



OFFICE OF THE
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Order F18-43

**MINISTRY OF FINANCE &
MINISTRY OF ATTORNEY GENERAL**

Lisa Siew
Adjudicator

October 10, 2018

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Summary: An applicant asked the Ministry of Finance and the Ministry of Attorney General for access to records about the BC government's decision to allow the sale of alcoholic beverages in grocery stores and the new wholesale pricing model for alcoholic beverages. The Ministries disclosed some information, but withheld other information under s. 12(1) (cabinet confidences) and s. 13(1) (policy advice and recommendations) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined that ss. 12(1) or 13(1) applied to most of the information in dispute and ordered the Ministries to disclose the remainder of the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c), 12(5), 13(1), 13(2)(a) and 13(2)(c); *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

INTRODUCTION

[1] This inquiry arises out of two access requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) made by an applicant, who is a journalist, to the Ministry of Finance and the Ministry of Attorney General.¹ The applicant asked for access to records, for a specific time period, relating to the sale of alcoholic beverages in grocery stores and a new wholesale pricing model for alcoholic beverages.

¹ Formerly the Ministry of Justice.

[2] The Ministries withheld the requested records on the basis s. 12(1) (cabinet confidences) and/or s. 13(1) (policy advice or recommendations) of FIPPA applied.² The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministries' decision. During mediation, the Ministries' disclosed some information in the requested records, but continued to withhold information under ss. 12(1) and 13(1). They also claimed s. 16 (harm to intergovernmental relations or negotiations), s. 17 (harm to financial or economic interests of a public body) and s. 21 (harm to business interests of a third party) of FIPPA applied. Mediation did not resolve the issues in dispute and the applicant requested the matters proceed to inquiry.

[3] During the inquiry process, the Ministry of Attorney General identified an additional responsive record, but withheld information in this record under ss. 12(1) and 13(1) of FIPPA. The Ministries also withdrew their reliance on ss. 16, 17 and 21 of FIPPA; therefore, I will only consider the application of ss. 12(1) and 13(1) to the disputed records. The Ministries made joint submissions which included pre-approved *in camera* materials.

ISSUES

[4] The issues I must decide in this inquiry are as follows:

1. Are the Ministries required to withhold the information in dispute under s. 12(1) of FIPPA?
2. Are the Ministries authorized to withhold the information in dispute under s. 13(1) of FIPPA?

[5] Under s. 57(1) of FIPPA, the burden is on the Ministries to prove the applicant has no right of access to all or part of the records in dispute under ss. 12(1) and 13(1) of FIPPA.

DISCUSSION

Background

[6] In 2013, the Parliamentary Secretary to the Attorney General and Minister of Justice for Liquor Policy Reform conducted a review of BC's liquor policies, regulations and legislation. He issued a report which made a number of recommendations for liquor policy reform, including the development and

² For ease of reference and where it is appropriate, I will refer to the public bodies collectively as the "Ministries," although each Ministry responded and dealt with the applicant's access request separately.

implementation of a retail model that allows for the sale of alcohol in grocery stores (the Report).³

[7] As a result of the recommendations in the Report, changes were made to BC's *Liquor Control and Licensing Act*.⁴ Effective April 1, 2015, these legislative amendments enabled the BC government to allow for liquor sales in grocery stores either in a "store within a store" model or a "wine on shelf" model. The BC government also implemented a new wholesale pricing model where alcohol will be purchased by all BC liquor retailers at a common wholesale price.⁵

Records in dispute

[8] The applicant requested the Ministries provide access to records regarding the cost/benefit analysis, feasibility study and business case for: (i) the store within a store concept of liquor sales in grocery stores and VQA wine sales in grocery stores; and (ii) a new price-based wholesale pricing model for alcoholic beverages.

[9] The Ministries withheld information from the following records on the basis ss. 12(1) and/or 13(1) of FIPPA applied:

- a) A document titled "Ministry of Finance – Financial Impact Assessment – Advice to the Minister" which was drafted by Treasury Board Staff (Financial Impact Assessment).
- b) Four presentation slides prepared by the Ministry of Attorney General titled "Liquor Policy Review" or "Liquor Briefing" (Presentation One, Two, Three and Four).⁶
- c) Two draft presentation slides prepared by Ernst & Young for the Ministry of Attorney General titled "BC Wholesale Liquor" (EY Presentation One and Two).⁷
- d) A report prepared by the Liquor Distribution Branch (the LDB Report).
- e) A cabinet submission titled "Liquor Policy Review" (Cabinet Submission).

³ *BC Liquor Policy Review Final Report*: copy provided as Exhibit "C" in affidavit of Associate Deputy Minister, Ministry of Attorney General, at p. 1

⁴ Affidavit of Associate Deputy Minister, Ministry of Attorney General, at paras. 9-10.

⁵ *Ibid* at paras. 12-13.

⁶ I will refer to the slides dated December 18, 2013 as "Presentation One", the slides dated January 27, 2014 as "Presentation Two", the slides dated January 29, 2014 as "Presentation Three" and the slides dated January 30, 2014 as "Presentation Four."

⁷ I will refer to the slides dated December 4, 2013 as "EY Presentation One" and the slides dated December 13, 2013 as "EY Presentation Two".

Cabinet confidences – s. 12(1)

[10] Section 12(1) of FIPPA requires a public body to withhold information that would reveal the substance of deliberations of Executive Council (also known as Cabinet) and any of its committees.

[11] The parts of s. 12 relevant for this inquiry are as follows:

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.

12(2) Subsection (1) does not apply to

...

(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...

...

12(5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.

[12] “The purpose of s. 12(1) of FIPPA is to protect the confidentiality of the deliberations of Cabinet and its Committees, including committees designated under s. 12(5).”⁸ Past OIPC orders and court decisions have recognized the public interest in maintaining Cabinet confidentiality to ensure and encourage full discussion by Cabinet members.⁹

[13] To determine whether information is properly withheld under s. 12(1) and cannot be disclosed under s. 12(2)(c) involves a two-part analysis. First, under s. 12(1), would disclosure of the withheld information reveal the substance of deliberations of Cabinet or any of its committees? In *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, the BC Court of Appeal held that “substance of deliberations” refers to the body of

⁸ *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.

⁹ Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 69-70. *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 at para. 18 (McLachlin C.J.’s comments were made in regards to federal legislation, but previous OIPC orders recognize its applicability to interpreting s. 12 of FIPPA: for example, Order 02-38 at para. 69).

information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.¹⁰

[14] Donald, J.A. explained that the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee's deliberations.¹¹ I understand Donald, J.A. to be saying that "substance of deliberations" includes any recorded information Cabinet or one of its committees considered in deliberations.

[15] The second step in the s. 12(1) analysis is to decide if s. 12(2)(c) applies. Section 12(2)(c) states that s. 12(1) does not apply to information in a record the purpose of which is to present background explanations or analysis for consideration by Cabinet or a Cabinet committee in making a decision. For s. 12(2)(c) to apply to information that is found to be "background explanations or analysis", one of the following must also apply: (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.

[16] Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."¹² However, any information of a factual nature which is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).¹³

The parties' position on s. 12

[17] The Ministries withheld information in the Cabinet Submission, Presentation One to Four, EY Presentation One and Two and the LDB Report on the basis s. 12(1) applies.¹⁴ They say the withheld information was prepared for and submitted to Cabinet and/or the Priorities and Planning Committee.¹⁵ While the Ministries do not explicitly say so, their submissions and affidavit evidence

¹⁰ *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) [*Aquasource*] at para. 39.

¹¹ *Ibid* at para. 48.

¹² Order No. 48-1995, July 7, 1995 at p. 12. The Court in *Aquasource* confirmed that Order No. 48-1995 correctly interpreted s. 12(2)(c) in relation to s. 12(1). Other BC Orders that have taken the same approach include Order 01-02, 2001 CanLII 21556 (BC IPC).

¹³ Order No. 48-1995, July 7, 1995 at p. 13 and *Aquasource*, *supra* note 10 at para. 49.

¹⁴ Some of this information was also withheld under s. 13(1), but I will consider whether s. 13(1) applies to this information only if I find s. 12(1) does not apply.

¹⁵ Ministries' initial submission at para. 4.28.

suggests some information was also prepared for or submitted to the Treasury Board.¹⁶

[18] The Ministries claim that disclosing the information at issue would reveal directly or by inference the substance of Cabinet's and its committee's deliberations. They submit that s. 12(1) applies to the information withheld from the records at issue and that s. 12(2)(c) does not apply because the information relates directly to the issue that was to be deliberated on by Cabinet or its committees "and, as such, cannot be characterized as 'background information'."¹⁷ The Ministries discuss and provide evidence for each record, which I will discuss below.

[19] The applicant argues that the Ministries are withholding information too broadly under s. 12(1). The applicant also says the records at issue in this inquiry relate to a government decision that was made public and was implemented; therefore, s. 12(2)(c) applies and the records should be disclosed.

Committees of the Executive Council

[20] Section 12(1) only applies to the Executive Council or its committees; therefore, I must first decide whether the Priorities and Planning Committee and the Treasury Board are "committees" for the purpose of s. 12. Under s. 12(5) of FIPPA, the Lieutenant Governor in Council may designate a committee for the purposes of s. 12.¹⁸ The *Committees of the Executive Council Regulation*¹⁹ lists the Priorities and Planning Committee and the Treasury Board as designated committees during the time period requested by the applicant.²⁰ Therefore, I am satisfied the Priorities and Planning Committee and the Treasury Board were committees of the Executive Council for the purposes of s. 12.

Section 12(1) – analysis and findings

i. Cabinet Submission

Section 12(1): substance of deliberations

[21] The Ministries submit that the Cabinet Submission was prepared for and submitted to Cabinet to make a decision regarding changes to BC's liquor policies. In an affidavit, the Deputy Cabinet Secretary of the Office of the Premier

¹⁶ Ministries' initial submission at para. 4.31 and affidavit of Associate Deputy Minister, Ministry of Attorney General, at para. 29.

¹⁷ Ministries' reply submission at para. 1.

¹⁸ Order 04-34, [2004] BCIPCD No. 35 at para. 14: "Section 12 of the Act was amended in November 2002 to allow for the designation by regulation of committees of the Executive Council for the purposes of s. 12."

¹⁹ B.C. Reg. 229/2005.

²⁰ The applicant requested records from September 1, 2013 to March 7, 2014.

explains that she provides “support to the Cabinet Secretary in all aspects of the management of Cabinet and its committees.”²¹ She provides *in camera* evidence to establish that the Cabinet Submission was distributed to Cabinet on a specific date.²²

[22] The Ministries assert that the information severed from the Cabinet Submission “contains advice, recommendations and policy considerations, and sets out various options available to the Province, as well as the implications of adopting those options, including financial implications.”²³ Therefore, the Ministries say this information “clearly falls within the ambit of subsection 12(1)” of FIPPA.²⁴

[23] I accept that the Cabinet Submission was prepared for and submitted to Cabinet for consideration at one of its meetings. I have reviewed the information withheld from the Cabinet Submission and I find some of this information is part of the body of information which Cabinet considered in making a decision. This information includes advice and policy considerations and discusses the implications for options regarding changes to BC’s liquor policies, along with a recommended course of action.

[24] However, I conclude none of the information on page 127 of the Cabinet Submission qualifies as information which would reveal the substance of Cabinet’s deliberations because it is merely a list of the items or topics to be considered by Cabinet. This information reveals nothing about what Cabinet thought or may have said about those items.²⁵ My finding is consistent with past OIPC orders which have found that subject headings and agenda items that merely identify the subject of discussion without revealing the substance of those deliberations do not fall within the s. 12(1) exception.²⁶

[25] To summarize, with the exception of the information on page 127, I find disclosing the withheld information in the Cabinet Submission would reveal the substance of Cabinet’s deliberations.

²¹ Affidavit of Deputy Cabinet Secretary of the Office of the Premier at para. 2.

²² *Ibid* at para. 12.

²³ Ministries’ initial submission at paras. 4.35-4.36.

²⁴ *Ibid* at para. 4.36.

²⁵ For similar comments, see Order F08-17, 2008 CanLII 57360 at para. 19, upheld on judicial review in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112.

²⁶ Order F08-17, 2008 CanLII 57360 at para. 18-24 and Order F08-18, 2008 CanLII 57357 at paras. 46-47, both upheld either wholly or in part at *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 93-100.

Section 12(2)(c): background explanations or analysis

[26] For the reasons to follow, I find some of the s. 12(1) information in the Cabinet Submission is also the type of information that s. 12(2)(c) says cannot be withheld under s. 12(1). All of the information on page 142 of the Cabinet Submission consists of factual information about BC's current beer mark-up system and includes some discussion about that factual content.²⁷ In my view, the purpose of this information is to provide background explanations or analysis on BC's current beer mark-up system. This information does not include nor is it interwoven with advice, recommendations, policy considerations or analysis of policy options found elsewhere in the Cabinet Submission.²⁸ Therefore, I find this withheld information qualifies as "background explanation and analysis" under s. 12(2)(c).

[27] I also find the circumstances in both s. 12(2)(c)(i) and (ii) apply. It is a matter of public record that the BC government implemented and publicly announced decisions about the sale of alcoholic beverages in grocery stores and a new wholesale pricing model for alcoholic beverages.²⁹ The applicant provides a link to a BC government news release with the headline "BC outlines balanced plan for grocery store liquor sales," which discusses the Province's decision to explore liquor sales in grocery stores.³⁰ Therefore, I find that s. 12(2)(c) applies to the factual information on page 142 and this information cannot be withheld under s. 12(1).

ii. Presentation One, Two, Three and Four

Section 12(1): substance of deliberations

[28] The Ministries say these four presentation slides were provided to the Priorities and Planning Committee. The Ministry of Attorney General's Associate Deputy Minister deposes that staff of the Liquor Control and Licensing Branch created these four presentations for submission to the Priorities and Planning

²⁷ This information meets the definition of "background explanations and analysis" as defined in Order No. 48-1995, July 7, 1995 at p. 12.

²⁸ *Aquasource*, *supra* note 10 at para. 49: any information of a factual nature which is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).

²⁹ The Associate Deputy Minister, Ministry of Attorney General, acknowledges these decisions at paras. 11-13 of his affidavit.

³⁰ Applicant's submission: <<https://news.gov.bc.ca/stories/bc-outlines-balanced-plan-for-grocery-store-liquor-sales>>. This news release included additional information such as a backgrounder with a timeline for implementation of legislative and policy changes, links to two fact sheets, the final report on the BC Liquor Policy Review and the Parliamentary Secretary's grocery recommendations.

Committee.³¹ I also note that each presentation's cover page is subtitled "Priorities and Planning" or "Presentation to Priorities and Planning Committee."

[29] The Associate Deputy Minister says he accompanied the former Minister to meetings where the Priorities and Planning Committee considered this information before the issues were then dealt with by Cabinet and the Treasury Board.³² He also deposes that Cabinet decided to approve one of the options identified in Presentation Two.³³ Considering the evidence provided and the records themselves, I accept that these four presentations were prepared and submitted to the Priorities and Planning Committee and that some of this information was subsequently considered by Cabinet.

[30] I have reviewed these records and find that the majority of the withheld information is recommendations, advice and various options available to the Province regarding its liquor policies, including the implications of adopting those options.³⁴ Therefore, I find that s. 12(1) applies to this information since it would reveal the substance of deliberations of the Priorities and Planning Committee and/or Cabinet.

[31] However, there is some information in three of the four presentation slides which does not reveal the substance of Cabinet or one of its committee's deliberations.³⁵ This information merely identifies the subjects or topics to be addressed. Therefore, for the same reasons as to why s. 12(1) does not apply to page 127 of the Cabinet submission, I find that s. 12(1) does not apply to this information.

Section 12(2)(c): background explanations or analysis

[32] I also find that some of the information in three of the four presentations is "background explanations and analysis" under s. 12(2)(c).³⁶ This withheld information is the exact same information as found on page 142 of the Cabinet Submission and, therefore, the same reasons provided previously also apply here.

³¹ Affidavit of Associate Deputy Minister, Ministry of Attorney General at para. 15.

³² Affidavit of Associate Deputy Minister, Ministry of Attorney General at paras. 20 and 21.

³³ *Ibid* at para. 21.

³⁴ My finding confirms the Ministries' description of the information at paras. 4.40 and 4.42 of the Ministries' initial submission.

³⁵ This information is found at Presentation Two (pages 19 and 56), Presentation Three (page 58) and Presentation Four (page 86)

³⁶ This information is found at Presentation Two (page 49), Presentation Three (page 85) and Presentation Four (page 113).

iii. EY Presentation One and Two

Section 12(1): substance of deliberations

[33] The Ministries submit that disclosing some parts of the EY Presentations would allow accurate inferences about the substance of Cabinet and/or the Priorities and Planning Committee's deliberations.³⁷ The Ministries acknowledge that these two slide presentations were not submitted to Cabinet or its committees. However, the Ministries say the information contained in these presentation slides was used to develop and draft the Cabinet Submission which was considered by Cabinet, and to draft Presentation One to Four which were considered by the Priorities and Planning Committee.³⁸

[34] The Associate Deputy Minister deposes that the Ministry of Attorney General hired Ernst & Young to "provide the Government of British Columbia with advice concerning liquor pricing."³⁹ He says Ernst & Young provided Ministry of Attorney General staff with EY Presentation One and used Ministry feedback to revise it and provide EY Presentation Two. The Associate Deputy Minister deposes that he incorporated most of the information in EY Presentation One and Two into the presentations prepared for Cabinet and the Priorities and Planning Committee.⁴⁰ He says the information in the reports such as the financial analysis, the implications of the options and the potential impacts to industry were incorporated into submissions, or used to provide advice and recommendations, to Cabinet and to the committee.⁴¹

[35] The Ministries rely on Order F09-26 where the adjudicator accepted that s. 12(1) applied to information in a business case and a value analysis not considered by the Treasury Board.⁴² In Order F09-26, the adjudicator concluded that s. 12(1) applied because the information in those documents was used to develop other documents, or was the "same or substantially similar" to information in documents, that were submitted to and considered by the Treasury Board in making a decision on a bridge and highway project.⁴³ She found that disclosing some of this information would, therefore, allow the drawing of accurate inferences about information considered by the Treasury Board.⁴⁴

[36] I have compared the information withheld in EY Presentation One and Two with the information withheld in the Cabinet Submission and Presentations

³⁷ The Ministries have assigned page numbers 1 to 11 for EY Presentation One and page numbers 12 to 28 for EY Presentation Two.

³⁸ Ministries' initial submission at para. 4.44.

³⁹ Affidavit of Associate Deputy Minister, Ministry of Attorney General at para. 17.

⁴⁰ *Ibid* at para. 23.

⁴¹ *Ibid* at paras. 22-27.

⁴² Ministries' initial submission at para. 4.53.

⁴³ Order F09-26, 2009 CanLII 66959 (BC IPC) at paras. 21-23.

⁴⁴ *Ibid* at paras. 22-23.

One to Four. I conclude some of this information is the same or substantially similar to information in either the Cabinet Submission or one of the four presentations.⁴⁵ Therefore, although this information in the EY Presentations was not directly submitted to Cabinet or the Priorities and Planning Committee, I accept that its disclosure would allow someone to accurately infer information which formed part of the body of information considered by Cabinet and one of its committees.

[37] However, I have carefully reviewed the disputed records and find some of the information in the EY Presentations was not incorporated into documents submitted or prepared for submission to Cabinet or one of its committees.⁴⁶ It is also unclear how disclosure of this information in the EY Presentations would allow someone to draw accurate inferences about such information. Neither the Ministries nor the Associate Deputy Minister identify where this particular information appears in the information considered by Cabinet or the Priorities and Planning Committee or explain how this information is substantially similar or would allow someone to accurately infer that information.⁴⁷

[38] Instead, the evidence indicates these presentation slides were working documents and not all of this information was intended to be submitted to Cabinet or one of its committees for consideration, but was provided to Ministry of Attorney General staff for their internal discussion and feedback.⁴⁸ The fact that information from the EY Presentations was later used to develop other records considered by Cabinet or a committee does not automatically mean that s. 12(1) will apply. Instead, each case is fact-specific and evidence is needed to establish that disclosure of the withheld information would allow someone to draw accurate inferences about what information was considered by Cabinet or one of its committees.⁴⁹

⁴⁵ This information is located at EY Presentation One (pages 5, 6, 7, 8, 9, 10 and 11) and EY Presentation Two (pages 17, 18, 19, 20, 21, 22, 24, 26, 27 and 28). For example, all of the information withheld on page 8 of EY Presentation One and page 19 of EY Presentation Two is the same information that was also withheld on page 137 of the Cabinet Submission.

⁴⁶ This information is found at EY Presentation One (pages 2, 6, 7, 9, 10 and 11) and EY Presentation Two (pages 13, 17, 18, 23 and 28).

⁴⁷ For example, there is some information on page 17 of EY Presentation Two, providing an overview of an issue, which is not repeated or similar to information withheld in the Cabinet Submission or Presentations One to Four. As well, all of the information withheld on page 2 of EY Presentation One and page 13 of EY Presentation Two merely identifies the general subject matter to be addressed and is also similar to information which has already been disclosed to the applicant such as general information referring to the current state of the retail and wholesale pricing models.

⁴⁸ Both presentations are sub-titled “Draft – For Discussion” and the Associate Deputy Minister says EY Presentation One was revised using Ministry feedback to produce EY Presentation Two.

⁴⁹ Order No. 48-1995, July 7, 1995 at p. 10.

Section 12(2)(c): background explanations or analysis

[39] I also conclude that s. 12(2)(c) does not apply to the s. 12(1) information in the EY Presentations because the purpose of this information was not to present background explanations or analysis to Cabinet or its committee. Instead, I find this s. 12(1) information was intended to provide advice, recommendations, policy considerations and analysis related to a proposed option. Therefore, it is not “background explanations or analysis” under s. 12(2)(c).

iv. The Liquor Distribution Branch (LDB) Report

Section 12(1): substance of deliberations

[40] The Associate Deputy Minister provides the following information about the LDB Report:

The LDB Report was requested by LDB management in order to obtain advice with respect to how LDB should manage their information systems in relation to proposed changes to the provincial liquor pricing model. Specifically, that report was created for the purpose of [LDB] staff providing advice and recommendations to LDB management with respect to systems issues. The LDB Report was prepared after a decision in principle was made by Cabinet. However, at that time Treasury Board had not yet approved that decision.⁵⁰

[41] The Ministries withheld all of the information in the LDB Report and say disclosing it would allow someone to accurately infer the substance of information in the Cabinet Submission and Presentations One to Four.⁵¹

[42] However, the Ministries do not provide sufficient explanation or evidence to show that this information was prepared for and/or submitted to Cabinet or its committee. Instead, the Ministries say the LDB report was prepared by LDB staff for LDB management and it was drafted after Cabinet had already made a decision. The Ministries and the Associate Deputy Minister mention the Treasury Board, but do not explain whether the information in the LDB report was considered by the Treasury Board, or was substantially similar to information considered and/or prepared for the Treasury Board.

[43] I have also reviewed the information withheld in the LDB Report to see if it is the same or similar to the information that I found may be withheld under s. 12(1). The Ministries do not identify where this may be the case and I cannot see it based on my review. Aside from their assertions, they do not provide

⁵⁰ Affidavit of Associate Deputy Minister, Ministry of Attorney General, at paras. 28-29.

⁵¹ Ministries' initial submission at para. 4.63.

sufficient explanation or evidence to establish that disclosing the information in the LDB Report would allow someone to accurately infer information properly withheld under s. 12(1).⁵²

[44] Further, some of the information withheld from the LDB Report (on pages 29 to 31) identifies the title, authors/contributors and table of contents of the report. This type of information is similar to the subject or agenda items that I found previously would not reveal the substance of deliberations.

[45] For the reasons given, I find that s. 12(1) does not apply to any of the information withheld in the LDB Report. Given my finding, I do not need to consider whether this information falls under s. 12(2)(c) as “background explanation or analysis.”

v. Summary of s. 12(1) information

[46] In conclusion, I find that s. 12(1) applies to some of the disputed information. However, for the above reasons, I find s. 12(1) does not apply to information withheld on the following pages and in the following record:

- Cabinet Submission: pages 127 and 142
- Presentation Two: pages 19, 49 and 56
- Presentation Three: pages 58 and 85
- Presentation Four: pages 86 and 113
- EY Presentation One: pages 2, 6, 7, 9, 10 and 11
- EY Presentation Two: pages 13, 17, 18, 23 and 28
- The LDB Report

Advice or recommendations - s. 13

[47] There was some overlap between the Ministries’ application of ss. 12(1) and 13(1). I will only consider the application of s. 13(1) to the information that I determined could not be withheld under s. 12(1). In addition to this information, the Ministries rely on s. 13(1) to withhold some information in the Financial Impact Assessment.

[48] The parts of s. 13 that are relevant for this inquiry are as follows:

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)

⁵² The Ministries’ submission in support of this record is located at paras. 4.62-4.63.

- (a) any factual material,
- ...
- c) a statistical survey
- ...

[49] The purpose of withholding this type of advice or recommendations from access applicants is to recognize “that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries.”⁵³ In Order 01-15, former Commissioner Loukidelis said s. 13 protects “a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.”⁵⁴

[50] To determine whether information is properly withheld under s. 13(1) involves a two-part analysis. First, I must decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or a minister. If so, I will then consider if any of the categories listed in s. 13(2) applies, in which case, the public body cannot withhold the information under s. 13(1).

Section 13(1): advice or recommendations

[51] In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, the BC Court of Appeal said the term “advice” under s. 13 includes “an opinion that involves exercising judgment and skill to weigh the significance of matters of fact,” which “includes expert opinion on matters of fact on which a public body must make a decision for future action.”⁵⁵

[52] Previous decisions also say s. 13 protects information that would allow accurate inferences to be made about advice and recommendations.⁵⁶ In Order 02-38, the former Commissioner found that the implications accompanying a list of options are also protected under s. 13(1) because “if they were disclosed, one could draw accurate inferences as to what the related options are, thus revealing those recommendations.”⁵⁷

⁵³ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*] at para. 105.

⁵⁴ Order 01-15, 2001 CanLII 21569 at para. 22, also cited in Ministries’ initial submission at para. 4.70.

⁵⁵ *College of Physicians*, *supra* note 53 at para. 113, also cited in Ministries’ initial submission at para. 4.25.

⁵⁶ Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 135; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*Provincial Health Services Authority*] at para. 94.

⁵⁷ Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 135.

Section 13(2): exceptions

[53] In *Insurance Corporation of British Columbia v. Automotive Retailers Association*, Weatherill, J. considered the term “factual material” under s. 13(2) and identified when facts or background information will be protected under s. 13(1):

Section 13(2) expressly requires the disclosure of “factual material”. But where that factual material is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created, the assembly is part of the deliberative process and the resulting work product is clothed with the same protection as the opinions or advice themselves. Otherwise disclosure of the facts that have been assembled would allow an accurate inference to be drawn as to advice or recommendations developed by or for the public body.⁵⁸

[54] Similarly, in *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, Dardi, J. considered s. 13(2)(a) and differentiated “factual material” from “factual information”.⁵⁹ Dardi, J. found that s. 13(2)(a) does not apply to factual information compiled from source materials by experts, using their expertise, for the specific purpose of aiding the deliberative process.⁶⁰ She explained “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,” then it is protected under s. 13(1).⁶¹

[55] As for s. 13(2)(c), in Order F11-23, the adjudicator adopted the following definition of a “statistical survey”: a collection, interpretation and presentation of numerical data relating to the study of a topic, issue, situation or program which may include facts, methodology, data, analysis, findings and conclusions.⁶² I accept this definition of a “statistical survey”.

The parties’ position on s. 13

[56] The Ministries say the withheld information consists of advice and recommendations regarding issues related to provincial liquor policies and information systems, which was prepared by Ministry employees for the Minister of Finance, Cabinet, the Priorities and Planning Committee or the Liquor Distribution Branch.⁶³

⁵⁸ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

⁵⁹ *Provincial Health Services Authority*, *supra* note 56.

⁶⁰ *Ibid* at para. 93.

⁶¹ *Provincial Health Services Authority*, *supra* note 56 at para. 94.

⁶² Order F11-23, 2011 BCIPC No. 29 at paras. 19-23.

⁶³ Ministries’ initial submission at para. 4.74.

[57] The Ministries submit this information qualifies as “advice” as defined in the case law since it can be categorized as “opinions of Ministry officials that involve exercising judgment and skill to weigh the significance of matters of fact and/or policy” or “recommendations and advice, including policy and financial implications, options and considerations.”⁶⁴ They also say s. 13(2) does not apply to any of this information.

[58] The applicant disputes the Ministries’ claim that s. 13(1) applies and says this information should be released under s. 13(2)(a) as factual material and/or s. 13(2)(c) as a statistical survey.⁶⁵

Analysis and findings on s. 13

i. Financial Impact Assessment

[59] The Ministries rely on s. 13 to withhold some information in the Financial Impact Assessment. The information that was disclosed indicates the Financial Impact Assessment was prepared by a Treasury Board Staff analyst. It also reveals the BC government “announced that the Liquor Policy Review included a recommendation to allow liquor retail in grocery stores while maintaining the existing cap on the total number of retail outlets.”

[60] The Treasury Board’s Executive Director explains that Treasury Board Staff review submissions prepared for Cabinet and its committees and advise on the potential financial implications of any proposed changes to government policy. The Executive Director deposes that the Financial Impact Assessment was prepared by a Treasury Board Staff employee to inform and advise the Minister of Finance about the potential financial implications of adopting the recommendations arising out of the government’s review of BC’s liquor policies.⁶⁶

[61] I have reviewed the Financial Impact Assessment and I am satisfied that the withheld information is “advice” developed by a Treasury Board Staff analyst for the Minister of Finance. The analyst provides background explanations, identifies facts to consider regarding liquor retail in grocery stores and then provides his opinion and assessment of those matters. In accordance with *College of Physicians of B.C.*, I find this information qualifies as “advice” under s. 13(1) since it is opinion on matters of fact on which a public body must make a decision for future action.

[62] While some of what the analyst writes is factual in nature, I find that s. 13(2)(a) does not apply. I am satisfied this information is not “factual material” in the way described by *Provincial Health Services Authority and Insurance*

⁶⁴ Ministries’ initial submission at para. 4.77.

⁶⁵ Applicant’s submission at p. 4.

⁶⁶ Affidavit of Executive Director of Treasury Board Staff at paras. 6-10.

Corporation of British Columbia v. Automotive Retailers Association. The facts in the present case were selected by the analyst to assist the Minister of Finance in understanding the financial implications of a change to BC's liquor policy. The analyst uses these facts as the foundation for his advice to the Minister of Finance and refers to this information in his advice. Therefore, I accept that this factual information is "an integral component of the expert's advice and informs the decision-making process."⁶⁷

[63] I have also considered whether any of the other categories under s. 13(2) apply to this information. This information cannot be characterized as a statistical survey under s. 13(2)(c), as the applicant submits. The information does not consist of the collection, interpretation and presentation of numerical data.

ii. EY Presentation One and Two

[64] I find some of the withheld information in the EY Presentations is advice and recommendations under s. 13(1) because it consists of opinions Ernst & Young provided to the Ministry of Attorney General about an existing set of circumstances regarding BC's liquor policy, the implications of adopting a particular option and some suggestions for future action.⁶⁸ Although some of this information is of a factual nature, I do not find s. 13(2)(a) applies since this factual information is a necessary and integrated part of the advice.

[65] However, I conclude that s. 13(1) does not apply to all of the withheld information in these presentations. There is information which merely identifies the topics to be addressed in the reports and does not reveal, directly or indirectly, any advice or recommendations.⁶⁹

iii. LDB Report

[66] I accept the Ministries' evidence that the LDB Report was compiled and prepared by LDB staff and thus contains information that was developed by a public body. I also find most of the withheld information is advice and recommendations regarding how LDB should manage its information systems. This information outlines and discusses several options, their implications and recommends adopting one of the options.

[67] Some of this information is factual content, but I find it is not "factual material" under s. 13(2)(a). I conclude these facts were compiled by LDB staff to provide background information which is integral to the advice and

⁶⁷ *Provincial Health Services Authority*, *supra* note 56 at para. 94.

⁶⁸ This information is found on pages 6, 7, 9, 10 and 11 of EY Presentation One and pages 17 and 18 of EY Presentation Two.

⁶⁹ This information is on page 2 of EY Presentation One and pages 13 and 23 of EY Presentation Two.

recommendations in the LDB Report and critical in assisting LDB management in making a decision regarding its information systems.⁷⁰ Therefore, I am satisfied that this information may be withheld under s. 13(1).

[68] However, I find s. 13(1) does not apply to the report's title page, table of contents and the names of its authors and contributors.⁷¹ Those details do not directly reveal the advice and recommendations in the report nor can I see how they would allow someone to accurately infer any of the advice and recommendations.

iv. Cabinet Submission and Presentations Two, Three and Four

[69] I find that s. 13(1) applies to some information which the Ministries have withheld from these records.⁷² I can see that it is "information the purpose of which is to present background explanations or analysis for consideration in making a decision" so it qualifies as "advice or recommendations" in the way described in *College of Physicians of B.C.*⁷³ Although this information is factual in nature, it is not "factual material" under s. 13(2)(a). Some of these facts are referred to in a recommendation and I can see that they are an integral part of the recommendation.⁷⁴ It is also clear to me that these facts were selected to assist Cabinet and the Priorities and Planning Committee in making a decision and this information forms background information necessary for the reader to understand the analyst's recommendations.⁷⁵ Therefore, I conclude s. 13(1) applies to this information.

[70] However, I find s. 13(1) does not apply to other information that only identifies the subjects or topics to be addressed and does not contain advice or recommendations or would allow accurate inferences about such information.⁷⁶

v. Summary of s. 13(1) information

[71] In conclusion, I find s. 13(1) applies to most of the information withheld on that basis. However, for the reasons previously given, I find s. 13(1) does not apply to information withheld on page 127 of the Cabinet Submission, pages 19 and 56 of Presentation Two, page 58 of Presentation Three, page 86 of

⁷⁰ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-57, 64.

⁷¹ All of this information is located on pages 29 to 31 of the LDB Report.

⁷² This information is on page 142 of the Cabinet Submission, page 49 of Presentation Two, page 85 of Presentation Three and page 113 of Presentation Four.

⁷³ *College of Physicians*, *supra* note 53 at para. 110.

⁷⁴ This recommendation is located at page 143 of the Cabinet Submission.

⁷⁵ For a similar conclusion, see Order F18-17, 2018 BCIPC 20 at para. 28.

⁷⁶ This information is located on page 127 of the Cabinet Submission, pages 19 and 56 of Presentation Two, page 58 of Presentation Three and page 86 of Presentation Four.

Presentation Four, page 2 of EY Presentation One, pages 13 and 23 of EY Presentation Two and pages 29 to 31 of the LDB Report.

Exercise of discretion – s. 13

[72] Section 13 is a discretionary exclusion to access under FIPPA and the head of a public body must properly “exercise that discretion in deciding whether to refuse access to information, and upon proper considerations.”⁷⁷ The head of the public body must “establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception.”⁷⁸

[73] If the head of the public body has failed to exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.”⁷⁹

[74] The applicant alleges the Ministries have not exercised their discretion properly under s. 13 because they are refusing to disclose information that should be released under s. 13(2). He says “the protection for public servants to offer advice and recommendations was not intended by the legislature to be a blanket to cover any information employed in that process.”⁸⁰ I understand the applicant to be arguing that the Ministries have applied s. 13(1) too broadly to the information at issue.

[75] The applicant cites the provincial government’s *Policy and Procedures Manual for FIPPA* which sets out a non-exhaustive and non-binding list of factors for the head of a public body to consider in exercising their discretion under FIPPA. However, the applicant ultimately argues that more information should be released under s. 13(2)(a) as factual material or under s. 13(2)(c) as a statistical survey.

[76] In response, the Ministries say they appropriately applied s. 13 because they “had no discretion under s. 13 to disclose any information that was also subject to section 12 on the basis that the latter exception is a mandatory one.”⁸¹ They argue that the release of any of the information withheld under s. 13 would allow someone to accurately infer the nature of the advice and recommendations

⁷⁷ Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144. Also cited in applicant’s submission.

⁷⁸ Order No. 325-1999, October 12, 1999, [1999] BCIPCD No. 38 at p. 4.

⁷⁹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52; Also Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.

⁸⁰ Applicant’s submission at p. 3.

⁸¹ Ministries’ reply submission.

concerning liquor policy issues that were developed for Cabinet, the Priorities and Planning Committee and Treasury Board.⁸²

[77] I note that there does not appear to be anything sensitive or controversial about the information withheld under s. 13(1), especially considering Cabinet's decisions regarding changes to BC's liquor policies have been implemented and made public. However, it is not my role to determine whether the heads of the Ministries should have exercised their discretion differently to release more information within the disputed records since "the Act does not contemplate my substituting the decision I might have reached for the head's decision."⁸³ Rather, I must be satisfied that the public body "considered whether to exercise its discretion and that it did not make its decision in bad faith or for an improper purpose or took into account irrelevant considerations or failed to take into account relevant considerations."⁸⁴

[78] The Ministries took into account the purpose of s. 13 and considered whether the withheld information "is exactly the type of information that section was designed to protect, namely, internal confidential communications that were conveyed during the decision making process and were meant to convey advice relating to a required decision."⁸⁵ The Ministries also considered that s. 13(1) is not a harms-based exception which requires proof that harm may result if the severed information is disclosed.⁸⁶ Further, the Ministries indicate they considered whether releasing the information withheld under s. 13 would allow someone to accurately infer information protected under s. 12(1).⁸⁷ I am, therefore, satisfied that the Ministries reflected on whether information should be released or withheld under s. 13.

[79] There is also no evidence before me to suggest the Ministries exercised their discretion in bad faith or for an improper purpose or based on irrelevant considerations. Therefore, I conclude this is not a situation which requires me to order the head of the Ministries to reconsider the exercise of their discretion in applying s. 13(1) to the records.

⁸² Ministries' reply submission.

⁸³ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.

⁸⁴ Order F18-17, 2018 BCIPC 20 at para. 33.

⁸⁵ Ministries' submission at paras. 4.72 and 4.65-4.67.

⁸⁶ *Ibid* at para. 4.68.

⁸⁷ Ministries' reply submission at para. 2.

CONCLUSION

[80] For the reasons provided above, I make the following orders under s. 58 of FIPPA:

1. The Ministries are required, subject to paragraph 3 below, to refuse to disclose the information withheld under s. 12(1).
2. The Ministries are authorized, subject to paragraph 3 below, to refuse to disclose the information they withheld under s. 13(1).
3. The Ministries are not required or authorized by ss. 12(1) or 13(1) to refuse to disclose the withheld information on page 127 of the Cabinet Submission, pages 19 and 56 of Presentation Two, page 58 of Presentation Three, page 86 of Presentation Four, page 2 of EY Presentation One, pages 13 and 23 of EY Presentation Two and pages 29 to 31 of the LDB Report.
4. I require the Ministries to give the applicant access to the information described above in paragraph 3 by November 22, 2018. The Ministries must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

October 10, 2018

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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