicated that the Ministry had "promised a response by October 26th, 2001", but that he had not yet received any records. His letter said the following about the Ministry's failure to respond:

> In the case of the Ministry of Skills Development and Labour I consider this a case of deemed refusal pursuant to Section 53(3). I request an expedited hearing to address the failure to respond, failure in the duty to assist, the failure to apply section 25 to the records, and any other issues that may be germane.

[6] The urgency with which the applicant viewed his request and the importance he placed on it are reflected in the following further passages from his November 15, 2001 request for review:

> In the case of the Office of the Premier I believe that there should have been no severing, whether pursuant to section 12 or 25 of the Act. I also believe that they have failed in their duty to assist by not making me aware that the Ministry of Public Safety and Solicitor General may have responsive records (I specifically asked that other public bodies be identified in my letter).
>
> In the case of the other ministries I request your assistance to find out what is going on.
>
> As I set out in my original request there are, in my view, health and safety issues of great significance at issue in this request. As well there is a clear public interest in the disclosure of these records.
>
> I seek the unsevered records and I do not see any benefit to mediation in the circumstances. I also do not believe that it would be in the public interest to engage in the normal practice of exchange of written submissions over a period of weeks.
>
> I therefore respectfully request an expedited oral hearing as soon as possible with respect to the Office of the Premier and the Ministry of Skills Development and

> Labour. In the case of the other ministries I wish to first obtain your assistance to find out what is going on before I decide how to proceed.

[7] The Ministry eventually responded to the applicant's request on November 21, 2001. While it disclosed records to the applicant, it severed and withheld information under ss. 13(1), 14 and 22(1) of the Act. The Ministry withheld six pages in their entirety under s. 14 of the Act, "as severing the information would render these documents incomprehensible." By a letter dated December 17, 2001, the applicant requested a review of the Ministry's November 21, 2001 response. He again requested an "expedited oral hearing".

[8] By a letter dated January 30, 2002, during mediation by my Office, the Ministry disclosed some of the information that it had previously withheld under s. 13(1) or s. 14 of the Act. At the same time as the public bodies made their initial submission in the inquiry, the Premier's Office decided to disclose material it had originally withheld. It did so because the decision to amend ss. 17.1(1) and (2) of the Liquor Control and Licensing Regulations, B.C. Reg. 608/76, had been implemented and made public, such that background information had to be disclosed under s. 12(2) (para. 1.08, initial submission).

[9] Although the applicant sought an oral inquiry, in the end both requests for review were dealt with in a written inquiry, from which this decision flows.

[10] The Premier's Office and the Ministry, who were represented by the same lawyer in the inquiry, made joint initial and reply submissions.

2.0 ISSUES

[11] In a February 11, 2002 communication to my Office, the applicant raised a question about the burden of proof as it relates to, among other things, "the timing of response, sections 6-10, 53(3) from the public bodies." In a letter to my Office the next day, the public bodies objected to the raising of any issues under ss. 6 through 10 of the Act or any s. 53(3) matter. After correspondence among the parties and my Office, the inquiry was adjourned to enable the parties to address these issues. My Office issued a February 22, 2002 Amended Notice of Written Inquiry, which confirmed that the inquiry would consider the issue of whether each public body met its duty to assist the applicant under s. 6 of the Act and whether the Ministry was authorized under s. 10 to extend the time for responding.

[12] The Portfolio Officer's Fact Report and Amended Notice of Written Inquiry confirm that the Ministry's decision to withhold third-party personal information under s. 22(1) of the Act is no longer in issue.

[13] The issues in this case therefore are as follows:

1. Have the Premier's Office and the Ministry performed their s. 6(1) duty to assist the applicant?

2. Was the Ministry authorized under s. 10 to extend the time for it to respond to the applicant's request?

3. Does s. 25(1) require either public body to disclose information to the public?

4. Does s. 12(1) require the Premier's Office to refuse to disclose information?

5. Does s. 13(1) authorize the Premier's Office or the Ministry to refuse to disclose information?

6. Does s. 14 authorize the Ministry to refuse to disclose information?

[14] Previous decisions have established that the public body bears the burden of proof respecting issue 1 and I consider the same burden applies to issue 2. As regards issue 3, this case presents an opportunity to more fully address the burden of proof and I address it below. As for the exceptions mentioned in paras. 4-6, s. 57(1) of the Act requires the public body to "prove that the applicant has no right of access".

[15] Before discussing the substantive issues, I will address an issue relating to materials that the public bodies submitted *in camera*.

3.0 DISCUSSION

[16] **3.1 *In Camera* Materials** – In a March 6, 2002 letter to me, the applicant said he questioned "the need for in-camera affidavits". He went on to say the following:

> I request the immediate disclosure of any portions which are not properly in-camera and request an explanation from the Commissioner for any affidavit information that continues to be held in-camera.

[17] In a March 7, 2002 letter to the parties, I accepted that Exhibit "A" to the affidavit of Brian Etheridge was properly received on an *in camera* basis, noting that Exhibit "A" consists of copies of records that have been withheld in their entirety under s. 14 of the Act. As I noted, disclosure of those copies would disclose information that may be protected from disclosure under s. 14 of the Act. I also accepted that portions of the second bulleted paragraph on p. 14 of the public body's initial submission were properly received *in camera*, as disclosure of that information would reveal information that might be excepted from disclosure under s. 12(1) of the Act.

[18] At the same time, I questioned whether portions of para. 7 of Robert Adamson's affidavit were properly submitted *in camera* by the public bodies, noting that the proposed *in camera* portions only gave the date and generic descriptions of various kinds

of records sent to Robert Adamson by Amy Faulkner. As a result, the Ministry consented to disclosure of one of the two portions of para. 7 of Robert Adamson's affidavit, but continued to argue against disclosure of the second bullet in that paragraph. In light of the Ministry's further submissions and supporting material, I was satisfied that the second bullet of para. 7 of the Adamson affidavit is properly received *in camera*, as its disclosure would reveal information that might be protected under s. 14 of the Act.

[19] **3.2 Duty to Assist the Applicant** – The applicant is not happy with the public bodies' responses to his access request and has raised issues under s. 6(1) of the Act. That section reads as follows:

> **Duty to assist applicants**
>
> 6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[20] Paragraphs 28-38 of the applicant's initial submission set out a series of questions about the public bodies' performance in responding. He asks whether the Premier's Office's "taking 53 days to disclose 15 pages of records, severed in their entirety" satisfies the s. 6(1) duty to respond "without delay" (para. 28, initial submission). He asks if the Ministry's "taking 82 days to disclose 85 pages of severed records" meets this s. 6(1) obligation (para. 33, initial submission). Another concern is the absence of any reasons in the public bodies' responses respecting the exercise of discretion (para. 33, initial submission).

Late responses

[21] The Ministry extended the time for its response under s. 10(1), but acknowledges that it responded to the applicant after the extended deadline passed (para. 4.07, initial submission). The Premier's Office also concedes that it did not respond by the required date (para. 4.07, initial submission). Nonetheless, they both say that they fulfilled their s. 6(1) duty to respond "without delay", having expended efforts that a fair and rational person would expect them to undertake. They contend that any review of their actions must account for demands on their resources, including demands from other access requests (para. 4.08, initial submission). They say the following at para. 4.07 of their initial submission, backed up by affidavit evidence from various government employees involved in processing the applicant's request:

> … [T]he Public Bodies submit that, in light of the large number of requests that their Information and Privacy staff were dealing with at the time, in addition to their other functions, and the number of requests being dealt with by the other public bodies who were consulted by the MSDL [Ministry], the length of time they took to respond to the Request was not unreasonable under the circumstances. Nor can it be said that the Public Bodies have breached their duty to respond to the Request without delay. There is simply no evidence of undue delay in this case. Rather, the evidence demonstrates that both Public Bodies were doing the best they could given their available resources and their workloads.

[22] Both public bodies breached the Act's requirement to respond to the applicant's request in the time required under s. 7(1) (subject to either s. 10(1) or ss. 23 and 24). It is simply not tenable to say that a public body that is in breach of the Act by having responded late can still be found to have fulfilled its statutory duty to respond to an applicant "without delay".` As I indicated in Order 01-47, [2001] B.C.I.P.C.D. No. 49, at para. 28, the s. 6(1) duty to respond without delay requires a public body to make every reasonable effort to respond before the time required under s. 7(1). A public body in breach of the latter duty cannot be found to have fulfilled the former.

[23] I do not question the diligence or good faith of those who processed the applicant's request, but their inability to respond as required by law cannot – whether or not it was due to an excess of demand over the resources available to respond – wipe away the fact that the responses were late. I therefore find that both public bodies have failed to discharge their duty under s. 6(1) to respond to the applicant without delay. Since they have responded, however, I can do no more in this case (there is no fee that I could have ordered to be waived or refunded under s. 58(3)(c)). Any issue arising from the deemed decisions to refuse access, under s. 53(3), also falls away in light of the eventual responses. In both instances, I can only say that these public bodies, and all others, should ensure that adequate resources are available so that their access to information staff can process requests in compliance with the law.

Reasons for exercise of discretion

[24] As I indicate below, while it might be desirable for the head of a public body to state his or her reasons for exercising discretion, I am not prepared to find that the public bodies have failed to assist the applicant within the meaning of s. 6(1) because their access responses were silent on the exercise of discretion.

[25] Last, I see no basis in the material before me to question the propriety of the Ministry's time extension under s. 10(1).

[26] **3.3 Records in Dispute** – I will now describe the records in dispute.

Premier's Office records

[27] Most of the information withheld from the 15 pages of Premier's Office records was withheld because it is not responsive to the applicant's request. The Premier's Office records consist of:

1. six pages of minutes of an August 22, 2001 Cabinet meeting,

2. two pages of minutes of an August 22, 2001 meeting of the Cabinet Caucus on Communities and Safety ("Communities & Safety Committee"), and

3. a seven-page briefing note to the Minister of Public Safety and Solicitor General ("Solicitor General") and the Minister of Skills Development and Labour ("Labour Minister") dated August 2, 2001.

[28] Three paragraphs of the August 22, 2001 Cabinet minutes have been withheld under s. 12(1) of the Act, while roughly two paragraphs of the August 22, 2001 Communities & Safety Committee minutes have been withheld under s. 12(1) (no other exceptions were claimed for these minutes). All but roughly one page in total of the August 2, 2001 briefing note has been withheld under s. 12(1) and one sentence has been withheld from that record under s. 13(1).

Ministry records

[29] There are 90 pages of Ministry records in dispute. The majority of this material has been disclosed to the applicant. The withheld portions consist of a variety of material:

1. a briefing note about what might occur during debate in the Legislative Assembly over any delay of the smoking regulation's implementation,

2. letters between the Labour Minister and the WCB,

3. internal public service e-mails about implementation of the smoking regulation and possible delay in its implementation,

4. "issues notes" to the Labour Minister,

5. parts of a July 10, 2001 draft Cabinet submission,

6. various notes and memorandums to the Labour Minister about any delay in implementation of the smoking regulation, and

7. records that the public bodies contend are protected by s. 14 of the Act.

[30] **3.4 Burden of Proof and Section 25** – Section 25 of the Act requires a public body to disclose information, in certain circumstances, despite any other provision of the Act. The relevant parts of s. 25 read as follows:

> **Information must be disclosed if in the public interest**
>
> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[31] As I noted earlier, the applicant suggested in his access request that both ss. 25(1)(a) and (b) might apply to the responsive records. He also contends that, contrary to what has been said in previous decisions, the burden of establishing that s. 25(1) applies does not properly rest on an access applicant. I will address this issue before dealing with the merits of the s. 25(1) issue.

Burden of proof

[32] In decisions such as Order No. 165-1997, [1997] B.C.I.P.C.D. No. 22, my predecessor indicated that an applicant bears the burden of establishing that s. 25 applies. I have followed my predecessor's lead in this respect and said that an applicant bears the burden of establishing that s. 25(1) applies. The public bodies say, at para. 4.62 of their initial submission, that they "put the Applicant to his burden of proof." This squarely raises questions about the character of any burden respecting s. 25(1) and the consequences, if any, of not meeting any such burden.

[33] The applicant acknowledges that decisions such as Order No. 165-1997 allocate a burden to applicants, but says the burden should nonetheless be on the public bodies. He cites in support various decisions under s. 23 of Ontario's *Freedom of Information and Protection of Privacy Act*, which is a form of public interest disclosure provision. At para. 44 of his initial submission, he cites the following passage from G. Levine, 'Disclosure of Information in the Public Interest Pursuant to Freedom of Information and Protection of Privacy Legislation', 11 Can. J. of Admin. Law & Practice 1, at p. 18:

> … the [Ontario] Commissioner held [in Order P-241, [1991] O.I.P.C. No. 35] that "this onus cannot be absolute where the appellant has not had the benefit of reviewing the requested records". Since this would always be the case, one would expect that this latter articulation of the burden would always apply but it has not always been articulated by the Commissioner. The 'burden' issue highlights a difference between the Ontario and British Columbia statutes because one could argue that the burden is always incumbent on public bodies in B.C. to show that the public interest override ought not to be applied since the heads of those bodies have a positive obligation to apply it where necessary. [applicant's emphasis]

[34] The applicant emphasizes the opinion stated in the last sentence of this passage as a reason for placing the burden of proof on the public bodies in this case.

[35] In Ontario Order P-241, [1991] O.I.P.C. No. 35, Commissioner Tom Wright said the following, at p. 8, about the burden of proof under s. 23 of the Ontario legislation:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its

> case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records that I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.

[36] Assistant Commissioner Tom Mitchinson said essentially the same thing in Order P-1190, [1996] O.I.P.C. No. 203, at p. 5.

[37] In Order No. 165-1997 and other s. 25(1) cases in which the applicant has been said to have a burden of proof, the applicant has raised the applicability of s. 25(1). This is the context in which my predecessor and I have referred to the applicant as bearing a burden of proof. Where an applicant has argued that s. 25(1) applies, it will be in the applicant's interest, in practical terms, to identify information in support of that contention. For example, although an applicant will not know the contents of requested records, she or he may well be in a position to establish that there is a clear public interest in the matter generally. Such evidence can provide support for the decision, in an inquiry under Part 5 of the Act, as to whether s. 25(1) requires information to be disclosed. In other words, an applicant will be obliged, as a matter of common sense, to provide evidence and explanation for her or his assertion that s. 25(1) requires disclosure. This practical obligation may obviously be constrained, however, by the fact that the applicant does not have access to the disputed information.

[38] I agree that, since the head of a public body must apply s. 25(1) even where no access request has been made, the head has some obligation to consider whether it applies on the facts known to the head. Consistent with this view, where a public body has, for example, relied on s. 25(1) in disclosing a third party's personal information, without an access request, and the commissioner later investigates that disclosure under s. 42 of the Act in response to a complaint, it will be up to the public body, in practical terms, to provide an explanation, including relevant evidence, as to why s. 25(1) required it to disclose the information.

[39] Section 4 of the Act creates a right of access, where an access request is made under s. 5, to parts of a record not excepted from disclosure (if the information that is excepted can reasonably be severed). By contrast, s. 25(1) requires a public body to disclose information where certain facts exist, regardless of whether an access request has been made. Section 25(1) either applies or it does not and in a Part 5 inquiry it is ultimately up to the commissioner to decide, in all the circumstances and on all of the evidence, whether or not it applies to particular information. Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.

Interpretation of s. 25(1)

[40] The applicant argues that s. 25(1) has been incorrectly interpreted in the past, with the result that it erects too high a hurdle for disclosure in the public interest. He mentions Order 01-28, [2001] B.C.I.P.C.D. No. 29, but refers particularly to para. 39 of my decision in Order 01-20, [2001] B.C.I.P.C.D. No. 21:

> [39] Even if I assume, without deciding, that disclosure of contractual and financial information is capable of being "clearly in the public interest" within the meaning of s. 25(1)(b), ***the required elements of urgent and compelling need*** for publication are not present in this case. Again, the applicant believes the agreement should be disclosed because UBC is a publicly-funded educational institution, such that the student body, general public and media ought to have the widest ability to scrutinize an exclusive commercial commitment by UBC to substantial funding from a private source. Even if this position is well-founded as a matter of public policy, it does not give rise to ***an urgent and compelling need*** for compulsory public disclosure despite any of the Act's exceptions. In my view, ***no particular urgency*** attaches to disclosure of this record. ***Nor is there a sufficiently clear and compelling interest in its disclosure***. [applicant's emphasis]

[41] The applicant says the words emphasized in the above passage introduce considerations more appropriate for the language of s. 23 of the Ontario *Freedom of Information and Protection of Privacy Act*. That section allows (but does not require) disclosure of information, despite the applicability to the information of any of several specified exemptions, where "a compelling public interest" in disclosure "clearly outweighs the purpose of the exemption". (I note here that s. 11 of the Ontario Act is closer to s. 25(1), as far as it goes, than is s. 23 of the Ontario statute.) The applicant says that, in Order 01-20, I "balanced the competing interests of protecting the public body under the exemption provisions and providing disclosure to the public" in a way suited rather to s. 23 of the Ontario legislation (para. 52, initial submission). My treatment of s. 25(1) in Order 01-20 does not support this contention. In fact, para. 34 of Order 01-20 says the following:

> I agree with the applicant that the application of s. 25(1) does not involve a weighing, from an evidentiary point of view, of the threshold in s. 25(1) against the exceptions in Division 2 of Part 2 of the Act.

[42] The applicant contends that s. 25(1)(b) has been interpreted incorrectly in past orders because the language of the section does not support a requirement of urgent or compelling need for disclosure. In particular, at para. 85 of his initial submission, the applicant says that the "correct interpretation of the phrase 'without delay' is to disclose information to which section 25 applies as soon as possible." He goes on to argue, at para. 86, that

> … "without delay" does not restrict the application of sections 25(1)(a) or (b) and that the correct interpretation is to apply these subsections in the circumstances of the particular case.

[43] He argues that the words "without delay", in the introductory portion of s. 25(1), merely require a public body to do what s. 6(1) requires it to do in responding to an access request under the Act – respond as soon as possible. He says the concept of urgency expressed in decisions such as Order 01-20 results from incorrectly applying the introductory words "without delay" as part of the tests in s. 25(1)(a) and (b). This is wrong, the applicant contends, because in

> … their ordinary and grammatical sense the words "without delay" in paragraph [*sic*] 25 modify the phrase "the head of the public body must disclose to the public".

[44] I will first note that my approach to the meaning of the section is consistent with my predecessor's. In Order No. 162-1997, [1997] B.C.I.P.C.D. No. 20, my predecessor said the following, at p. 3, about s. 25(1):

> In my view, the facts in this inquiry do not meet the test of urgency and vital communication implied by the language of section 25. The fact that some members of the public might be interested in an issue does not necessarily make it a matter "clearly in the public interest."

[45] In Order No. 165-1997, at p. 8, he said the following:

> I further agree with the Ministry's submission, in the context of this inquiry, that the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest. The duty to disclose must be performed *without delay*, which also strongly indicates that the public interest in disclosure must be of an urgent and compelling nature before section 25 will come into play. (Submission of the Ministry, paragraph 4.02; italics in original.)

[46] Similar statements about the meaning of s. 25(1) are found in Order No. 182-1997, [1997] B.C.I.P.C.D. No. 43, and Order No. 185-1997, [1997] B.C.I.P.C.D. No. 46. Last, in Order No. 246-1998, [1998] B.C.I.P.C.D. No. 40, at para. 41, Commissioner Flaherty said, citing Order No. 165-1997, that the s. 25(1) "positive duty of disclosure 'only exists in the clearest and most serious of situations'."

[47] In support of his contention that s. 25(1) has not been interpreted correctly, the applicant relies on the following statement of principle from E. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[48] As the applicant notes, the courts have approved of this statement on a number of occasions. The applicant cites *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. See, also, *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] S.C.J. No. 43, 2002 SCC 42,

where the Supreme Court of Canada, in addition to affirming the *Rizzo* approach, recently confirmed that provisions such as s. 8 of the *Interpretation Act* buttress the *Rizzo* approach. Section 8 reads as follows:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[49] I adverted to the *Rizzo* interpretive approach and s. 8 of the *Interpretation Act* in, for example, Order 02-19, [2001] B.C.I.P.C.D. No. 19. I do not agree, however, that the *Rizzo* approach or s. 8 of the *Interpretation Act* supports the applicant's interpretation of the words "without delay" in s. 25(1).

[50] One cannot pick and choose, as I believe the applicant is doing, and assert that the words "without delay" look only to the expression "the head of the public body must disclose to the public". To do so ignores the very interpretive principle on which the applicant relies, *i.e.*, that the words "without delay" must be read in their context and in their ordinary and grammatical sense. In my view, those words – which were introduced when s. 25 was amended, during Committee, to add what is now s. 25(1)(b) – do form part of the tests in both s. 25(1)(a) and s. 25(1)(b). I consider that the applicant's argument that "without delay" has an effect in s. 25(1) that is simply parallel to the effect of those words in s. 6(1) is misconceived. For s. 6(1), the time of an access request is the trigger for the requirement under that section to respond "without delay" to the access applicant. For s. 25(1), on the other hand, the requirement to disclose "without delay" is not triggered by the making of an access request. The s. 25(1) requirement to disclose without delay comes into play if the conditions described in s. 25(1)(a) or (b) exist. Contrary to the applicant's argument, the different contexts of s. 6(1) and s. 25(1) do materially affect the meaning to be given to the words "without delay" in each provision.

[51] Nor is the applicant's position supported by the legislative debates he relies on. I acknowledge that, as the Supreme Court of Canada affirmed in *Rizzo*, legislative debate can be relevant in interpreting a statutory provision. The legislative debate the applicant cites – most of which is reproduced below – stemmed from concerns about possible delay, on the part of public bodies, in responding to access requests under the Act. That debate arose during consideration of amendments to s. 20 of the Act, not s. 25(1). In fact, although the amendment to s. 25 that introduced the words "without delay" may have been on the Order Paper at the time the following exchange took place, s. 25 as it then stood was silent on disclosure "without delay". That is the context in which the Attorney General of the day spoke to possible delay by public bodies in responding to access requests (Hansard, June 22, 1992 (Vol. 4, No. 4), p. 2919):

> **Hon. C. Gabelmann:** We dealt with the questions of undue delay with some amendments and some sections yesterday. The general scheme is that the head of the public body must produce the information without delay. There is a 30-day provision, and then there is another 30-day provision. After 60 days it has to be treated as a new request, which is in the amendment that we're dealing with and that we've just adopted.

> The amendment ensures that where a head promises to release information in 60 days and subsequently changes his or her mind, the initial request is treated as a new formal request. As a result, the applicant will receive any information that can be released more quickly. If that's not clear, I'm prepared to do some more on it. I think it should be.
>
> **A. Warnke:** Also on section 20, although there is a general issue involved, but very briefly: as we noted in second reading, there is the media's concern about the issue of access to soliciting information and so forth. It was argued earlier from that perspective that obtaining information is not possible unless some sort of permission is granted for the release of the information. As I thought about it later, maybe I should have asked that on section 9. Nonetheless, here the media has expressed that it would like information released as soon as possible. I'm just wondering whether the media's concern about information being released as soon as possible has been considered. What sort of response is there from the ministry?
>
> **Hon. C. Gabelmann:** In respect of the concern about "as soon as possible," yesterday we added some amendments that talked about "without delay" so that there wouldn't be the temptation to hold the material until the 29th day. This section talks about material that is available to individuals through the normal course of events. That's not part of the legislation. It also says that if an individual asks for something that is scheduled to be published within 60 days, then the person has to wait for the material until that publication date.

[52] Section 25 of the Act was amended later in the same legislative proceedings without debate (including over what is meant by the words "without delay", which were added at that time). Contrary to the applicant's submission, I do not see how this legislative exchange assists his argument that the words "without delay" in the opening part of s. 25(1) have no bearing on the interpretation of s. 25(1)(a) or (b). Nor do I think the report commissioned by the government of the day, which led to the amendments at Committee stage, supports his position, even if one assumes, as the applicant does, that the report is a legitimate part of the Act's legislative history and can be considered as such.

[53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

Disclosure of information under s. 25(1)(a)

[54] The applicant's submissions on the meaning of s. 25(1)(a) focus on the word "about", which he says (relying on a dictionary definition of "about") should be interpreted to mean "on the subject of" or "concerning" (para. 87, initial submission). He says, at para. 88 of his initial submission, that information under s. 25(1)(a) "must include

all relevant information concerning that risk in order to hold the public body accountable." The applicant argues for a degree of disclosure sufficient to enable recipients of the disclosed information to have as full an understanding of the risk as the public bodies. Relying on the legislative history of s. 25 – which I do not consider to advance his argument – he says the following at para. 90 of his initial submission:

> Information is needed not simply to avoid the risk, but also to understand government decision-making in relation to the risk. Headings contained in issue notes and Cabinet submissions are illustrative of the breadth of relevant information: Issue, background, options, implications, government values and priorities, financial management considerations, legislative and legal considerations, and communications considerations.

[55] I have already mentioned that s. 25(1) was amended before the Act was enacted. The First Reading version of s. 25 spoke to disclosure of information that would "reveal the existence of a serious environmental, health or safety hazard to the public or group of people." The later amendment to s. 25, at Committee stage, introduced the concept of disclosure, not just of information that would reveal the fact that a "hazard" existed, but information "about" a risk of significant harm. This signalled some expansion of the range of information that must be disclosed "about" a risk. But it does not, in my view, go as far as the applicant's approach to the meaning of the word "about" in s. 25(1)(a) could, in light of para. 90 of his initial submission, be taken. Following the applicant's reasoning, one could argue that the word "about" captures any information that is in any way connected with a risk mentioned in s. 25(1)(a), however remote that connection might be. I believe that is further than the Legislature intended the mandatory disclosure duty under s. 25(1)(a) to go.

[56] It is not a good idea to attempt to lay down any firm and fast rules for what information will be "about" a risk identified in s. 25(1)(a) and I will certainly not try to do so here. The circumstances of each case will necessarily drive the determination, but information "about" a risk of significant harm to the environment or to the health or safety of the public or a group of people may include, but will not necessarily be limited to:

- information that discloses the existence of the risk,

- information that describes the nature of the risk and the nature and extent of any harm that is anticipated if the risk comes to fruition and harm is caused,

- information that allows the public to take or understand action necessary or possible to meet the risk or mitigate or avoid harm.

[57] At para. 104 of his initial submission, the applicant says the disputed information is about a risk of significant harm to the health or safety of the public or a group of people

> … because the decision to delay implementation of the workplace smoke ban continues a significant health risk to hospitality workers in, and patrons of, establishments where smoking is permitted.

[58] The applicant relies on an affidavit sworn by Dr. Gillian Arsenault, a Clinical Assistant Professor in the Division of Health Care and Epidemiology of the Faculty of Medicine at the University of British Columbia and the former Medical Health Officer for the Fraser Valley Health Region. The applicant also relies on an affidavit sworn by Dr. Richard Stanwick, who is the Regional Medical Health Officer for the Vancouver Island Health Authority. The public bodies did not object to the contents of either affidavit. I note that the professional medical and scientific qualifications, and experience, of Dr. Arsenault and Dr. Stanwick are evidently extensive. I have given their evidence weight on the question of the risks to health or safety of the public or restaurant and bar workers, among others, from second-hand tobacco smoke.

[59] Dr. Arsenault deposed, at para. 4 of her affidavit, that she has acted as a consultant for "regional tobacco control, and provided information and given school- and community-based talks covering tobacco-caused illness, tobacco control, and harm reduction." Paragraphs 5-7 express her opinions on health risks she considers arise from the Cabinet decision to delay implementation of the smoking regulation in bars and restaurants:

> 5. In my opinion, based on current scientific and medical knowledge, there is a clinically important risk of significant harm to the health of hospitality workers in, and patrons of, establishments where smoking is permitted ("the significant health risk").
>
> 6. The significant health risk encompasses risks of both short-term and chronic illness, which, in more severe cases, will cause complications leading to chronic disabilities and/or death.
>
> 7. The decision to delay implementation of the environmental tobacco smoke regulations announced on August 22nd, 2001 continues the significant health risk to hospitality workers in and patrons of establishments where smoking is permitted.

[60] She then goes on, in paras. 8 and 9, to describe her perception that "the public" is disappointed about the implementation delay and that "the public" feels it is owed an explanation for the decision to delay implementation.

[61] For his part, having noted that the Capital Regional District Board enacted a smoking regulation bylaw in 1996 based on his recommendation, Dr. Stanwick deposed as follows about risk to health or safety from second-hand tobacco smoke:

4. In my opinion, based on current scientific and medical knowledge, there are very few public health challenges that have the same negative impact on health and health to risk to Canadians as second-hand smoke.

5. Recent research has shown that breathing second-hand smoke for even two hours affects the blood vessels of the heart. Moreover, second-hand smoke contains at least 50 cancer-causing chemicals, of which five are so dangerous that no safe exposure levels exist. The only safe level of exposure in these circumstances is zero.

6. In addition, the American Organization of Ventilation Professions (ASHRAE), the group that establishes generally recognized ventilation standards, acknowledges that a standard high enough to protect human health cannot be achieved mechanically. Even if the ventilation standards for the automotive paint industry were applied, it would not remove the toxins in second hand smoke to a safe level although it would be difficult to maintain candles and tablecloths on the restaurant tables.

7. Delaying the implementation of the smoke ban regulations will mean that human health is compromised unnecessarily and that there is a continuing significant health risk to hospitality workers in, and patrons of, establishments where smoking is permitted.

[62] It is clear from the evidence adduced by the applicant, and from information already disclosed by the public bodies in response to the access request, that second-hand smoke presents a significant health risk to the public, including workers in environments where smoking is permitted. If the information the public bodies have refused to disclose revealed or explained, in a scientific or medical sense, the existence or gravity of that risk or associated risks, or means of mitigating those risks, then disclosure under s. 25(1)(a) could well be required. But the severed information is not of that nature. It relates rather to policy, political or legal aspects of the government's decision to delay implementation of the WCB's environmental tobacco smoke regulation. The information does not in any immediate sense disclose the existence of risks, describe their nature, describe the extent of anticipated harm, or allow the public to take or understand action necessary or possible to prevent or mitigate risks. In my view, the words "about a risk" in s. 25(1)(a) do not in this case include the government's consideration of the political and public policy tolerability of delaying curtailment of the risk involved here. I conclude that mandatory disclosure of the information withheld by the public bodies is not required under s. 25(1)(a).

Disclosure of information under s. 25(1)(b)

[63] The applicant says the starting point for applying s. 25(1)(b) should be whether the information "is related to a matter of public interest" (para. 95, initial submission). He cites Order 01-24, [2001] B.C.I.P.C.D. No. 25, which he says sets out factors that can be used to answer this question. He then contends that, if the information relates to a matter of public interest, one must determine if disclosure is "clearly" in the public interest. At paras. 100 and 109 of his initial submission, he argues that the smoking

regulation issues involved here are characterized by significant public interest and debate, involve a significant change to a public policy and have "significant potential implications". According to the applicant, these types of circumstances "are consistent with the rationale" for adding the s. 25(1)(b) disclosure provision to s. 25(1), as discussed above. He supports his s. 25(1)(b) case with the affidavit evidence discussed above.

[64] Order 01-24 dealt with the public interest waiver of fees under s. 75(5)(b) of the Act. I have no doubt that the concept of a clear "public interest" in compulsory and immediate disclosure of information under s. 25(1)(b) is not the same thing as the concept of a matter of "public interest" that warrants a fee waiver under s. 75(5)(b) in connection with an access request.

[65] As I have already indicated, s. 25(1)(b) is intended, in my view, to require disclosure of information, as being clearly in the public interest, that is of clear gravity and present significance to the public interest. The words "for any other reason" in s. 25(1)(b) also convey that this provision refers to information disclosable in the public interest other than information already encompassed by s. 25(1)(a). As an example, this could perhaps include financial information, such as information disclosing a clear and large-magnitude error or misrepresentation in published public accounts. (Hutchison J. referred, in passing, to the possibility that this kind of information might be covered by s. 25(1)(b) in *Tromp* v. *British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 761, at paras. 18 and 19.)

[66] Section 25(1)(b) does not compel disclosure of any and all policy and political advice or recommendations, and associated legal advice, in relation to a matter of significant public concern and debate. In addition to the element of need for disclosure without delay, consideration must also be given to whether the information in issue contributes, in a substantive way, to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion and making political choices.

[67] I cannot agree that s. 25(1)(b) requires mandatory disclosure of the information withheld in this case on the basis that it involves a significant shift in public policy, a shift that has attracted widespread interest and debate in this province. The information in dispute will add little or nothing, qualitatively, to that which is already known. Its immediate, mandatory disclosure is not clearly necessary in the interests of public debate and political participation.

[68] **3.5 Substance of Cabinet Deliberations** – As I noted earlier, the Premier's Office has disclosed portions of the responsive Cabinet minutes and Communities & Safety Committee minutes. The Premier's Office contends, however, that portions of the records are protected from disclosure under s. 12(1) of the Act. The relevant portions of s. 12 read as follows:

Cabinet and local public body confidences

12 (1) 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.

(2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 15 or more years,

(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) 5 or more years have passed since the decision was made or considered.

Interpretation of s. 12(1)

[69] The purpose of the s. 12(1) exception has been commented on in a number of decisions under the Act. The public interest in maintaining Cabinet confidentiality was affirmed by the Supreme Court of Canada in a decision handed down earlier this month, *Babcock* v. *Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57, where (at para. 18) McLachlin C.J.C. said the following:

> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions 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: see *Singh* v. *Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the Report of the Committee of Privy Counsellors on Ministerial Memoirs, January 1976, at p. 13:
>
>> A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations – members must feel themselves

> untrammelled by any consideration of consistency with the past or self-justification in the future ... The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardize" another – ever compare his present contribution to the common fund of counsel with a previously expressed opinion ...

> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey* v. *Ontario*, [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

[70] The importance of maintaining Cabinet confidentiality is reflected in the mandatory nature of the s. 12(1) exception.

[71] The Premier's Office emphasizes that, except where s. 12(2) applied to information in the records, under the Act it "had no choice but to refuse the Applicant access to the information falling within the ambit of s. 12(1)" (para. 4.19, initial submission). It cites Order No. 33-1995, [1995] B.C.I.P.C.D. No. 4, in which my predecessor accepted that minutes of Cabinet meetings clearly form the basis of the substance of deliberations of Cabinet, since they document discussions at Cabinet meetings.

[72] In his initial submission, the applicant restricts himself to raising a series of questions about the application of s. 12(1). He asks why s. 12(2) has not been applied to "some or all of the records in dispute", since the provincial government publicly announced its decision and has implemented it. (As I noted earlier, the Premier's Office has disclosed portions of the meeting minutes under s. 12(2).) He also asks whether the decision to disclose other Cabinet documents in their entirety operates to narrow the scope of s. 12(1). (I see no merit to the argument that a previous decision to voluntarily disclose, without access request, other Cabinet records narrows the scope of s. 12(1) here.)

[73] Paragraphs 18 and 19 of the applicant's initial submission read as follows:

> 18. Prior to the passage of the Act, the government, in its sole discretion, decided whether or not to release cabinet documents. Cabinet documents containing material that called into question subsequent government actions or otherwise raised potentially embarrassing questions were never disclosed. The information necessary to facilitate public scrutiny and accountability was kept secret.
>
> 19. Have we not come full circle? The broad interpretation of section 12(1) has once again left government with the sole discretion to decide whether or not to release Cabinet documents.

[74] It is not clear which "broad interpretation" of s. 12(1) is referred to here, although the Court of Appeal's interpretation of s. 12(1) in *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1927, undoubtedly gives s. 12(1) full meaning. That interpretation binds me. At para. 4.20 of their initial submission, the public bodies rely on para. 39 from *Aquasource*, which I reproduce below along with other relevant paragraphs:

> [39] … Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted…". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision. An exception to this is found in s. 12(2)(c) relating to background explanations or analysis which I will discuss later.
>
> …
>
> [41] It is my view that the class of things set out after "including" in s.12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications. I arrive at this conclusion with the assistance of several authorities.
>
> …
>
> [48] What then is a workable test for s.12(1) questions? The Attorney General argues, and I agree, that the Commissioner took the right approach in another case: *Inquiry re: A Request for Access to Records about the Premier's Council on Native Affairs* (2 February, 1995), Order No. 33-1995, where he said at p.5 of the decision:
>
>> The public bodies offered useful descriptions of each type of record at issue in this dispute. A "Cabinet submission" and a Treasury Board Chairman's report contain some information, now severed, that would necessarily be the object of Cabinet's deliberation with respect to "recommendations," "advice," and outlining a suggested course of action. The internal evidence of the language used, the public bodes argue, supports this argument. Furthermore, they argue, "a Cabinet submission, by its nature and content, comes within the ambit of s.12 (1)."
>>
>>> It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal' the substance of Cabinet deliberations[,] because it would permit the drawing of accurate inferences with respect to the deliberations. (Argument for the Public Bodies, pp. 9-10).
>>>
>>> I agree with this general characterization of Cabinet submissions and apply it specifically below.
>
> From that acceptance there emerges this test: Does the information sought to be disclosed form the basis for Cabinet deliberations?

[75] I pause here to note that the Nova Scotia Court of Appeal has, in *O'Connor* v. *Nova Scotia*, [2001] N.S.J. No. 360, 2001 NSCA 230 (leave to appeal denied June 12, 2002, [2001] S.C.C.A. No. 582 (S.C.C.)), declined to follow *Aquasource* in interpreting and applying the phrase "substance of deliberations" in the similar Cabinet confidences provision of Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

The evidence relating to s. 12(1)

[76] The public bodies submitted five affidavits in support of their case in this inquiry, but only para. 15 of the affidavit of Sean Gadsby, sworn March 5, 2002, speaks directly to s. 12(1). It addresses the decision of the Premier's Office to reconsider the application of s. 12(1) on the basis that the decision to delay implementation of the smoking regulation had been made and implemented, thus triggering the application of s. 12(2) to material originally withheld under s. 12(1). I also have, of course, a copy of the response from the Premier's Office to the applicant's request. Further, I have the disputed records themselves, which provide evidence of their nature. The written arguments of counsel for the public bodies also speak to this issue.

[77] Taken together, these materials enable me to conclude that the records are minutes of a Cabinet meeting and a Communities & Safety Committee meeting or consist of materials submitted to Cabinet or to Communities & Safety Committee meetings. Affidavit evidence to expressly and directly establish that Cabinet meetings or Cabinet committee meetings were in fact held – and that disputed information is protected under s. 12(1) – should, however, be the norm in such cases.

Is the Communities & Safety Committee a Cabinet committee?

[78] Paragraph 4.07 of the public bodies' initial submission asserts that the Communities & Safety Committee is a Cabinet committee, but does not elaborate on this assertion or support it with evidence. The portion of the minutes of the Communities & Safety Committee's August 22, 2001 meeting disclosed to the applicant indicates the Communities & Safety Committee had, at the time, 15 members. Six were Cabinet members and nine were members of the Legislative Assembly. The meeting was attended by four guest members of the Legislative Assembly. An official from the Premier's Office attended, as did an official from the Treasury Board Secretariat and one from Cabinet Operations.

[79] The question is raised of whether the Communities & Safety Committee is a committee of Cabinet within the meaning of s. 12(1), which refers to "the Executive Council or any of its committees". I sought further representations, and supporting evidence, from the Premier's Office on this point. The applicant made a submission in response to the further evidence and argument of the Premier's Office.

[80] The Premier's Office says the following about this issue:

> BC Order 309-1999 accepted that Treasury Board and the Priorities and Planning Committee were committees of the Executive Council. BC Order 01-14 accepted that

> Treasury Board and the Cabinet Committee on Legislation were committees of the Executive Council. Ontario [*sic*] Order 2000-013 accepted that the Agenda and Priorities Committee was a committee of the Executive Council.

[81] The Premier's Office relies on an affidavit sworn on July 22, 2002 by Joy Illington, the Deputy Cabinet Secretary. She deposed that she is the "senior official in Cabinet Operations" (para. 1). She deposed that the government decided, after being elected in May of 2001, to implement a committee system similar to that used in Alberta. She deposed that the committees in this new system "are created by the Premier's prerogative" (para. 4). There are five committees, each of which is made up of Cabinet members and private members of the Legislative Assembly. A member of Cabinet is the vice chair of each of these committees, while a member of the Legislative Assembly chairs each committee. One of these committees is the Communities & Safety Committee. The chair attends Cabinet meetings to present the results of her or his committee's deliberations. Although these committees were originally called 'Cabinet Caucus Committees', the public bodies say these committees are now called 'Government Caucus Committees'.

[82] Joy Illington deposed as follows, at para. 6:

> The mandate of each of the five government caucus committees is, within the subject area assigned to each: (1) to review and make recommendations to Cabinet on policy, legislation and programs; (2) to monitor existing programs and services through reviews of ministries' service plans; and (3) to receive public delegations. This is a mandate that other committees in the Cabinet decision-making system have had in the past.

[83] She also deposed that there are "ten committees that operate as an integral part of the Cabinet decision-making system", under the overall policy direction and co-ordination of the Agenda and Priorities Committee (para. 4). These include Treasury Board (which has some legislative foundation), the Economy and Environment Committee (which also has some legislative foundation) and the various Government Caucus committees. She deposed that the Agenda and Priorities Committee refers a policy matter to the appropriate Government Caucus committee, which considers the matter and makes recommendations to Cabinet for decision. A Government Caucus committee's consideration of a matter includes its review of "submissions intended to go to Cabinet" (para. 8). Its recommendations to Cabinet are "presented to Cabinet as minutes and in the reports given by each Chair" to Cabinet (para. 8).

[84] As for creation of the Communities & Safety Committee and other Government Caucus committees, it is not clear from Joy Illington's affidavit when or how the Communities & Safety Committee was, as she says, made a committee of Cabinet through exercise of a "prerogative" of the Premier.

[85] Joy Illington deposed that all private members who serve on these committees take the same oath to keep Cabinet confidences as do Cabinet members. She deposed that Cabinet Operations supports each committee's work by formulating agendas, distributing materials, briefing committee chairs and taking minutes of meetings.

[86] The applicant argues that simply calling a committee a 'Cabinet committee' is not enough. He also says the fact that a member of a committee is also a Cabinet member is not enough to make the committee a Cabinet committee. The Legislature could not have intended to allow the government to gain the protection of s. 12(1) through the expedient of appointing a Cabinet member to whichever committee it wishes to gain protection under s. 12(1). He notes the breadth of the mandate of the Government Caucus Committees, primarily as described in para. 6 of Joy Illington's affidavit and a June 13, 2001 press release of the Premier's Office. He contends that none of the functions of these committees suffices to transform them into Cabinet committees within the meaning of s. 12(1). At para. 10 of his submission on this issue, he says the following:

> It is submitted that the public body must prove that there is a clear nexus between the consultation, monitoring, and review activities and the substance of Cabinet deliberations before it can be said that the Government Caucus Committee is operating as a Committee of the Executive Council.

[87] I have already mentioned the historical rationale, as explained in *Babcock* and *Carey* (cited in *Babcock*), for recognizing and protecting Cabinet confidences. It is also important to examine the language of s. 12(1) and other relevant statutory provisions. As for other relevant provisions, s. 29 of the *Interpretation Act* provides that, in an enactment, the term "Executive Council" means "the Executive Council appointed under the *Constitution Act*". It says the term "'Lieutenant Governor' means the Lieutenant Governor of British Columbia and includes the Administrator of British Columbia". It defines the term "Lieutenant Governor in Council" as meaning "the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council".

[88] Section 9(1) of the *Constitution Act* provides that the Executive Council is composed of the persons whom the "Lieutenant Governor" appoints, including the "Premier of British Columbia", whom s. 9(1) designates "president of the Executive Council." Section 9(2) provides that the "Lieutenant Governor in Council" must, from among those appointed to the Executive Council under s. 9(1), designate those "officials with portfolio" (and their portfolios) and those without portfolio. Section 10(1) provides that "[a]ny of the powers and duties assigned by law to any of the officials constituting the Executive Council may, by order in council, be assigned and transferred for any period to any other of the officials." Section 11 provides for the appointment in certain circumstances, by the Lieutenant Governor in Council, of acting ministers from among the members of the Executive Council. Under s. 12, the Lieutenant Governor in Council may appoint members of the Legislative Assembly to be parliamentary secretaries to members of the Executive Council. Section 13 provides that, despite any Act, the Lieutenant Governor in Council may determine the organization of the executive government and the various ministries, including by creating or re-creating ministries and assigning statutory duties and functions between them.

[89] The government has, in the Communities & Safety Committee, created a committee composed of some members of the Legislative Assembly who are members of

Cabinet and some who are not. A member of the Legislative Assembly who is not a member of Cabinet serves as chair. A Cabinet member serves as a vice-chair. Cabinet Operations staff provide administrative support to the Communities & Safety Committee. Committee members who are not Cabinet members take a confidentiality oath comparable to that sworn by Cabinet members. It is not clear from the evidence provided by the Premier's Office whether the oath taken by Communities & Safety Committee members who are not Cabinet members relates generally to the deliberations of Cabinet – including its committees such as Treasury Board – or whether it is specific to the deliberations of the Communities & Safety Committee as a committee composed of private members and Cabinet ministers.

[90] At para. 10 of her affidavit, Joy Illington deposed that previous administrations in this province have had, and Alberta, Saskatchewan, Manitoba, Ontario and Prince Edward Island also currently have, committees that include private members as well as Cabinet members. The issue at hand is not whether the Communities & Safety Committee can be created, as must surely be so, but whether it is a committee of the Executive Council within the meaning of s. 12(1) of the Act. As indicated below in the discussion of s. 13(1), in interpreting s. 12(1), I must give due regard to the words used in s. 12(1), to the explicit purposes of the Act as articulated in s. 2(1) and to the purpose of s. 12(1) and the interests it protects, as discussed in *Babcock*.

[91] As I noted above, the Premier's Office cites Order No. 309-1999, [1999] B.C.I.P.C.D. No. 22, and Order 01-14, [2001] B.C.I.P.C.D. No. 15, but these cases are inconclusive one way or the other. The fact that the committees involved in those cases were treated as Cabinet committees does not shed light on the question of whether the Communities & Safety Committee, given its particular composition or other characteristics, is such a committee. The question of whether a committee composed of Cabinet ministers and members of the Legislative Assembly was a committee of the Executive Council was not considered in either case. Further, as regards the treatment of Treasury Board in Order No. 309-1999, I note that Treasury Board's status as a Cabinet committee has, unlike the Communities & Safety Committee, a legislative foundation in the *Financial Administration Act*. Nor is Alberta (not Ontario) Order 2000-013, [2000] A.I.P.C.D. No. 32, of real assistance. In that case, then Commissioner Robert Clark accepted, without discussion, that the Agenda and Priorities Committee of the Alberta Cabinet was a committee of that Cabinet.

[92] The Premier's Office also relies on the *Policy and Procedures Manual* published by the Ministry of Management Services. Among other things, it expresses the provincial government's interpretation of the Act. That government publication – which is being called in aid by the same government – interprets a Cabinet committee as including "one or more Cabinet members" (p. 6 of the on-line version's s. 12 discussion). The manual also says that the s. 12(1) reference to committees of Cabinet includes "all Cabinet Caucus Committees". The manual cites no supporting material for either assertion. As I have noted in a number of previous decisions, the *Policy and Procedures Manual* merely states government's policy on the interpretation and administration of the Act and it is not binding on me.

[93] More to the point is Ontario Order P-604, [1993] O.I.P.C. No. 314. Section 12(1) of the Ontario *Freedom of Information and Protection of Privacy Act* provides, among other things, that the head of a public body must refuse to disclose a record where the disclosure would reveal the substance of deliberations of the "Executive Council or its committees", the same phrase used in s. 12(1) of the Act in British Columbia. In that case, Assistant Commissioner Irwin Glasberg directly addressed the status of a committee that was not made up of ministers. He rejected the applicability of the Cabinet confidentiality exception on the ground the committee in question was not a committee of the Executive Council. He said the following at p. 7:

> Record 65 is the agenda for a meeting of the "Provincial Investment Review Committee" (the PIRC) (now called the Provincial Investment Committee). In its representations, the Ministry submits that this committee is a sub-committee of the Cabinet Committee on Economic and Labour Policy (CCLEP) and, thus, that the agenda for this session should attract the section 12(1)(a) exemption.
>
> I do not accept this submission. In my view, for a body to be considered as a "committee" for the purposes of section 12(1) of the Act, the group must be composed of Ministers where some tradition of collective ministerial responsibility and Cabinet prerogative can be invoked to justify application of this exemption. The PIRC and its successor, on the other hand, are "staff" committees which report to the CCELP but which are not made up of ministers. On this basis, I find that the agenda in question does not fall within the parameters of section 12(1) of the Act.

[94] The decision of the Saskatchewan Court of Appeal in *Re Regina and Vanguard Hutterian Brethren Inc.* (1970), 97 D.L.R. (3d) 86, also supports the view that meetings – even formally organized ones – of a committee of Cabinet members sitting with or as part of an advisory committee of non-members of Cabinet are not protected by the Crown privilege relating to Cabinet confidences. The Court of Appeal directed that *subpoenas* to four government employees could stand in the following terms (at pp. 91-92):

> … to bring with you all correspondence passing between the Government of Saskatchewan and the Rural Municipality of Wiska Creek No. 106 or the Vanguard Hutterian Brethren Inc. or the Waldeck Hutterian Brethren and Reverend Michael Entz, and minutes of the meetings of the Advisory Committee whether sitting alone or with the Cabinet Committee, which are in your possession or under your control.

[95] The above conclusion also accords with the description of the evolution of Cabinet committees in Canada in J.R. Mallory, *The Structure of Canadian Government*, rev. ed. (Toronto: Gage Publishing Ltd., 1984), at pp. 111-117. The paragraphs at pp. 113-114 quoted below illustrate how Cabinet committees evolved as an administrative means of organizing Cabinet and how, although such committees may operate in an advisory capacity to the full Cabinet, they are in every sense a body of Cabinet, bear its collective responsibilities and are fundamentally not an amalgam of persons who do and do not hold Cabinet membership:

> The reasons given in the past for cloaking the operations of Cabinet committees in secrecy was that all decisions of this sort are the collective responsibility of the Cabinet,

> whether particular ministers had primary responsibility for initiating a decision or not. As Mackenzie King once said, "Because of the general principle of collective responsibility it has always been recognized that matters [relating to the proceedings and organization of the Cabinet]…are necessarily secret….The responsibility of the Cabinet, however, remains a collective responsibility and organization into committees is merely a matter of procedural convenience." As a consequence, it was not considered appropriate to inform the public or Parliament of the composition of Cabinet committees, or whether a particular decision was taken by a Cabinet committee or by Cabinet as a whole. This position was supported by a ruling by Mr. Speaker Michener, who ruled that "an inquiry into the method by which the government arrives at its decision in cabinet is entirely out of order….As I understand the situation the decision of the government is one and indivisible. Inquiry into how it was arrived at and particularly inquiry into the cabinet process is not permitted in the house." The general principle of collective responsibility still stands, but no harm to the polity seems to have come from making the process more open.
>
> These quotations suggest the relationship of Cabinet committees to the process of Cabinet government. They are not a substitute for the Cabinet, but an elaboration of it. To facilitate the conduct of business, much of the preliminary and some of the final discussion is carried out in committees. Cabinet committees act as screening and filtering devices for the consideration of questions which are not, for one reason or another, in a form suitable for disposition in Cabinet. They may be brought directly to the committee or referred to it by Cabinet. In this way business reaches the attention of Cabinet at a time and in a form which permits of effective disposition. [footnotes omitted]

[96] I have also considered the discussion of Cabinet committees and committees external to Cabinet at pp. 63-78 of R. Dusseault and R. Borgeat, *Administrative Law – A Treatise*, vol. 1, 2nd ed. (Toronto: Carswell, 1985).

[97] Historical and jurisprudential perspectives, as well as literal and logical perspectives on the words used in s. 12(1) of the Act, viewed in conjunction with relevant provisions of the *Interpretation Act* and the *Constitution Act*, strongly compel the conclusion that a committee of the Executive Council, for the purposes of s. 12(1), means a committee that is composed of members of the Executive Council. I am not persuaded that, however desirable such committees may be, it includes advisory committees of non-Cabinet members working together with one or more Cabinet members. As I have already said, this does not mean that a committee such as the Communities and Safety Committee cannot exist. It is simply not a committee of the Executive Council under s. 12(1) and the substance of its deliberations is therefore not protected from disclosure under that particular provision. I am reinforced in this conclusion by the purposes set out in s. 2(1) of the Act and by the fact that s. 12(1) is a mandatory exception embodying the traditional rationale for Cabinet confidentiality, which did not embrace a multitude of advisory bodies with members who were not members of the Executive Council or an historical equivalent.

Application of s. 12(1) to the records

[98] I now will consider, in light of the above discussion, the two pages of minutes of the August 22, 2001 meeting of the Communities & Safety Committee. The Premier's Office withheld the last three lines of the first page under s. 12(1). These lines record the views expressed by some members of the committee about various aspects of the tobacco smoke regulation. The Premier's Office withheld three sentences on the second page of the minutes. Part of the first sentence sets out one option recommended to Cabinet. The material before me confirms that Cabinet considered that recommendation. Accordingly, the portion of the first sentence that discloses the recommended option is protected under s. 12(1), because its disclosure would reveal the substance of deliberations of Cabinet itself. The second and third sentences on the second page, however, record views expressed by members of the Communities & Safety Committee and disclosure of those views would not directly or indirectly reveal the substance of Cabinet's deliberations. These two sentences are not protected by s. 12(1). Last, the Premier's Office properly withheld a fourth sentence from page two of the minutes. That sentence consists of a recommendation to Cabinet that was considered by Cabinet, so its disclosure would reveal the substance of deliberations of Cabinet itself. It is properly withheld under s. 12(1). As indicated below, I have marked a copy of the minutes to show the portions that cannot be withheld under s. 12(1) and must be disclosed.

[99] Turning to the minutes of the August 22, 2001 Cabinet meeting, I am satisfied the Premier's Office properly withheld the information it severed from this record under s. 12(1). Disclosure of that information would reveal deliberations at that Cabinet meeting, since it would reveal the back and forth of Cabinet debate over issues considered at the meeting. Disclosure of the information, in other words, would reveal the "substance of deliberations" of Cabinet. This information is protected by s. 12(1).

[100] The Premier's Office has also properly withheld the portions of the August 2, 2001 briefing note to the Solicitor General and Labour Minister that it withheld under s. 12(1). The material before me, including *in camera* material, establishes that disclosure of the withheld information would reveal submissions to Cabinet itself.

[101] **3.6 Advice or Recommendations** – Most of the information withheld from the Ministry's records has been severed under s. 13(1) of the Act. Sections 13(1) and 13(2)(a) read as follows:

Policy advice, recommendations or draft regulations

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

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

(a) any factual material, … .

Interpretation of s. 13(1)

[102] In para. 22 of his reply submission, the applicant says that I have a "positive obligation" to interpret s. 13(1) "in a remedial manner". As I indicated above in the s. 25(1) discussion, one must, in interpreting a legislative provision, read it in context and in the ordinary and grammatical sense of the words used. I must keep in mind the guidance of s. 8 of the *Interpretation Act* and s. 2(1), the Act's purposes provision. I cannot, however, ignore the express language of the Act or supplement it with language that I think should be there.

[103] At para. 24 of the applicant's reply submission, he says the following:

> It bears repeating that other exceptions may apply to records excepted by public bodies under section 13. It is submitted that a class-based exception such as the policy advice exception was not intended to be interpreted so broadly as to render it unnecessary to apply other harm-based exceptions. This would do indirectly what one cannot do directly – treat a harm-based exception as a class-based exception.

[104] I do not understand the public bodies to be arguing that s. 13(1) should be interpreted broadly. Consistent with the above interpretive principles, it is not my role to expand or control s. 13(1) by reading it restrictively in the face of its plain language or by failing to apply it in cases where the evidence supports its application. If there is any danger in a class-based exception of this kind, one must assume that this was obvious to those who were responsible for making policy choices for, and drafting, the Act.

[105] The main thrust of the applicant's s. 13(1) argument is that the portions of the disputed records withheld under s. 13(1) are described as "options" and "implications". He says, at para. 23 of his initial submission, that "the listing of possibilities or options does not amount to advice or recommendations." The applicant also says the following at para. 24 of his initial submission:

> To hold otherwise is to unreasonably broaden the definition of advice or recommendations. One could argue that any information presented in a briefing note or other document is advice because the writer is providing advice to the recipient on the salient information to consider in the decision-making process.

[106] This is not, as it happens, an accurate picture of the kinds of options, and information about their implications, found in the disputed Ministry records. This information is not, as the applicant puts it, merely "any information".

[107] At para. 22 of his initial submission, the applicant relies on the following passage from Order 01-15, [2001] B.C.I.P.C.D. No. 16:

> This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, **in particular while the public body is considering a given issue,** by encouraging the free and frank flow of advice and recommendations. I have considered s. 13(1) in a number of orders. For example, in Order 00-08, [2000] B.C.I.P.C.D. No. 8, I said the following:

> 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**.' [applicant's emphasis]

[108] He argues that options are similar to "factual material", it seems as contemplated by s. 13(2)(a), because they amount to "a statement of fact – here are several possibilities or courses of actions to consider", as the applicant puts it. I do not find the applicant's distinction between "options" and "advice or recommendations" to be persuasive. I am not clear how an option can be 'factual' if the option has yet, by definition, to be selected, much less implemented.

[109] For their part, the public bodies say the above passage from Order 01-15 supports their position that all of the information withheld here under s. 13(1) "constitutes advice relating to a course of action, a policy choice or the exercise of a power, duty or function", as contemplated by Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37 (para. 4.31, initial submission). The public bodies argue that, although some of the information withheld under s. 13(1) consists of the "implications or consequences of various options", this material has properly been withheld as "advice" (para. 4.34, initial submission).

[110] They say that a "necessary component of giving advice about a range of options is giving guidance as to the implications or consequences of such options" (para. 4.34, initial submission). They develop this theme by contending that ordinary principles of statutory interpretation dictate that the Legislature did not intend the words "advice" and "recommendations" to be given the same meaning. If the Legislature had intended them to mean the same thing, it would not have used two different words. On this basis, the public bodies argue that "advice" is broader than "recommendations" and includes "information concerning the implications or consequences of potential courses of action, including, but not limited to, the implications of options that are not recommended" (para. 4.36, initial submission).

[111] In Order 00-08, [2000] B.C.I.P.C.D. No. 8, in the passage quoted above in Order 01-15, I said "'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" (at p. 38 of Order 00-08). It is clear from the public bodies' submissions that they believe a broader interpretation of the word "advice" is warranted than they interpret the preceding passage as suggesting. My findings on s. 13(1) in Order 00-08 were upheld on judicial review in *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 1030 (S.C.) (an appeal by the petitioner to the Court of Appeal has not been heard at the time of writing). Owen-Flood J. agreed that the word "advice" means "words offered as opinion or recommendation about future action." The College had,

much as the public bodies now do, challenged this interpretation on the basis that it gives the words "advice" and "recommendations" essentially the same meaning. The Court disagreed, noting that the views of the five medical experts consulted by the College did not advise or recommend a "specific course of action or a range of actions available to the College" (para. 131).

[112] Without commenting on the merit or utility of Estragon's advice to Vladimir, I cannot resist quoting, in passing, Owen-Flood J.'s perspective on the difficulty of distinguishing between "advice" and "recommendations", expressed at para. 133 of his reasons:

> In holding as I do, I add as *obiter* that the distinction between "advice" and "recommendations" can be difficult to describe with clarity. In Samuel Beckett's *Waiting for Godot* (New York: Random House, 1954) Estragon would be giving Vladimir "advice" if he said, "Vladimir, I have considered at length the life you lead on this bitch of an earth, and I am of the opinion that you should hang yourself tomorrow." However, Estragon would be providing Vladimir with a "recommendation" if he proposed the following: "Vladimir, I have tested the willow's branch and I am sure that your neck will break before it does. I suggest that you reinforce the branch, find a stepladder so that you can reach it, and proceed with the hanging tomorrow at sundown."

[113] The Federal Court of Appeal has recently considered the meaning of the words "advice or recommendations" in s. 21(1)(a) of the federal *Access to Information Act* ("ATIA"). That section provides that a federal government institution "may refuse to disclose" any "advice or recommendations developed by or for a government institution or a minister of the Crown". This provision is, in all material respects, the same as s. 13(1) of the British Columbia Act. I refer to *3430901 Canada Inc.* v. *Canada (Minister of Industry)*, [2002] 1 F.C. 421, [2001] F.C.J. No. 1327 (leave to appeal denied June 13, 2002, [2001] S.C.C.A. No. 537), a decision that merits discussion.

[114] An access request had been made for records created by an Industry Canada working group in evaluating applications for a licence to provide personal communications services, mostly wireless telephone services. The working group's task was to assess the various applications and report to a selection panel its findings and recommendations to the Minister of Industry as to which applicant should get the licence. The working group evaluated the applications using criteria and weightings approved by an Industry Canada official. The group reported its conclusions to the selection panel orally and gave the panel a document containing scores the working group had assigned to each application, using the approved criteria and weightings. In turn, the selection panel met and prepared notes and memorandums for the Minister. These included a spreadsheet setting out the panel's rankings of the applications, again using the approved criteria and weightings. Having reviewed this material, the Minister directed that some of the criteria be altered and that certain of the weightings be changed. These amendments affected the outcome and one of the disappointed applicants sought access to relevant records. Industry Canada refused access, a decision upheld by the Federal Court at first instance.

[115] The appellants argued in the Federal Court of Appeal that the word "advice" should be given a narrow meaning in light of s. 2(1) of the ATIA, which says exemptions from the right of access under the ATIA "should be limited and specific". Writing for the Court, Evans J.A. first acknowledged, at para. 23 (Q.L.), that the right of access under the ATIA is to be interpreted broadly in light of the accountability goals of the legislation, while exemptions to the right of access are to be given as narrow a meaning as is consistent with their purpose and the statutory language used in each case. At para. 27, he quoted from the judgement of McDonald J.A. in, *Rubin* v. *Canada (Minister of Transport)*, [1998] 2 F.C. 430 (C.A.), at para. 24:

> It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it. Where, however, there is ambiguity within a section, that is, it is open to two interpretations (as paragraph 16(1)(c) is here), then this Court must, given the presence of section 2, choose the interpretation that infringes on the public's stated right to access to information contained in section 4 of the Act the least.

[116] In relation to the appellants' argument that the word "advice" should be given a narrow interpretation, Evans J.A. said the following, at paras. 50-52:

> [50] I certainly have no difficulty with this proposition as a matter of general principle. However, an examination of the statutory context in which the word "advice" is used is not altogether helpful to the appellants. For example, by exempting "advice and [*sic*] recommendations" from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter, otherwise it would be redundant.
>
> [51] In addition, the exemption must be interpreted in light of its purposes, namely, removing impediments to the free and frank flow of communications within government departments, and ensuring that the decision-making process is not subject to the kind of intense outside scrutiny that would undermine the ability of government to discharge its essential functions: *Canadian Council of Christian Charities*, *supra*, [[1999] 4 F.C. 245 (T.D.)], at paragraphs 30-32.
>
> [52] On the basis of these considerations, I would include within the word "advice" an expression of opinion on policy-related matters, but exclude information of a largely factual nature, even though the verb "advise" is sometimes used in ordinary speech in respect of a communication that is neither normative, nor in the nature of an opinion. Thus, a police officer may say that she advised the suspect of his legal rights or, when the person in custody asked her the time, the officer advised him that it was two o'clock.

[117] At para. 55, Evans J.A. repeated his view that the protection of s. 21(1)(a) "should be reserved for the opinion, policy or normative elements of advice, and should not be extended to the facts on which it is based." I understand the word "normative" to refer in this context to a communication that establishes, or commends, a standard or norm.

[118] It is important to note that Evans J.A. was careful to restrict his comments about what "advice" is to information that is an "integral part of an institutional decision-making process", information that is not "largely factual in nature" (a point addressed in s. 13(2)(a) of the British Columbia statute), information that consists of a "range of policy options" on a specific issue, or opinion "on policy-related matters". The exclusion of information that is largely "factual" illustrates, I believe, the difficulty of defining what is "advice".

[119] The observations in *3430901 Canada Inc.* about the purpose of the s. 21(1)(a) ATIA exemption are acknowledged in Order 01-15, at para. 22, where I said that s. 13(1) is designed

> … to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[120] Also consistent with *3430901 Canada Inc.*, in Order 00-08, I acknowledged that the words "advice" and "recommendations" must be given different meanings, since the Legislature is presumed not to use redundant language in a statute. I said there, as the above passage from Order 00-08 indicates, that advice "usually" involves a communication as to "which courses of action are preferred or desirable". This view is also, I note, consistent with my predecessor's view, in Order No. 116-1996, at pp. 8-9, that s. 13(1) is intended to protect advice or recommendations "intended to be acted upon or at least considered" by the public body.

[121] Canada's leading text on access to information says that *3430901 Canada Inc.* takes "a fairly broad view of the expression 'advice or recommendations'": C. McNairn & C. Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell, 1992 (rev.)), at p. 3-25. The authors also note that the view expressed in *3430901 Canada Inc.* is at odds with interpretation of the comparable provision of Ontario's *Freedom of Information and Protection of Privacy Act*. Section 13(1) of that Act permits an institution to refuse to disclose "advice or recommendations of a public servant" or of others specified in the section.

[122] In Order 94, [1989] O.I.P.C. No. 58, Commissioner Sidney Linden (as he then was), adverting to the accountability goals of the legislation as set out in s. 1 of that Act, took a purposive approach in interpreting s. 13(1). He concluded that s. 13(1) was intended to protect the free flow of advice and recommendations within the deliberative processes involved in government decision-making and policy-making. He held that s. 13(1) was not intended to exempt all communications between public servants, even though many can be regarded as, broadly speaking, advice or recommendations.

[123] In Order 118, [1989] O.I.P.C. No. 81, it was said that the word "advice" in s. 13(1) must mean more than "information" and that "advice" generally refers to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. Order P-1147, [1996] O.I.P.C. No. 118, among others, suggests that a deliberative process that applies to existing policies, in which no new

policies are being formulated, does not engage s. 13(1). Order P-398, [1993] O.I.P.C. No. 8, suggests that, even within policy-making processes, a record that merely identifies an option without explicitly recommending it is not protected under s. 13(1). By contrast, Order P-529, [1993] O.I.P.C. No. 239, suggests that a record which sets out a series of options and their implications, but explicitly recommends one of them, is subject to s. 13(1).

[124] I agree with the authors of *Government Information: Access and Privacy* that *3430901 Canada Inc.* appears to take quite a broad view of the meaning of "advice or recommendations". I also think, however, that the Ontario interpretation of s. 13(1) has, at times, been narrow. I refer here to Order P-1147, which ousts s. 13(1) unless 'new' policies are being formulated.

[125] I also hesitate to adopt the approach in Order P-398, which the applicant urges on me, as mentioned above. It seems to me that, even if no recommendation is explicitly offered as to which option to adopt, the communication to a decision-maker of options and their implications ordinarily carries with it the implicit recommendation that one of the options should be adopted. It is implicit that all the options are possible courses of action, although the choice of options is in the discretion of the decision-maker. It seems to me that such a record conveys, at the very least, "recommendations". The record in issue in Order 01-17, [2001] B.C.I.P.C.D. No. 18, did not, it should be said, fall into this class of record.

[126] In saying that such a record communicates "recommendations", it follows that I also respectfully disagree with Evans J.A. to the extent he considered, at paras. 61-63 of *3430901 Canada Inc.*, that a record of that kind can only be said to contain "advice":

> [61] Other records sought by Telezone identify for the Minister the most important aspects of the licence applications, inform the Minister of issues that require a decision, and set out the options available to him in making a decision, together with the arguments for and against adopting them. It was argued that a public official is not giving "advice" when she simply identifies a matter for decision and sets out the options, without reaching a conclusion as to how the matter should be decided or which of the options should be selected.
>
> [62] I do not agree. First, in insisting that advice must urge a specific course of action, counsel seems to be equating "advice" with "recommendations", even though, by using both words in paragraph 21(1)(a), Parliament clearly indicated that records that do not contain "recommendations" may still fall within the exemption.
>
> [63] Second, a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process. They cannot be characterized as merely informing the Minister of matters that are largely factual in nature. Nor do I think that the use in the French text of paragraph 21(1)(a) of the

> word "avis", which is generally translated into English as "opinion", conveys a narrower meaning in this context than the word "advice" in the English version.

[127] A record presenting a "range of policy options" to a decision-maker may be normative in that respect, but I consider that, even in the absence of explicit language of recommendation, the options presented are recommendations or advice as to courses of action that arise in the context of a deliberative process within the public body.

Application of s. 13(1) to the records

[128] As the following discussion indicates, the public bodies have, with a few minor exceptions, correctly applied s. 13(1) to the records. I will note in passing that the Ministry has chosen to keep secret under s. 13(1) information that, to a notable degree, deals with public relations issues, *i.e.*, the Ministry has withheld advice or recommendations about how ministers should or could communicate to citizens what government was doing in their name and why. This information about communications strategies or positions is not of any particularly earth-shattering quality, especially now that Cabinet's decision has been implemented and made public. But the Ministry has chosen to stand its ground under s. 13(1), as it is entitled to do to the extent noted below.

[129] I will first deal with the single sentence that the Premier's Office has withheld under s. 13(1) from p. 3 of the August 2, 2001 briefing note to the Solicitor General and Labour Minister. The public bodies argue simply that the sentence "clearly constitutes advice developed for a public body" (para. 4.39, initial submission). I disagree. The sentence appears in a two-sentence paragraph about the design of karaoke rooms. The first sentence, which the Premier's Office properly disclosed, comments that "visibility standards" for karaoke rooms – to allow for public safety regulation inspections – have proved ineffective given low lighting levels and other factors. The severed sentence is comparable. It merely communicates the view, or belief, that is held by one sector involved in enforcement about how karaoke room design in fact affects certain specific aspects of inspection and enforcement. The severed sentence does not set out or imply options or recommended courses of action. It is factual material and, as provided in s. 13(2)(a), it cannot be withheld under s. 13(1).

[130] Page 2 of the Ministry's records is described in the public bodies' initial submission as having been drafted by Irwin Henderson, Director of Communications with the Ministry, in response to the Labour Minister's request for advice. The record itself is silent as to the record's authorship or the circumstances of its creation. The Ministry has not offered evidence to underpin this assertion of fact. It is, I will note again, desirable for public bodies, at least, to prove their cases with sworn evidence wherever practicable.

[131] I am unable to see how the information severed on p. 2 differs from the remainder of this record, which has correctly been disclosed to the applicant. The severed information does not offer advice or recommendations, as defined above, and I fail to see

how it would allow an accurate inference to be drawn about any advice or recommendations.

[132] Pages 16 through 20 consist, according to the public bodies' submissions, of a draft July 10, 2001 Cabinet submission, which never went to Cabinet. They assert that the submission was prepared for the Labour Minister by Ministry staff. They assert that "the purpose of this document was to give advice to the Minister, in anticipation of the matter going to Cabinet" (para. 4.38, initial submission). It is argued, also at para. 4.38, that the record's contents are "advice developed by Ministry staff for the Minister" and that the record's statement of "options and their implications clearly constitutes 'advice'".

[133] Again, I have only assertions in argument that the draft Cabinet submission was prepared for the Labour Minister in order to advise him. On its face, the record is a Cabinet submission and it is not clear how it is that the record was, despite appearances, actually created to advise the Labour Minister and not Cabinet. Having said this, I accept that, regardless of whether or not the draft submission was prepared for the Labour Minister as asserted in argument, advice or recommendations found in this draft Cabinet submission can qualify as advice or recommendations "prepared by or for a minister or a public body". The remaining question is whether the severed portions of this record are in fact advice or recommendations.

[134] Pages 17 and 18 set out three options for proceeding respecting the WCB tobacco smoke regulation. In each case, after the option is set out, the implications of choosing that option are listed. The text of the options, and the corresponding implications, have been withheld under s. 13(1). I have already mentioned the applicant's argument, at para. 23 of his initial submission, that "the listing of possibilities or options does not amount to advice or recommendations" and repeat my disagreement with this. As I indicated above, when someone lists options for a minister or a public body, the alternatives are properly characterized as recommendations. To require the record to contain the words "I recommend that you choose one of the following three options" or "I recommend that you choose the first option" threatens to allow form to trump substance. The three options presented here are implicitly, at least, recommendations. I find that the options set out on pp. 17 and 18 are covered by s. 13(1).

[135] I also find that the implications that accompany the three options are protected under s. 13(1). If they were disclosed, one could draw accurate inferences as to what the related options are, thus revealing those recommendations. The principle that s. 13(1) applies to information the disclosure of which would permit accurate inferences about underlying advice or recommendations is well recognized. See, for example, Order 01-17, at para. 21.

[136] Page 19 sets out, under the disclosed headings "Government Values and Priorities" and "Financial Management Considerations", the implications of proceeding in various ways. For the reasons just given, I find that the information severed from p. 19 is protected under s. 13(1), as its disclosure would reveal advice or recommendations. It is reasonable to conclude that, if disclosed, this information would reveal the three

options found on pp. 17 and 18. The sentence deleted from the bottom of p. 19 explicitly contains a recommendation for action. I do not, however, agree that the small amount of text severed at the top of p. 20 is protected by s. 13(1). This information appears under the heading "RECOMMENDED DECISION", but it does not, in fact, recommend anything, explicitly or implicitly. The applicant already knows that this record set out three options. The information severed from p. 20 does not, explicitly or implicitly, disclose any of the options. It does not contain advice or recommendations.

[137] Page 27 is a one-page July 17, 2001 "issues note" prepared by Gordon Williams for the Labour Minister, dealing with communications aspects of the matter. (Page 40 is a copy of this same note.) Except for three brief bulleted paragraphs, the entire note has been disclosed to the applicant. The severed paragraphs are found under the disclosed heading "ADVICE AND RECOMMENDED RESPONSE". Before considering whether s. 13(1) applies, I will step aside and deal here with the applicant's invitation, at para. 25 of his reply submission:

> Finally, the Commissioner is in a unique position to determine if a review of the records in dispute would permit an individual to draw a negative inference that the records are structured to minimize disclosure, contrary to the core purpose of the Act – to foster greater openness and accountability. The Commissioner is invited to introduce a negative inference test in his deliberations.

[138] This submission appears to flow from the fact that some of the Ministry records have a heading "ADVICE AND RECOMMENDED RESPONSE". As I understand the applicant's argument, he is concerned that this label is a colourable attempt to gain protection under s. 13(1). If the applicant is concerned that a public body might succeed in withholding information simply because it has labelled the information "advice" or "recommendations", his fears are unwarranted. A public body can attach whatever label it likes, but it remains for the public body to establish whether information under such a heading truly qualifies for protection under s. 13(1) or any other exception. Boot-strapping will not work.

[139] This is not a case of attempted boot-strapping. The paragraphs severed from pp. 27 and 40 set out recommended courses of action, or positions for the Labour Minister, respecting communications matters. This information is covered by s. 13(1).

[140] Page 30 contains two e-mails from July of 2001, small portions of which have been disclosed to the applicant. The public bodies say these e-mails deal with options, and their implications, for amendment to the tobacco smoke regulation (para. 4.38, initial submission). They also contend the severed information "consists of recommended actions". I do not agree that all of the severed information "consists of recommended actions". Parts of it contain recommendations for action, but not all of it has this character. I do accept, however, that some of the withheld information is explicit advice and recommendations, while other parts would implicitly reveal underlying advice or recommendations, in a way that justifies withholding all of the five paragraphs that have been severed under s. 13(1).

[141] One sentence and part of a second have been withheld on pp. 31, 33, 35 and 36. Those same sentences, or portions, are found in an e-mail that is repeated on these pages. This information is properly withheld under s. 13(1), as it would reveal one option that was under consideration and would therefore disclose a recommendation.

[142] The Ministry says the first paragraph on p. 42 is properly withheld under s. 13(1), but does not explain why. That paragraph is, as the Ministry notes, found in an e-mail from a Senior Policy Analyst in the Solicitor General's Ministry to a Communications Officer in the Ministry of Attorney General. The paragraph describes the history of the communications aspect of the tobacco smoke issue and refers to a Cabinet submission (which the applicant knows was made). It does not, on its face, express any advice or recommendations. Nor would its disclosure by inference reveal advice or recommendations. It is factual material in my view, such that s. 13(2)(a) applies. I conclude that s. 13(1) does not apply to this paragraph.

[143] Page 45 is an August 13, 2001 "communications note" prepared for the Solicitor General. Most of one paragraph has been withheld, properly in my view, because it sets out recommendations in a Cabinet submission. Three bulleted paragraphs of recommended positions for the Solicitor General have also been severed, again properly in my judgement. The same goes for the portions of the two different August 16, 2001 issues notes prepared for the Labour Minister, found at pp. 48 and 51, from which recommended positions have been severed under s. 13(1). The "response points" withheld from p. 57, a record prepared for the Labour Minister by Ministry communications staff, are also properly withheld under s. 13(1). Also in the realm of communications, the severed portions of the August 23, 2001 communications note prepared for the Labour Minister, found at pp. 67 and 69, contain recommended positions that have been properly withheld under s. 13(1).

[144] Last, the information severed from p. 59, an August 22, 2001 e-mail between communications staff in government, would reveal a recommended course of action for government, so it has been properly withheld under s. 13(1).

Exercise of discretion by the Ministry's head

[145] In his initial submission, the applicant says he is not aware of any consideration by the Ministry's head of his discretion to waive the protection of either s. 13(1) or s. 14. The Ministry has addressed this issue here. In an affidavit sworn on February 12, 2002, Jay Fedorak, the Ministry's Director, Information and Privacy, deposed, at para. 5, that the Ministry's head, Lee Doney, Deputy Minister, had considered the following factors in exercising his discretion:

- At the time he made the decision regarding release, a final decision about implementing the regulation had not been made;
- The records relate to an issue that is highly contentious;
- The requested records contain advice concerning possible legislative and regulatory options that is highly confidential;

- Disclosure of some of the information in advance of a final decision on the issue might have enabled third parties to interfere with the deliberative process; and
- Disclosure of the information might harm the Ministry's deliberative process in the future, as staff may become reluctant to provide advice expressing the full range of possible options and implications.

[146] I reject the applicant's argument, at para. 39 of his reply submission, that the public bodies should be required to provide evidence, in the context of their exercise of discretion, that disclosure could reasonably be expected to harm the "deliberative process" before the discretion can be exercised against disclosure. There is no warrant in s. 13(1) or elsewhere in the Act for this back-door insertion of a harms test. I agree that the head of a public body ought not to, as a matter of policy, exercise his or her discretion against disclosure of s. 13(1) information unless the head is satisfied that disclosure would harm the integrity of the deliberative process or other public interests. It is, however, quite another thing to contend that a public body should be *required* to show a reasonable expectation of harm before it can rely on s. 13(1) at the discretion-exercise stage.

[147] As I have said before, the Act does not contemplate my substituting the decision I might have reached for the head's decision. I can require a public body's head to consider the exercise of discretion where that has not been done, but I will not myself exercise that discretion. See, in this vein, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, at p. 4. Moreover, it is open to me to require a head to re-consider the exercise of discretion if she or he has exercised the discretion in bad faith or has considered irrelevant or extraneous grounds in doing so. Acknowledging the differences between the Act and the federal ATIA, I note that this approach to the review of a head's exercise of discretion is consistent with, among others, views expressed by the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 148 D.L.R. (4th) 385, and *3430901 Canada Inc.*, at paras. 77 and following.

[148] The above factors that the Ministry's head considered are pretty general (including because they refer to the records and not the s. 13(1) or s. 14 information in issue). Nor is it particularly compelling to say that the matter was controversial, since that could equally heighten the public interest in disclosure, not secrecy. It is also not clear what the head meant when he said disclosure could allow third parties to interfere in the deliberative process. Does this refer to lobbying by interest groups, directly or in the media? Bearing in mind the information actually withheld here under s. 13(1), I would hope the head was not thinking of such activity by interest groups, since that is part of the give and take of public life, not interference in government decision-making. Finally, the last factor could suggest the head did not exercise his discretion in the circumstances of the case. Having said that, the last factor must be viewed in light of the others, which also guided the head's exercise of discretion. All the factors must be taken together and in that light I have decided, after careful consideration, that I cannot interfere with the exercise of discretion in this case.

[149] In closing, I will repeat here that the head of a public body should always consider the public interest in disclosure of information that is technically protected from disclosure. I repeat for convenience some factors relevant to the exercise of discretion that I set out at p. 5 of Order No. 325-1999, noting here that the fourth factor is not very helpful where past practice – including before the Act came into force – has been to favour secrecy without considering the circumstances of each case:

> In exercising discretion, the head considers all relevant factors affecting the particular case, including:
>
> - the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;
> - the wording of the discretionary exception and the interests which the section attempts to balance;
> - whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
> - the historical practice of the public body with respect to the release of similar types of documents;
> - the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
> - whether the disclosure of the information will increase public confidence in the operation of the public body;
> - the age of the record;
> - whether there is a sympathetic or compelling need to release materials;
> - whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
> - when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

[150] These factors are found in the provincial government's *Policy and Procedures Manual* for the Act, now published on the Web by the Corporate Privacy and Information Access Branch of the Ministry of Management Services.

[151] **3.7 Solicitor Client Privilege** – The Ministry withheld all of pp. 85-88 and 90, and part of p. 89, of the Ministry records under s. 14 of the Act. That section authorizes a public body to refuse to disclose "information that is subject to solicitor client privilege". This provision incorporates both kinds of privilege recognized at common law. Section 14 has been interpreted in many orders and court decisions. I will apply here, without repetition, the principles outlined in, for example, Order 00-08.

[152] The Ministry relies here on solicitor client communication privilege, not litigation privilege. It says, at para. 4.50 of the public bodies' initial submission, that the severed information is privileged because it consists of confidential communications between lawyer and client relating directy to the seeking or giving of legal advice. It also says the Ministry's head has exercised his discretion under s. 14. (The above discussion of that issue also applies here.)

[153] The Ministry relies on the affidavit sworn by Brian Etheridge on February 6, 2002. Brian Etheridge is a lawyer employed in the Legal Services Branch of the Ministry of Attorney General. He deposed that he gave "confidential legal advice" to Jan Rossley, of the Ministry, on August 29, 2001. He gave this advice, he deposed, in response to her request for advice. Copies of pp. 85-88 of the Ministry's records form Exhibit "A" to his affidavit. He identifies these as the legal advice he gave to Jan Rossley. In light of this evidence, I conclude that pp. 85-88 of the Ministry's records were properly withheld under s. 14. In the circumstances of this case, I have reviewed those records and my review has confirmed the Ministry's position.

[154] In relation to pp. 89 and 90 of the Ministry's records, Robert Adamson deposed in his affidavit sworn on February 22, 2002, that he is employed as a Senior Legislative Counsel in the Legal Services Branch of the Ministry of Attorney General. He also deposed as follows:

> 4. In the course of my duties as Senior Legislative Counsel, I provide advice on the formulation, implementation and interpretation of legislation. My duties include the drafting of legislation, regulations and orders in council. In addition, I provide advice conerning the preparation of legislation, regulations and orders in council.
>
> 5. The drafting of legislation, regulations and orders in council requires the exercise of legal skill and judgment. Legislative Counsel are required to demonstrate an understanding of current case law, provincial and federal enactments and principles of statutory interpretation.
>
> 6. I drafted an Order in Council relating to the *Occupational Health and Safety Regulation*, a regulation enacted pursuant to the *Workers Compensation Act*, on receipt of instructions from Amy Faulkner, Policy Analyst, Ministry of Skills Development and Labour, on or about August 23, 2001.

[155] The applicant argues that it is not enough for the Ministry to simply assert that legislative counsel applies legal skill and judgement in his or her role in order for solicitor client privilege to apply. That is true – as far as it goes – just as it is true that the fact that an individual is a lawyer does not cloak everything that person does with privilege. As Thackray J. (as he then was) noted in *B.* v. *Canada*, [1995] 5 W.W.R. 374, [1995] B.C.J. No. 41 (S.C.), at para. 41 (Q.L.):

> Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[156] Having said that, I do not accept the applicant's suggestion, if I understand it correctly, that privilege should not apply if "the subject matter of the advice becomes a public record in the form of legislation or a regulation" (para. 32, reply submission).

[157] I also consider that *Idziak* v. *Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, does not assist the applicant. That case dealt with a memorandum prepared for the federal Minister of Justice regarding an extradition proceeding. The appellant claimed that the Ministry should have given him a copy of the memorandum. At para. 35 of his reply submission, the applicant says four members of the Supreme Court of Canada "preferred not to characterize the memorandum as protected by solicitor client privilege". In fact, Cory J., joined by two other members of the Court, found the memorandum to be privileged, while the other four members of the Court simply said it was not necessary to consider the issue. The comments of La Forest J. that the applicant has quoted do not assist his position that *Idziak* somehow casts doubt on the application of solicitor client privilege to the work of lawyers employed by public bodies.

[158] Robert Adamson's evidence, and the contents of pp. 89 and 90, leave me in no doubt that these pages are protected by solicitor client privilege. One of them is an August 23, 2001 memorandum from a Ministry employee to Robert Adamson; it contained the instructions referred to above in para. 6 of Robert Adamson's affidavit. That confidential communication from client to lawyer is, like p. 90, directly related to the seeking and giving of legal advice and is privileged.

[159] In closing, I note that similar communications between a government department and legislative counsel have been held in Ontario to be protected by solicitor client privilege under Ontario's *Freedom of Information and Protection of Privacy Act*. See Order P-1205, [1996] O.I.P.C. No. 234, and Order P-1570, [1998] O.I.P.C. No. 112.

4.0 CONCLUSION

[160] For the reasons given above, I make the following orders:

1. Under s. 58(3)(a) of the Act, I confirm that the duties of the Ministry under s. 10(1) of the Act have been performed,

2. Under s. 58(2)(c) of the Act, subject to para. 3, below, I require the Premier's Office to refuse access to the parts of the records that it withheld under s. 12(1) of the Act,

3. Under s. 58(2)(a) of the Act, I require the Premier's Office to give the applicant access to the portions of the minutes of the August 22, 2001 meeting of the Communities & Safety Committee shown circled and marked "release" on the copy of those minutes delivered to counsel for the public bodies with this order,

4. Under s. 58(2)(a) of the Act, I require the Premier's Office to give the applicant access to the sentence on p. 3 of the August 2, 2001 briefing note to the Solicitor General and Labour Minister that it withheld under s. 13(1) of the Act,

5. Under s. 58(2)(b) of the Act, subject to para. 6, below, I confirm the Ministry's decision that it is authorized by s. 13(1) to refuse access to the information that it withheld under s. 13(1) on pp. 17-19, 27, 30, 31, 33, 35, 36, 40, 45, 48, 51, 57, 59, 67 and 69 of the Ministry records,

6. Under s. 58(2)(a) of the Act, I require the Ministry to give the applicant access to the information that it withheld under s. 13(1) on pp. 2, 20 and 42 of the Ministry records, and

7. Under s. 58(2)(b) of the Act, I confirm the Ministry's decision that it is authorized by s. 14 to refuse access to the information that it withheld under that section on pp. 85-88, 89 and 90 of the Ministry records.

[161] In light of the fact that the public bodies have responded to the applicant's request, albeit late, no order is called for under s. 58 respecting performance of their duty to assist under s. 6(1). Similarly, in light of my finding respecting s. 25(1), no order is called for under s. 58 in that respect.

July 26, 2002

ORIGINAL SIGNED BY

____

David Loukidelis
Information and Privacy Commissioner
for British Columbia