



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

Protecting privacy. Promoting transparency.

Order F17-08

**MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL**

Celia Francis  
Adjudicator

February 21, 2017

CanLII Cite: 2017 BCIPC 09  
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 09

**Summary:** The Ministry disclosed a report in severed form, withholding some information under s. 13(1) (advice or recommendations). The adjudicator found that s. 13(1) applied to most of the withheld information. The adjudicator also found that s. 13(2)(a) (factual material), s. 13(2)(g) (final report) and s. 13(2)(m) (information cited publicly) did not apply. The adjudicator ordered the Ministry to disclose the information to which s. 13(1) does not apply.

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

**Authorities Considered: B.C.:** Order F07-17, 2007 CanLII 35478 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order F15-60, 2015 BCIPC 64 (CanLII); Order F16-32, 2017 BCIPC 35 (CanLII); Order 00-27, 2000 CanLII 14392 (BC IPC); Order F14-17, 2014 BCIPC 20 (CanLII).

**Cases Considered:** *John Doe v. Ontario (Finance)*, 2014 SCC 36; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322.

## INTRODUCTION

[1] This order arises out of the BC Government and Service Employees' Union's ("BCGEU") request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Ministry of Justice for the "original report" by Laurie Throness, MLA and Parliamentary Secretary to the Minister of Justice ("Throness report").<sup>1</sup> The Ministry of Justice told the BCGEU that the only copy of the Throness report provided to the Minister of Justice was the final version, which was available online. It also provided a link to the appropriate website.

[2] The BCGEU told the Ministry that Mr. Throness said he had submitted his report in June 2014. It said that it wanted this June report, which it called the "original report". The Ministry of Justice explained that the Ministry had received a "draft copy" of the Throness report in June 2014, but that the Minister had not. It further stated that a draft of the Throness report might no longer be in the Ministry's custody but, if it were, s. 13 of FIPPA (advice or recommendations) would apply to those portions that did not make it into the final report.

[3] The BCGEU complained about this response to the Office of the Information and Privacy Commissioner ("OIPC"), noting that a media release on the Throness review had said the review would culminate in a report to the Minister of Justice by June 30, 2014. It argued that the report available online was not the June 2014 report and that the June report should be released.<sup>2</sup>

[4] In November 2015, mediation by the OIPC resulted in the disclosure, in severed form, of what the Ministry of Justice called the "draft report submitted by Parliamentary Secretary Laurie Throness to the Ministry [of Justice] in June 2014". The Ministry of Justice told the BCGEU that it was withholding information under ss. 13 (advice or recommendations), 15 (harm to law enforcement), 16 (harm to intergovernmental relations) and 22 (harm to third-party privacy).

[5] The BCGEU requested a review of this response, arguing that the Ministry of Justice had applied the exceptions too broadly and that the public should see the "complete report". The BCGEU did not take issue with the s. 22 severing.<sup>3</sup> In December 2015, the Ministry of Justice was split into two and the Ministry of Public Safety and Solicitor General ("Ministry") took responsibility for the program area that the Throness report deals with.

[6] Mediation did not resolve the request for review and the matter proceeded to inquiry. The BCGEU and the Ministry both made submissions. In its initial submission to this inquiry, the Ministry said it had reconsidered its decision and was no longer relying on s. 16. It said it had also removed its application of s. 15,

---

<sup>1</sup> The report was on Mr. Throness's review of safety in the Corrections system.

<sup>2</sup> OIPC File F15-61163.

<sup>3</sup> OIPC File F15-64198.

except for one excerpt, which the BCGEU was not seeking.<sup>4</sup> The Ministry maintained its application of s. 13, which is now the only exception at issue here.

## **ISSUE**

[7] The issue before me is whether the Ministry is authorized by s. 13 to refuse to disclose the withheld information to the BCGEU. Under s. 57(1) of FIPPA, the Ministry has the burden of proving that the BCGEU has no right of access to the withheld information.

## **DISCUSSION**

### ***Background***

[8] The Corrections Branch (“Corrections”) is the part of the Ministry responsible for supervising adult inmates in BC correctional centres and individuals under court orders (e.g., bail, probation orders). In August 2013, the BC Government asked Laurie Throness, MLA and Parliamentary Secretary for Corrections, to conduct consultations and make recommendations to the Minister of Justice and Attorney General on safety related to correctional centres. Mr. Throness toured correctional centres, community correction offices and consulted with stakeholders. Mr. Throness’s report on his review was publicly released in December 2014.<sup>5</sup>

### ***Information in dispute***

[9] The record in dispute is called “Standing Against Violence: A Safety Review of BC Corrections” (“report”) which the Ministry disclosed in severed form. The withheld portions of the report are the information in dispute.

### ***Advice or recommendations – s. 13(1)***

[10] Section 13(1) is a discretionary exception which says that 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.” Section 13(2) of FIPPA states that a public body may not refuse to withhold certain types of information under s. 13(1). Numerous orders have considered the application of s. 13 of FIPPA, for example, Order F07-17,<sup>6</sup> which stated that:

In making a determination regarding s. 13, a public body must first determine whether the material fits within the scope [of] s. 13(1). If it does, the public body must then go on to determine whether the material falls within any of the categories set out in s. 13(2). If the records at issue are caught by one of the categories under s. 13(2), the public body must

<sup>4</sup> Ministry’s initial submission, para. 17. BCGEU confirmed this in its reply submission at para. 22.

<sup>5</sup> Ministry’s initial submission, paras. 1-14.

<sup>6</sup> Order F07-17, 2007 CanLII 35478 (BC IPC), at para 18.

not refuse disclosure under s. 13(1). If the public body determines that the material falls within s. 13(1) and is not caught by any of the s. 13(2) categories, the public body must then decide whether to exercise its discretion to refuse disclosure.

[11] Many orders and court decisions have considered the purpose and interpretation of s. 13(1). The Supreme Court of Canada has stated that the term “advice” includes an expression of opinion on policy-related matters and that policy options prepared in the course of the decision-making process fall within the meaning of “advice or recommendations”.<sup>7</sup> The leading case in BC on s. 13(1) is *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [*Physicians*]<sup>8</sup> which found that “advice” includes expert opinion on matters of fact on which a public body must make a decision for future action. The BC Court of Appeal also recognized that some degree of deliberative secrecy fosters the decision-making process.

[12] The BC Supreme Court had this to say about the type of factual information to which s. 13(1) applies:

... if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body or if the expert’s advice can be inferred from the work product it falls under s. 13(1) ... the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert’s advice and informs the decision-making process. Based on the principles articulated in *Physicians*, the documents created as part of a public body’s deliberative process are subject to protection.<sup>9</sup>

[13] In Order 01-15,<sup>10</sup> former Commissioner Loukidelis expressed the view that the purpose of s. 13(1) is 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. Previous OIPC orders have added that a public body is authorized to refuse access to information not only when it directly reveals advice or recommendations but also when it would enable an individual to draw accurate inferences about advice or recommendations.<sup>11</sup>

---

<sup>7</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at paras. 34, 46, 47. The Supreme Court of Canada also approved the lower court’s views in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 1999 CanLII 9066 (FC), that there is a distinction between advice and factual “objective information”, at paras. 50-52.

<sup>8</sup> 2002 BCCA 665.

<sup>9</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)* [PHSA], 2013 BCSC 2322, at para. 94.

<sup>10</sup> Order 01-15, 2001 CanLII 21569 (BC IPC), at para. 22.

<sup>11</sup> See, for example, Order F15-60, 2015 BCIPC 64 (CanLII), at para. 12. See also Order F16-32, 2017 BCIPC 35 (CanLII).

[14] In arriving at my decision on s. 13(1), I have considered the principles for applying s. 13(1) as set out in the court decisions and orders cited above.

*Does s. 13(1) apply?*

[15] The BCGEU acknowledged that the report at issue contains “recommendations developed for a public body”. It argued, however, that s. 13(1) does not apply to the withheld information because ss. 13(2)(g) and (m) do.<sup>12</sup>

[16] The Ministry said that the report at issue is a draft report. It argued that disclosure of the withheld information would reveal direct statements of advice and recommendations developed for the Minister, as well as factual information that would enable the drawing of accurate inferences about the advice and recommendations. The Ministry also said that Mr. Throness sent the draft report to Corrections staff for comments, fact-checking and advice, as part of the deliberative process. It argued that a comparison of the differences between the draft and final reports, including the factual information, would reveal advice Corrections staff gave Mr. Throness. For example, it said that Corrections staff provided advice about changes to structure and formatting, clarification of opinions, correction or updating of figures, and removal of certain information that could be harmful to law enforcement or to third-party privacy.<sup>13</sup>

*Analysis and finding on s. 13(1)*

[17] Statistical information – The Ministry withheld a number of statistical figures in the report at issue. The Ministry said that Corrections staff advised Mr. Throness that these figures were inaccurate or out of date and that accordingly he changed the figures for his final report.

[18] The Ministry argued, and I accept, that Mr. Throness is an expert in the Corrections system.<sup>14</sup> I also accept that Corrections staff provided Mr. Throness with some corrected or updated figures as part of commenting on the report at issue.

[19] The statistical information that the Ministry withheld later in the report precedes a withheld recommendation.<sup>15</sup> In my view, it is factual information that was integral to Mr. Throness’s analysis and was “compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing

---

<sup>12</sup> BCGEU’s response submission, para. 29.

<sup>13</sup> Ministry’s initial submission, paras. 32, 34-49.

<sup>14</sup> The Ministry noted that Mr. Throness is the parliamentary secretary for Corrections. It also said he has a Ph.D. in history from Cambridge University and wrote a book about the history of the prison system in England; Ministry’s initial submission, para. 39; Affidavit of Brent Merchant, Assistant Deputy Minister, Corrections Branch, Ministry of Public Safety and Solicitor General, paras. 11-12.

<sup>15</sup> I refer here to the withheld statistics in the middle of p. 17 of the report.

explanations necessary to the deliberative process of a public body”.<sup>16</sup> Its disclosure would, in my view, reveal Mr. Throness’s advice or recommendations regarding changes to the Corrections system or enable the drawing of an accurate inference about such information. I find that s. 13(1) applies to it.

[20] As for the statistical information that the Ministry withheld at the beginning of the report, it appears, in isolation, as background information, under the heading “Affirmations and context”.<sup>17</sup> Its purpose is clearly to provide a “snapshot” of current conditions in the Corrections system, that is, to set the scene for the discussion of Mr. Throness’s investigation, findings and recommendations, which follow in the next part of the report. The withheld statistical information at the beginning of the report is not “actual advice or recommendations”.<sup>18</sup> In my view, its disclosure would also not enable the drawing of accurate inferences of such information. I do not, in any case, consider that Corrections staff were providing Mr. Throness with “advice or recommendations”, as the courts have interpreted these terms, when they updated or corrected these statistical figures during the fact-checking process.

[21] The Ministry provided an *in camera* example of Corrections staff’s reason for changing one of these figures. However, the report itself does not refer to this reason (for example, in the form of handwritten annotations). Disclosure of this withheld figure would also not, in my view, allow the drawing of an accurate inference of Corrections staff’s reason for changing it. The same applies to the other withheld statistical information. In any case, we know that the final report reflects the updated or corrected figures which Corrections staff provided to Mr. Throness. Moreover, the final report notes that these types of figures change daily.<sup>19</sup> For all these reasons, I find that s. 13(1) does not apply to this withheld statistical information.

[22] Remaining information – The Ministry withheld some information that consists of Mr. Throness’s recommendations that do not appear in the final report. The Ministry also withheld associated reasons, expert opinions, considerations or analyses leading up to some of the withheld recommendations. Disclosure of this information would, in my view, reveal Mr. Throness’s advice or recommendations for changes to the Corrections system or enable the

---

<sup>16</sup> PHSA, at para. 94.

<sup>17</sup> I refer here to the statistical information starting at the bottom of p. 2 of the report, under the heading “statistical context”, and ending at the bottom of p. 6. In some cases, the Ministry withheld only the figures and in others it withheld partial or full sentences containing figures.

<sup>18</sup> Previous orders have found that only “actual advice or recommendations” in drafts may be withheld under s. 13(1); see Order 00-27, 2000 CanLII 14392 (BC IPC), at p. 6 and Order F14-17, 2014 BCIPC 20 (CanLII), at para. 40.

<sup>19</sup> See footnote 1, p. 3 of the final report.

drawing of accurate inferences about such information.<sup>20</sup> I find that s. 13(1) applies to this withheld information.

[23] The Ministry also withheld some text that consists of statements of fact.<sup>21</sup> It does not contain advice or recommendations, nor would its disclosure enable the drawing of an accurate inference of such information. Moreover, it appears in the introductory part of the report and is clearly there only to provide context. In addition, the Ministry disclosed some of this information in the final report.<sup>22</sup> I find that s. 13(1) does not apply to this information.

### *Section 13(2)*

[24] I will now consider whether s. 13(2) applies to the information to which I found above s. 13(1) applies. The parties raised ss. 13(2)(a), (g) and (m) which read as follows:

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

...

(g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities,

...

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy ...

### *Factual material – s. 13(2)(a)*

[25] The BC Supreme Court has interpreted the phrase “factual material” as follows:

... source materials accessed by the experts or background facts not necessary to the expert’s “advice” or the deliberative process at hand

<sup>20</sup> For example, the two withheld sentences which appear before the withheld recommendation on p. 7, the withheld sentences which appear before the withheld recommendations on p. 8, the withheld paragraphs which appear before the withheld recommendations on pp. 9 and 10, the withheld paragraph at the bottom of p. 16, the withheld sentence at the end of para. 4 on p. 17, all of p. 22.

<sup>21</sup> I refer here to the withheld sentence in the first full paragraph of p. 3, the withheld phrase in the fifth paragraph, also on p. 3, and two of the withheld phrases in paras. 1 and 2 on p. 5.

<sup>22</sup> I refer here to the withheld sentence in the first full paragraph and the withheld phrase in the fifth paragraph, both on p. 3.

would constitute “factual material” under s. 13(2)(a) and accordingly would not be protected from disclosure.

[26] The Ministry admitted that some of the withheld information is “factual in nature”. It argued, however, that the withheld information is not “factual material” for the purposes of s. 13(2)(a).<sup>23</sup> The BCGEU did not comment on this issue.

[27] I agree with the Ministry that some of the withheld information is factual. It does not consist of background facts that are “not necessary ... to the deliberative process”. Rather, the factual information is integral to Mr. Throness’s expert advice or recommendations and necessary to his deliberative process. Its disclosure would reveal his advice or recommendations, either directly or by inference. I find that s. 13(2)(a) does not apply to this information.

*Final report – s. 13(2)(g)*

[28] The parties devoted considerable energy to the question of whether the report at issue is a “draft” report or the “final” report. The BCGEU argued the report before me is the final “unpublished original report” on the “performance and efficiency” of Corrections, which Mr. Throness submitted to the Minister of Justice in June 2014. The BCGEU said that what was published in December 2014 was an amended or changed version of the “final” June report.<sup>24</sup>

[29] The Ministry argued, first, that the report before me is not about the performance and efficiency of the Corrections Branch but rather was “a project about brainstorming ideas and recommendations about how to enhance safety”. Secondly, the Ministry argued, the report at issue is not a final report but is instead a draft. It says that the final report was made public in December 2014.<sup>25</sup>

[30] I am satisfied that the report at issue here is not a “final report” for the purposes of s. 13(2)(g), but rather is a draft, for the following reasons:

- it has not been formatted in a formal way, as a finished product would be;<sup>26</sup>

---

<sup>23</sup> Ministry’s initial submission, paras. 51-62.

<sup>24</sup> BCGEU’s response submission, paras. 36-75.

<sup>25</sup> Ministry’s reply submission, paras. 6-35; Merchant affidavit; Affidavit of Shauna Rasmussen, Paralegal, Legal Services Branch, Ministry of Justice.

<sup>26</sup> For example, it has no cover page, date, table of contents, executive summary, photographs, footnotes or footers. Also, the recommendations are not numbered and the headings are inconsistent: some are in bold-face type; others are in regular-face type.



- it contains some incomplete thoughts or sentences,<sup>27</sup> as well as some notes and comments from Mr. Throness to himself about what to include in the report;<sup>28</sup>
- it does not say who the author is or to whom it is directed;
- the Ministry’s evidence is that Mr. Throness provided Ministry staff with his draft report in June 2014 for review and comment;<sup>29</sup>
- the final report, made public in December 2014, is a finished product and is different in format and content from the report in issue here.

[31] Given that the report at issue is not a “final report”, I need not consider whether it is also “on the performance or efficiency of a public body or on any of its policies or its programs or activities”.

*Information cited publicly – s. 13(2)(m)*

[32] The BCGEU said that the Minister of Justice referred publicly to the recommendations in the “unpublished original report” that Mr. Throness submitted in June 2014. The BCGEU referred to the Minister’s statements to the *Vancouver Sun* in December 2015 and in debates in the Legislature in February 2015. In its view, s. 13(2)(m) therefore applies to the report.<sup>30</sup>

[33] The Ministry disputed the BCGEU’s arguments on this point. It said that the Minister was never given the June 2014 report, so she could only have been referring to the final report, which she received in December 2014. The Ministry also said that the Minister did not cite any of the withheld information as a basis for making a decision or formulating a policy, which is a required element of s. 13(2)(m).<sup>31</sup>

[34] I find that s. 13(2)(m) does not apply to the report, for several reasons. First, the Minister referred only generally to Mr. Throness’s recommendations in the December 2015 *Vancouver Sun* article. She did not refer to any specific information in any other version of the report, such as the one at issue in this inquiry. Secondly, the Minister’s comments in the Legislature in February 2015 do not refer to a draft report. Moreover, the only evidence before me on this point is that the Minister never saw the draft report. I do not see how the Minister could refer to a draft report which she had not seen. Nor do I see why she would refer publicly to a draft report, when the final report had been made public. In addition, while I note that the Minister referred to one of Mr. Throness’s recommendations in the Legislature, the Ministry has disclosed that recommendation to the BCGEU, so that information is not at issue here.

<sup>27</sup> For example, the three withheld paragraphs in the middle of p. 20 and parts of p. 22.

<sup>28</sup> For example, the top two lines on p. 20 and all of p. 22.

<sup>29</sup> Merchant affidavit, paras. 17-21.

<sup>30</sup> BCGEU’s response submission, paras. 76-82.

<sup>31</sup> Ministry’s reply submission, paras. 6, 36-40.

*Exercise of discretion*

[35] The Ministry noted that the final report was made public. It said it exercised its discretion to disclose information in the report at issue which, in its view, was the same as that in the final report. It also said that, in disclosing the report in severed form, it decided to reveal that Mr. Throness had received advice from Corrections staff on how to restructure the report.<sup>32</sup>

[36] It is clear from the report in dispute that the Ministry conducted line-by-line severing and that it disclosed advice or recommendations in the report that it could technically have withheld under s. 13(1). I am therefore satisfied that it properly exercised its discretion in this case.

*Conclusion on s. 13(1)*

[37] I found above that s. 13(1) applies to most, but not all, of the withheld information. I also found that ss. 13(2)(a), (g) and (m) do not apply to any of the withheld information.

**CONCLUSION**

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

1. Under s. 58(2)(b) of FIPPA, subject to item 2 below, I confirm the Ministry's decision to deny BCGEU access to the information it withheld under s. 13(1)
2. Under s. 58(2)(a) of FIPPA, I have determined that the Ministry is not authorized to deny BCGEU access to some of the information it withheld under s. 13(1), as highlighted in yellow in the attached pages I provide to the Ministry with its copy of this order. I require the Ministry to give BCGEU access to this information by April 4, 2017. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

February 21, 2017

**ORIGINAL SIGNED BY**

---

Celia Francis, Adjudicator

OIPC File No.: F15-64198

---

<sup>32</sup> Ministry's initial submission, paras. 33, 63-64.