OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-03

COLLEGE OF PHARMACISTS OF BRITISH COLUMBIA

Lisa Siew
Adjudicator

January 11, 2024

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Summary: The College of Pharmacists of British Columbia (College) received a request from an individual who requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to the College's investigation of a pharmacist. The College provided the individual with access to most of the information in the responsive records but withheld some information under various FIPPA exceptions to access. The individual requested a review of the College's decision. The issues between the parties were eventually narrowed down to the College's decision to withhold information in a particular record under both s. 13(1) (advice and recommendations) and s. 12(3)(b) (local public body confidences) of FIPPA. A central issue between the parties was whether the disputed record qualified as a report under s. 13(2)(k). Except for a small amount of information, the adjudicator found the College correctly applied s. 13(1) to the information at issue and that s. 13(2)(k) did not apply to the disputed record. For the small amount of information that the College was not authorized to withhold under s. 13(1), the adjudicator also found s. 12(3)(b) did not apply to this information and ordered the College to disclose it.

Statutes and sections discussed in the order: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, s 165, ss. 2(1), 4(1), 4(2), 12(3)(b), 13(1), 13(2)(a), 13(2)(k), 56(1) and Schedule 1 (definition of "officer of the Legislature"). *Health Professions Act*, RSBC 1996, c 183, ss. 1 (definition of "registrant"), 18(1), 19(1)(t), 27(1), 28(2) and 33.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an individual who is a lawyer (Lawyer) requested the College of Pharmacists of British Columbia (College) provide access to records related to the College's investigation of a pharmacist (Pharmacist).[1] The Lawyer represented the Pharmacist in the College's investigation.

[1] During the inquiry and upon request, the Lawyer clarified they were making the access request on their own behalf and not as a representative of the Pharmacist and that any indications

[2] The College provided the Lawyer with access to most of the information in the responsive records but withheld some information under ss. 15(1)(a) (disclosure harmful to a law enforcement matter) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The Lawyer requested the College reconsider its decision and release more information. The College refused to do so and added s. 13(1) (advice and recommendations) to the same information that it withheld under s. 15(1)(a).

[3] The Lawyer then requested the Office of the Information and Privacy Commissioner (OIPC) review the College's decision, including whether the College exercised its discretion "reasonably."[2] The Lawyer later clarified that they were not interested in the information withheld under s. 22(1). The College also revised its access decision and added s. 12(3)(b) (local public body confidences) to the same information that it withheld under ss. 13(1) and 15(1)(a). The OIPC's investigation and mediation process did not resolve the issues between the parties and the Lawyer requested an inquiry to determine the matters still at issue.

[4] Under s. 56(1) of FIPPA, the College later requested the Commissioner decline to hold an inquiry into the matters at issue. Section 56(1) gives the Commissioner the discretion to choose whether to hold an inquiry. As part of its s. 56(1) application, the College argued that it was plain and obvious that s. 13(1) applied to the information at issue.

[5] As the Commissioner's delegate on that matter, I determined in Order F22-27 that the upcoming inquiry would proceed because the College had not proven that it was plain and obvious that it was authorized to withhold the information at issue under s. 13(1).[3] This current inquiry is the result of my decision in Order F22-27 that the matters at issue between the parties proceed to an inquiry under Part 5 of FIPPA.

[6] As part of its submissions for this inquiry, the College clarified that it was no longer relying on s. 15(1)(a) to withhold information in the responsive records.[4] Therefore, I conclude s. 15(1)(a) is no longer at issue in this inquiry.

PRELIMINARY MATTERS

[7] Based on the parties' submissions, there are several preliminary matters that I need to address. First, the College submits that I should reject certain documents that the Lawyer provided as evidence in this inquiry. Second, the

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otherwise was done so in error (Lawyer's letter to the OIPC dated October 23, 2023). Therefore, for the purposes of this inquiry, I accept the Lawyer is the access applicant.

[2] Request for review dated May 10, 2021.

[3] 2022 BCIPC 30 (CanLII).

[4] College's initial submission at p. 2.

College contends the principle of *res judicata* applies to part of an issue in this inquiry. Third, the College argues the Lawyer is trying to re-open a previous inquiry and should not be allowed to do so. I will consider these preliminary matters below.

Should the Lawyer's evidence be excluded from this inquiry?

[8] As part of their submission, the Lawyer provided several documents to support their arguments, including correspondence between them and College staff about the access request and the investigation. The College objects to the Lawyer introducing this evidence into the inquiry. It says, "These irrelevant documents should not be admitted or should be given no weight even if admitted."[5]

[9] Section 56(1) of FIPPA gives the Commissioner or their delegate the authority to decide all matters of fact and law arising during an inquiry, which would include matters regarding the admissibility of evidence. As an administrative tribunal, the OIPC is generally not bound by the formal rules of evidence that govern judicial proceedings.[6] The Commissioner or their delegate has the authority and discretion to admit evidence that they consider relevant or appropriate for the purposes of deciding the matters at issue in an inquiry, whether or not that evidence would be accepted in a court of law.[7]

[10] In this case, I am not persuaded there is a justifiable reason to exclude the Lawyer's evidence from this inquiry. The Lawyer provided these documents to support their arguments at the inquiry. However, the weight or attention that I give to this evidence in terms of its reliability and relevance is a separate matter which is incorporated into my analysis and findings throughout this order. I also find there is no unfairness to the College in admitting this evidence. The College was given an opportunity to comment on this evidence and contradict it. Therefore, I have accepted the Lawyer's evidence for this inquiry and I will consider it along with the rest of the parties' submissions.

Does res judicata apply to part of the s. 13(1) analysis?

[11] Section 13(1) is an issue in this inquiry. The College submits that I do not have the jurisdiction to consider whether the information at issue qualifies as advice or recommendations under s. 13(1) because of the doctrine of *res judicata*. The College contends that I already decided that question in Order F22-27.

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[5] College's reply submission at para. 24.
[6] *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 at paras. 28-36.
[7] *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 (CanLII) at para. 64.

[12] The College does not describe what it means by *res judicata* or cite any relevant authorities to support its position. However, I am aware that the doctrine of *res judicata* is one of a number of common law rules and principles that aims to prevent abuse of the decision-making process and promote a finality to litigation.[8] A common justification for the doctrine of *res judicata* is that "a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue."[9]

[13] The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. The College did not identify which branch it is relying on, but based on the College's submissions, I find it is arguing issue estoppel applies here. For issue estoppel to apply, the following three requirements must be satisfied:

1. The issue in the current proceeding must be the same as the one decided in the prior decision;

2. The prior judicial decision must have been final; and

3. The parties to both proceedings, or their privies, must be the same.[10]

[14] The focus of the parties' arguments is on the second criteria, specifically whether Order F22-27 was a final decision about whether s. 13(1) applies to the information at issue. I note that a "final decision for the purposes of issue estoppel is a decision which conclusively determines the questions between the parties" and "when the decision-making forum pronouncing it has no further jurisdiction to rehear or to vary or rescind the finding."[11]

[15] The College argues Order F22-27 was a final decision on whether the information at issue qualifies as advice or recommendations under s. 13(1). For the purposes of deciding the College's s. 56(1) application, I determined in Order F22-27 that the information at issue qualified as advice and recommendations and then considered whether it was plain and obvious s. 13(2)(k) applied. I said:

> Based on the parties' submissions, I find the applicant and the College agree that the information withheld in the Record qualifies as advice and recommendations under s. 13(1). From my own review of the Record,

[8] Order F22-05, 2022 BCIPC 5 (CanLII) at para. 26, citing *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 18. I was the adjudicator that decided the inquiry resulting in Order F22-05.
[9] *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 (CanLII) at para. 50.
[10] *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 (CanLII) at para. 23
[11] Order F22-05, 2022 BCIPC 5 (CanLII) at para. 37, citing *Toronto Dominion Bank v. Lineaux*, 2005 NSCA 97 (CanLII) at para. 32, leave to appeal to the SCC dismissed with costs at 2006 CanLII 1124 (SCC).

> I conclude the withheld information consists of the Investigator's advice and recommendations to the inquiry committee about the complaint.
> …
>
> Furthermore, I also conclude that ss. 13(2)(a) to (j) and (l) to (n) do not apply…As a result, the central issue on this application is whether it is plain and obvious that s. 13(2)(k) applies to the Record. If s. 13(2)(k) does not apply, then it is clear to me, for the reasons set out above, that the College would be authorized to withhold the information at issue under s. 13(1).[12]

[16] Therefore, the College submits the only question to be resolved at this inquiry regarding s. 13 is whether the Report falls under s. 13(2)(k) as a report of a task force, committee, council or similar body established to consider any matter and make reports or recommendations to a public body.

[17] The Lawyer disputes the College's interpretation of Order F22-27 and its effect on this inquiry. The Lawyer says their submissions in Order F22-27 were for the purpose of deciding the College's s. 56(1) application. The Lawyer points out this was made very clear in its written submissions, which read, "For the purposes of this application, we do not dispute that s. 13(1) applies to the disputed information."[13] Therefore, the Lawyer submits they are not prevented from taking a different position about s. 13 at this inquiry.

[18] The Lawyer also argues the College is incorrect in relying on the doctrine of *res judicata*. The Lawyer submits Order F22-27 decided an interim application made by the College that resulted in an interlocutory or interim order.[14] The Lawyer argues these types of applications are not final decisions. Therefore, the Lawyer argues the doctrine of *res judicata* does not apply because Order F22-27 was not a final decision about whether the College was authorized to withhold the information in the Report under s. 13(1).

[19] In response, the College contends Order F22-27 was a final decision and, therefore, *res judicata* applies. It says Order F22-27 "made a final disposition of the rights of the parties in respect of the subject matter of that application – the subject matter being whether or not an inquiry under FIPPA section 56 should proceed and if so what the scope of the inquiry should be."[15] The College submits the only question to be addressed under s. 13 is whether s. 13(2)(k) applies to the Report.

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[12] Order F22-27, 2022 BCIPC 30 (CanLII) at paras. 27 and 29, citations omitted.
[13] Lawyer's submission at para. 69, emphasis in original.
[14] Applicant's submission at para. 69, citing *Cliffs Over Maple Bay Investments Ltd. (Re)*, 2011 BCCA 180 at para. 46 and *Young v. Young*, 1989 CanLII 2964 (BCCA) at paras. 10-11.
[15] College's response submission at para. 45, citing *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, 2008 BCCA 120 (CanLII) at para. 15 (this case was about determining time for filing an appeal in court).

[20] As well, based on its belief that the s. 13(1) issue was already decided in Order F22-27, the College contends the Lawyer is raising a "new issue" without permission by challenging "the applicability of section 13(1)." The College says the notice of inquiry identified the issues in this inquiry as "whether the public body is authorized to refuse to disclose the information at issue under ss. 12(3), 13(1)…of FIPPA."[16] The College argues, therefore, the scope of this inquiry "does not include any reconsideration of whether section 13(1) applies to the disputed information in the first place."[17]

[21] For the reasons that follow, I find Order F22-27 was not a final decision about s. 13(1) and the OIPC still has jurisdiction to decide whether the College was authorized to withhold the information in the Report under s. 13(1).

[22] Section 56(1) gives the Commissioner a broad discretionary power to decide whether to hold an inquiry.[18] The Commissioner or their delegate may decline to conduct an inquiry on several grounds, including that it is plain and obvious that the information at issue in the disputed records is subject to an exception to disclosure under FIPPA. If a party's s. 56(1) application is allowed, then the upcoming inquiry is cancelled.[19]

[23] However, when a party's s. 56(1) application is denied, then the OIPC's inquiry process resumes and the issues in dispute will be decided by the Commissioner or their delegate at the upcoming inquiry. In those circumstances, previous OIPC decisions have made it clear that the s. 56(1) application is not the ultimate determination of the issues in dispute between the parties and that the upcoming inquiry will be based on the evidence and arguments that the parties submit at the inquiry.[20] It is also evident that when a party's s. 56(1) application is denied, any findings made by the decision-maker in the s. 56(1) application about a FIPPA exception or provision is not a final decision and does not bind the adjudicator at the upcoming inquiry.[21]

[24] In Order F22-27 I dismissed the College's s. 56(1) application and, consistent with past orders, I ordered "the matters at issue between the parties will proceed to an inquiry under Part 5 of FIPPA so the Commissioner or their delegate can consider the parties' evidence and argument and decide whether

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[16] College's response submission at para. 49, emphasis in original.
[17] College's response submission at para. 49.
[18] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 at para. 47.
[19] For example, Order F23-23, 2023 BCIPC 27 (CanLII) at paras. 20, 35 and 86.
[20] Order F16-37, 2016 BCIPC 41 (CanLII) at paras. 32-33 and Decision F10-02, 2010 BCIPC 19 (CanLII) at para. 13.
[21] Order F17-29, 2017 BCIPC 31 (CanLII), which resulted from the decision in Order F16-37, 2016 BCIPC 41 (CanLII) to deny the public body's s. 56(1) application. See also Order F10-41, 2010 CanLII 77327 (BC IPC) which is the inquiry that resulted from Decision F10-02, 2010 BCIPC 19 (CanLII).

FIPPA authorizes the College to refuse access to the information at issue."[22] I also specified that the central issue in the s. 56 application was "whether it is plain and obvious that s. 13(2)(k) applies to the Record."[23] Therefore, any findings or opinions about s. 13(1) in Order F22-27 were for the sole purpose of deciding the College's s. 56(1) application. Order F22-27 makes it clear that the upcoming inquiry is the forum that will make any final determinations about the issues in dispute between the parties, including s. 13(1).

[25] Furthermore, Order F22-27 did not narrow the scope of s. 13(1) for the upcoming inquiry. If that was the intention, then I would have said so in that order. Instead, the notice of inquiry issued to the parties in this current inquiry listed s. 13(1) as an issue. I understand the College thinks the wording of the notice of inquiry supports its arguments; however, I am not persuaded that it does so. The determination as to "whether the public body is authorized to refuse to disclose the information at issue" under s. 13(1) involves a two-step analysis, starting with whether the information at issue would reveal advice or recommendations. For this inquiry, the Lawyer has not conceded that point, so it is still at issue between the parties.

[26] To conclude, I find Order F22-27 was not a final decision about s. 13(1). It did not conclusively determine the matters at issue between the parties and instead ordered the scheduled inquiry to proceed so the parties could make submissions about those matters. Therefore, my jurisdiction in this inquiry includes a full consideration of s. 13(1) and, consistent with past OIPC orders, I am not bound by any findings made in Order F22-27. Instead, my findings about s. 13(1) will be based on the parties' submissions and evidence at this inquiry.

Does the principle of functus officio apply?

[27] The College submits the Lawyer is trying to reopen Order F22-27 after the Lawyer conceded the information withheld in the Report is protected under s. 13(1). The College says Order F22-27 cannot be reopened because the principle of *functus officio* applies.[24] The College does not describe *functus officio*, but I note the College cites an OIPC order which describes it as follows: "In general, once an administrative tribunal has made a final decision on a matter, it is considered to be '*functus officio*' and the tribunal cannot revisit it."[25]

[28] I also note the OIPC order cited by the College identified the following exceptions to *functus officio*: (1) where there has been a slip in drawing up the decision, and (2) where there was an error in expressing the manifest intention of

[22] Order F22-27, 2022 BCIPC 30 (CanLII) at para. 37.
[23] Order F22-27, 2022 BCIPC 30 (CanLII) at para. 29.
[24] College's response submission at para. 46, citing Order F20-25, 2020 BCIPC 30 (CanLII) at para. 7.
[25] Order F20-25, 2020 BCIPC 30 (CanLII) at para. 5.

the decision-maker.[26] The College submits none of the exceptions to *functus officio* apply here; therefore, it says Order F22-27 cannot be reopened by the Lawyer.

[29] I am not persuaded the Lawyer is attempting to reopen Order F22-27 by now arguing the information withheld in the Report would not reveal advice or recommendations under s. 13(1). The College contends Order F22-27 cannot be reopened because the principle of *functus officio* applies and there was no error in expressing the manifest intention of the decision-maker. However, Order F22-27 made a final decision about the College's s. 56(1) application to have the present inquiry cancelled. As discussed previously, Order F22-27 denied the College's s. 56(1) application and the Lawyer is not challenging that decision. Therefore, I conclude the principle of *functus officio* does not apply here.

ISSUES AND BURDEN OF PROOF

[30] The issues I must decide in this inquiry are the following:

1. Is the College authorized to refuse to disclose the information at issue under s. 13(1)? If so, did the College exercise its discretion under s. 13(1) appropriately?

2. Is the College authorized to refuse to disclose the information at issue under s. 12(3)(b)?

[31] Section 57(1) of FIPPA places the burden on the College to prove the Lawyer has no right of access to the information withheld under ss. 13(1) and 12(3)(b).

DISCUSSION

Background

[32] The *Health Professions Act* (*HPA*)[27] governs the licensing and discipline of persons engaged in designated health professions in British Columbia.[28] The practice of pharmacy is a designated profession under the *HPA*.[29] The College is a self-governing body established under the *HPA* to regulate the practice of

[26] Order F20-25, 2002 BCIPC 30 (CanLII) at para. 7.
[27] RSBC 1996, c. 183. This was the version of the *HPA* in force at the time of the events central to this inquiry. According to the College, the HPA will be replaced when the *Health Professions and Occupations Act*, SBC 2022, c. 43, is brought into force by regulation.
[28] The information in this background section is compiled from the parties' submissions and evidence and information disclosed in the records.
[29] Health Professions Designation Regulation, BC Reg 270/2008 at s. 2(3)(d).

pharmacy, which includes services or activities that may be provided or performed by a pharmacist.[30]

[33] As part of its regulatory functions, the College is required to investigate complaints made against a registrant in accordance with Part 3 of the *HPA*. A "registrant" refers to a person who is granted registration as a member of a health profession college designated under the *HPA*. A person who wishes to make a complaint against a registrant must deliver the complaint in writing to the College's registrar (Registrar).[31]

[34] Subject to certain exceptions, when the Registrar receives a complaint about a registrant, the Registrar must deliver a copy of the complaint to the College's inquiry committee, along with the Registrar's assessment of the complaint and any recommendations for the disposition of the complaint.[32] The inquiry committee is then required to investigate the matter raised by the complainant as soon as possible.[33] However, the inquiry committee can also decide on its own motion to investigate a registrant for certain matters, including a contravention of the *HPA*, the regulations or the bylaws.[34]

[35] Following the completion of an investigation, an inquiry committee may take one of the following four actions under s. 33(6) of the *HPA* to dispose of the matter:

a) take no further action if the inquiry committee is of the view that the conduct or competence to which the matter relates is satisfactory;

b) take any action it considers appropriate to resolve a matter between a complainant and a registrant;

c) act under s. 36 of the *HPA* to seek a consent agreement with remedial terms; or

d) direct the issuance of a citation for a discipline hearing under s. 37 of the *HPA*.

[36] The Pharmacist is a registrant of the College. An incident involving the Pharmacist's practice of pharmacy was reported to the College, but the individual who reported the incident declined to pursue a formal complaint. The College's inquiry committee (Inquiry Committee) approved a recommendation to investigate the matter on its own motion.

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[30] *HPA* at s. 25.8.
[31] *HPA* at s. 32(1).
[32] *HPA* at ss. 32(2) and (3).
[33] *HPA* at s. 33(1).
[34] *HPA* at s. 33(4)(a).

[37] A College investigator (Investigator) conducted the investigation and interviewed the Pharmacist and several other individuals. The Pharmacist later retained the Lawyer to represent them in the investigation and to make submissions on their behalf. The Investigator drafted a document titled "Complaint Assessment Recommendation and Rationale" which was about the investigation and its results. A copy of this document was provided to the Inquiry Committee for their review and consideration.

[38] At the end of its investigation, the Inquiry Committee sought a consent agreement with the Pharmacist under s. 33(6)(c) of the *HPA* which allows an inquiry committee to request that the registrant under investigation consent to several remedial conditions. The Pharmacist agreed to the proposed consent agreement and the College closed its file on the matter.

Record and information at issue

[39] The responsive records total 299 pages, which includes a 21-page document titled, "Complaint Assessment Recommendation and Rationale." The parties refer to this document as a report and, for ease of reference, I will refer to it as the Report.[35] The College disclosed most of the information in the Report and its appendices. The information at issue for this inquiry is found on 7 pages of the Report.[36]

Advice and recommendations – s. 13

[40] The College withheld all the information at issue in the Report under s. 13(1). Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or minister. Previous OIPC orders recognize that s. 13(1) protects "a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."[37]

[41] The analysis under s. 13(1) involves two stages. To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. If I find the information at issue would reveal advice or recommendations under s. 13(1), then the next step is to consider if any of the categories or circumstances listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under

[35] The Report is found at pp. 147-167 of the records.
[36] Information at issue located on pp. 160, 162, 163, 164, 165, 166, 167 of the records. The information withheld in the appendices is not at issue in this inquiry.
[37] For example, Order 01-15, 2001 CanLII 21569 at para. 22.

s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

Step one: would disclosure reveal advice or recommendations?

[42] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. The term "recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.[38] The term "advice" has a broader meaning than "recommendations."[39] "Advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.[40]

Is s. 13(1) limited to advice or recommendations that are policy related?

[43] The Lawyer submits s. 13(1) applies only to "policy advice or recommendations" and that "the purpose of s. 13 is to protect certain policy advice or recommendations, not all advice or recommendations."[41] As support for their interpretation of s. 13(1), the Lawyer points to the heading for s. 13 which reads "policy advice and recommendations." The Lawyer also relies on the "context and scheme of FIPPA" and some of the exceptions under s. 13(2) which the Lawyer describes as "policy-oriented information."[42] Applying this interpretation, the Lawyer contends the information at issue does not consist of policy advice or recommendations, but recommendations about the complaint that are not policy related; therefore, the Lawyer submits s. 13(1) does not apply.[43]

[44] The College disagrees with the Lawyer's interpretation of s. 13(1). It says this interpretation is not consistent with previous OIPC orders, case law and statutory interpretation principles. The College cites s. 11 of the *Interpretation Act* which the College interprets to mean section headings in an enactment are "not part of the enactment" and "must be considered to have been added editorially for convenience of reference only."[44] The College also relies on and distinguishes some court cases and discusses the legislative history of s. 13 to argue the heading of this section is not to be considered in interpreting and applying s. 13. I will discuss those submissions in detail further below.

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[38] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.
[39] *Ibid* at para. 24.
[40] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 113.
[41] Lawyer's submission at para. 71, emphasis in original.
[42] Lawyer's submission at para. 71.
[43] Lawyer's submission at para. 72.
[44] College's reply submission at para. 64.

[45] The College also notes the BC Supreme Court and the Court of Appeal have taken an expansive approach to s. 13(1) by interpreting advice to include "expert opinion on matters of fact on which a public body must make a decision for future action."[45] The College also submits past OIPC orders have accepted that advice and recommendations includes "policy options prepared in the course of the decision-making process."[46] Therefore, the College argues policy options are "included in, rather than synonymous with, the term 'advice and recommendations.'"[47]

[46] For the reasons that follow, I find that s. 13(1) is not limited to "policy advice or recommendations." To start, there is nothing in my review of FIPPA and s. 13 or how this exception has been applied by other decision makers, that suggests s. 13(1) should be interpreted in such a narrow way. For instance, previous OIPC adjudicators have considered and rejected similar arguments that attempt to narrow the scope of s. 13(1) to decisions only about government policy.[48] Those orders and many others have found s. 13(1) applies to any advice and recommendations developed by or for a public body.

[47] The Lawyer relies on several provisions under s. 13(2) that the Lawyer describes as "policy-oriented information" such as ss. 13(2)(i), (j) and (m) to show that s. 13(1) is limited to policy related advice and recommendations.[49] Subsection 13(2) identifies certain types of records and information that a public body may not withhold under s. 13(1). I understand the Lawyer is arguing the purpose of s. 13(2) is to exempt records and information that would be covered under s. 13(1) and since there are several "policy-oriented" provisions under s. 13(2), then that means s. 13(1) was only intended to apply to policy related advice and recommendations.

[48] However, the Lawyer neglects to consider the other provisions under s. 13(2) that are not policy related or "policy-oriented information" such as s. 13(2)(d) which applies to an appraisal or s. 13(2)(n) which applies to a decision that is made in the exercise of an adjudicative function. Applying the Lawyer's logic, if the legislature intended s. 13(1) to apply only to policy-related advice or recommendations, then it is unclear why the legislature would include these other categories under s. 13(2).

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[45] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 113. *Provincial Health Services Authority*, 2013 BCSC 2322 (CanLII) at paras. 86-88.
[46] College's reply submission at para. 61, citing Order F22-21, 2022 BCIPC 23 (CanLII) at para. 57.
[47] College's reply submission at para. 61.
[48] For example, Order F20-32, 2020 BCIPC 38 (CanLII) at para. 33 and Order F23-65, 2023 BCIPC 75 (CanLII) at para. 100.
[49] Lawyer's submission at para. 71.

[49] Moreover, if the legislature intended s. 13(1) to apply to advice or recommendations that are only policy related, then it could have drafted or amended s. 13 to reflect that intention. Instead, I find the wording of s. 13(1) clearly indicates this provision is not limited to a specific type of advice or recommendation but applies to any advice or recommendations developed by or for a public body or a minister. The fact there is no modifier to the term "advice or recommendations" in s. 13(1) challenges the Lawyer's assertion that s. 13(1) is limited to policy-related advice or recommendations.

[50] I also note FIPPA does not define the terms "advice" or "recommendations"; however, as argued by the College, the courts have taken an expansive approach to interpreting s. 13(1). For instance, the Supreme Court of Canada has determined that the term "advice" in Ontario's legislative equivalent to BC's s. 13(1) includes "policy options" developed and considered as part of the decision-making process.[50] The Supreme Court of Canada determined that this interpretation "…accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access."[51] Given this interpretation, I agree with the College that the term "advice" in s. 13(1) of BC's FIPPA includes policy-related information rather than excludes any information that is not policy related.

[51] I take note that unlike Ontario's equivalent, the heading for s. 13 of BC's FIPPA reads, "Policy advice or recommendations." However, for the reasons that follow, the College has persuaded me that the heading for s. 13 of FIPPA is not a reliable indicator of legislative intent about the scope of this provision.

[52] To start, the College notes that when FIPPA was first enacted in 1992, the heading for s. 13 read, "Policy advice, recommendations or draft regulations" and the exception applied to "information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister."[52]

[53] Section 13 of FIPPA was then amended in 1993 so it no longer applied to "draft regulations" and read, "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."[53] However, the heading for s. 13 was not amended at that time and still read, "Policy advice, recommendations or draft regulations" even though s. 13(1) no longer applied to draft regulations.[54]

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[50] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 34-35 and 47.
[51] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at para. 46.
[52] https://www.leg.bc.ca/content/legacy/web/35th1st/3rd_read/gov50-3.htm.
[53] https://www.leg.bc.ca/content/legacy/web/35th2nd/3rd_read/gov62-3.htm.
[54] https://www.bclaws.gov.bc.ca/civix/document/id/consol3/consol3/96165_01#JD_RSBC96-165-013.

[54] This discrepancy was in place until September 2000 when the heading to s. 13(1) appeared as "Policy advice or recommendations" even though there were no legislative amendments to s. 13 during this time.[55] As a possible explanation for this informal change, the College notes section headings are not amended by legislation, but "may be changed editorially at any time by the Office of Legislative Counsel without any oversight by the Legislative Assembly."[56]

[55] As a result, the College questions whether the legislature even considered or approved the heading for s. 13 and its subsequent changes. The College generally rejects the applicability of section headings as part of statutory interpretation but argues, in the alternative, that section headings "should be narrowly construed so as to be applicable only in situations where it is first established that the section heading…was before the Legislative Assembly at the same time the section – in its current iteration at the time of interpretation – was enacted…."[57] The College submits there is no evidence that the legislature considered the heading to s. 13 when it enacted or later amended s. 13. Therefore, the College contends "section headings cannot be accepted unquestioningly as reliable indicators of the Legislative Assembly's intent."[58]

[56] I agree with the College that the heading to s. 13 is not a useful interpretative aid in this case given the legislative history of s. 13 and its discrepancies. The College has persuaded me that the legislative history of s. 13 is useful in understanding the unreliability of its heading. As noted by the College, I am also unaware of any information that indicates the heading to s. 13 was considered by the legislature at the time FIPPA was enacted or amended. Therefore, I am not satisfied that the heading to s. 13 is a reliable indicator of legislative intent about the scope of s. 13(1).

[57] I also note there is another heading in FIPPA that does not match the scope of its related provision. The heading to s. 15 of FIPPA reads, "Disclosure harmful to law enforcement."[59] However, s. 15 covers harms that apply to things other than law enforcement. For example, s. 15(1)(l) prevents disclosure of information that could reasonably be expected to harm "the security of any property or system, including a building, a vehicle, a computer system or a communications system."

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[55] https://www.bclaws.gov.bc.ca/civix/document/id/consol4/consol4/96165_01#JD_RSBC96-165-013.
[56] College's reply submission at para. 67, citing *Principles of Legislative Drafting: A Guide to Legislation and Legislative process in British Columbia* at p. 13.
[57] College reply submission at para. 74.
[58] College's reply submission at para. 67.
[59] The term "law enforcement" is defined in Schedule 1 of FIPPA to mean "policing, including criminal intelligence operations" and investigations and proceedings that "lead or could lead to a penalty or sanction being imposed."

[58] If the heading to s. 15 was used to interpret s. 15(1)(l), then this provision would apply to property or systems where the harm is related only to law enforcement. Like s. 13(1), this narrow interpretation is not supported by the clear and ordinary meaning of the words in s. 15(1)(l) and how other OIPC orders have interpreted and applied this provision.[60] Therefore, I find the heading of a FIPPA section may not accurately describe a provision or capture its scope and application.

[59] To conclude, for the reasons given, I find s. 13(1) is not limited to a specific type of advice or recommendation but applies to information that would reveal any advice or recommendations developed by or for a public body or a minister. With that in mind, I will consider below whether the information withheld in the Report would reveal that kind of information.

Analysis and findings on advice and recommendations

[60] The College submits the information at issue in the Report reveals the Investigator's advice and recommendations to the Inquiry Committee about how to deal with the complaint involving the Pharmacist. The College says the Investigator prepared the Report for the Inquiry Committee's confidential deliberations about the complaint. The College also says it was open to the Inquiry Committee to accept, reject or vary the Investigator's recommendations.

[61] The Lawyer disputes the College's application of s. 13(1) to the information at issue. Alternatively, the Lawyer argues the College cannot withhold the information at issue under s. 13(1) because s. 13(2)(k) applies to the Report. In response, the College submits the Lawyer cannot argue s. 13(2)(k) applies unless the Lawyer first concedes that the information withheld in the Report is advice and recommendations. The College submits that it is "illogical and self-contradictory" for the Lawyer to argue that "section 13(1) does not apply while continuing to assert that section 13(2)(k) does apply."[61]

[62] I can see that the Report is divided into five sections: (1) Background, (2) Analysis and Rationale for Recommendation, (3) Summary, (4) title withheld, and (5) Appendices. The information withheld in the Report is located under sections two, three and four. Based on my review of the record, I am satisfied that most of the information at issue would reveal the Investigator's advice or recommendations to the Inquiry Committee about the complaint.

[63] For instance, the College disclosed most of the information in sections two and three of the Report but withheld what the Investigator thought about an aspect of the complaint or what they said about how to address certain concerns

[60] For example, Order F14-45, 2014 BCIPC 48 (CanLII) and Order F18-13, 2018 BCIPC 16 (CanLII).
[61] College's response submission at para. 43.

with the Pharmacist's practice of pharmacy. As well, the College withheld all the information under section four, but I can see that most of this information is the Investigator's suggestions to the Inquiry Committee about how to deal with the concerns identified in the complaint and arising from the investigation. I also accept the Inquiry Committee was the ultimate decision-maker as to how to deal with those concerns and issues and could accept or reject the Investigator's advice or recommendations. Therefore, I find the disclosure of this withheld information would reveal advice or recommendations developed by or for a public body under s. 13(1).

[64] However, there is a small amount of information that I find would not reveal any of the Investigator's advice or recommendations. The College withheld the heading to section four of the Report.[62] It is not apparent, and the College does not explain, how this information reveals advice or recommendations as required under s. 13(1). Instead, I find this section heading is a general description of section four, which is like the other titles that have already been disclosed.

Step two: analysis and findings on ss. 13(2) and 13(3)

[65] The next step in the s. 13(1) analysis is to consider whether any of the circumstances under ss. 13(2) and 13(3) apply to the information that I found would reveal advice or recommendations developed by the Investigator. Subsections 13(2) and 13(3) identify certain types of records and information that a public body may not withhold under s. 13(1).

[66] The parties' submissions focus on s. 13(2)(k) which applies to a report of a task force, committee, council or similar body. The Lawyer submits s. 13(2)(k) applies to the Report, while the College argues the opposite. The parties did not identify any other s. 13(2) provisions for consideration.

[67] I have reviewed the categories under s. 13(2) and conclude the only other relevant provision is s. 13(2)(a) which applies to any factual material. Therefore, I will consider ss. 13(2)(a) and 13(2)(k) below, along with s. 13(3).

Factual material – s. 13(2)(a)

[68] Section 13(2)(a) says the head of a public body must not refuse to disclose under s. 13(1) any factual material. The term "factual material" does not include facts that are an integral and necessary component of the advice or recommendations.[63] It also does not include facts compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing

[62] Information located on p. 165 of the records. Heading to section 4 of the Report.
[63] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

explanations necessary to the deliberative process of a public body.[64] The protection given to these integral facts ensures no accurate inferences can be drawn about the advice or recommendations developed by or for the public body.[65]

[69] The College says any information at issue that "might be viewed as factual in nature" is protected under s. 13(1) because it would "permit the drawing of accurate inferences about advice or recommendations developed for the College" because of "the nature and function of the report and the circumstances of its consideration."[66] The College also argues this information should be protected because the Investigator used his skills and expertise to compile the information as part of the investigation. The College submits the courts have found s. 13(1) applies to this kind of information.[67]

[70] I can see that the College disclosed most of the factual and background information in the Report and only withheld a small amount of information of a factual nature.[68] I am satisfied that these facts are an integrated part of the Investigator's advice and recommendations to the Inquiry Committee and disclosing them may allow someone to accurately infer that advice or those recommendations. As noted, s. 13(2)(a) does not apply to factual information that is a necessary and integrated part of the advice or recommendations developed by or for a public body. Therefore, although this information is factual in nature, I find it is not "factual material" under s. 13(2)(a).

Report of a task force, committee, council or similar body – s. 13(2)(k)

[71] Section 13(2)(k) states the head of a public body must not refuse to disclose under s. 13(1) "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body."

[72] The College makes three general arguments about why s. 13(2)(k) does not apply here. It contends:

1) Section 13(2)(k) does not apply to regulatory bodies or to an entire report.

2) Section 13(2)(k) only applies when a public body refuses access to an entire report.

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[64] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[65] *Ibid* at para. 52.
[66] College's initial submission at p. 10.
[67] College's initial submission at pp. 10-11, citing *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 88-89.
[68] Information withheld on pp. 164-165 of the records.

3) The BC Court of Appeal in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)* [*College of Physicians*][69] did not consider s. 13(2)(k) when it determined s. 13(1) applied to an expert report.

[73] I will address these arguments first before considering whether the Report falls under s. 13(2)(k).

[74] First, the College submits the legislature did not intend for s. 13(2)(k) to apply to advice or recommendations developed by regulatory bodies. The College argues "such an interpretation could seriously impair the proper functioning of scores of investigative agencies across all sectors in British Columbia and that cannot have been the Legislature's intention."[70] It says the result "would be that, in a very significant number of cases, the exception would devour the rule" and the legislature did not intend "such an absurd interpretation."[71]

[75] However, s. 13(2)(k) applies to public bodies. The term "public body" is defined in Schedule 1 of FIPPA to include a "local public body." Schedule 1 of FIPPA defines a "local public body" to include "a governing body of a profession or occupation, if the governing body is designated in, or added by regulation to, Schedule 3." The College is a governing body designated in Schedule 3 of FIPPA and, therefore, is a "local public body." Consequently, the College is a "public body" under FIPPA and for the purposes of s. 13(2)(k). As a result, the Legislature clearly intended for regulatory bodies such as the College to be subject to the exceptions listed under s. 13(2). If the Legislature wanted to exclude governing bodies of a profession or occupation from s. 13(2), then it could have used appropriate language to do so.

[76] The College also argues s. 13(2)(k) does not apply to an entire report, but "is intended to prevent a public body from withholding under section 13(1) only advice or recommendations found in a 'report' captured by section 13(2)(k)."[72] However, s. 13(2)(k) clearly states that it applies to "a report" and does not say it applies to "information in a report", as argued by the College.

[77] As well, the Supreme Court of Canada has recognized that the exceptions listed in Ontario's legislative equivalent to s. 13(2) means the Ontario Legislature turned its mind to consider and identify what types of records must be disclosed even if they contain advice or recommendations.[73] The Supreme Court of Canada clarified that "such records will not always contain advice or

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[69] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII).
[70] College's initial submission at p. 11.
[71] *Ibid*.
[72] College's reply submission at para. 77.
[73] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 32-33, regarding Ontario's legislative equivalent to s. 13(2) of BC's FIPPA.

recommendations, but when they do, s. 13(2) ensures that they are not protected from disclosure by s. 13(1)."[74]

[78] I find the Supreme Court of Canada's reasoning applies equally to BC's s. 13(2), which means the BC Legislature intended s. 13(2) to override s. 13(1) and that certain provisions under s. 13(2) apply to records in their entirety and not just information in a record. As a result, if the Report falls under s. 13(2)(k), then the College cannot rely on s. 13(1) to refuse access to any information in the Report even though that information would reveal advice or recommendations.

[79] The College also contends s. 13(2)(k) does not apply because it did not withhold the entire Report under s. 13(1).[75] The College emphasizes that it disclosed most of the Report and its appendices and only withheld information on several pages of the Report. I understand the College is arguing s. 13(2)(k) will apply only if a public body has refused access to an entire report under s. 13(1). However, this interpretation is not supported by FIPPA.

[80] Sections 4(1) and 4(2) of FIPPA provide an applicant with the right to access a record in the custody or under the control of a public body, except for any information in that record which falls under an exception to disclosure under Part 2 of FIPPA. Section 13(1) is an exception to disclosure under Part 2 of FIPPA and it clearly states that it applies to information in a record rather than the whole record itself. Therefore, read together, ss. 4 and 13(1) require a public body to conduct a line-by-line severing of information in a responsive record as the College did here.

[81] The fact that the College withheld information in the Report, rather than the entire Report, does not prevent the application of s. 13(2)(k). Sections 13(1) and 13(2) were enacted together and the legislature clearly intended these provisions to work collaboratively. The analysis under ss. 13(1) and 13(2) requires a public body to first determine whether there is information in a responsive record that would reveal advice or recommendations developed by or for a public body or a minster. If so, then the public body needs to consider s. 13(2).

[82] If the information at issue is the type of information or record that falls under any of the categories listed under s. 13(2), such as a report under s. 13(2)(k), then the public body cannot rely on s. 13(1) as a reason to refuse access to the information in that record. Therefore, the application of s. 13(2)(k) does not depend on how much information in the record a public body had chosen to sever or redact. As previously noted, the legislature intended specific

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[74] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at para. 32.
[75] College's initial submission at p. 11.

categories of records to be disclosed in their entirety under s. 13(2) even if those records contain information that reveals advice or recommendations.[76]

[83] Finally, the College submits the BC Court of Appeal in *College of Physicians* found s. 13(1) applied to a similar record to what is at issue here, that is, an expert report prepared for a regulatory body who was investigating a complaint of professional misconduct against a physician. The College points out that the Commissioner's order under review in *College of Physicians* did not consider s. 13(2)(k), nor did the courts during the judicial review proceedings.[77] I understand the College is arguing s. 13(2)(k) does not apply to reports prepared for regulatory bodies because the BC Court of Appeal in *College of Physicians* did not consider s. 13(2)(k) and instead authorized the public body to withhold the report under s. 13(1).

[84] However, it is important to note that the Commissioner's order that led to the judicial review found that s. 13(1) did not apply to the expert's report; therefore, s. 13(2)(k) was not considered by the Commissioner or the courts during the judicial review proceedings.[78] Given their finding about s. 13(1), the Commissioner was not required to and did not determine whether any of the circumstances and categories listed under s. 13(2) applied to the information at issue in that inquiry. As a result, s. 13(2)(k) was not an issue in that case. Therefore, I am not persuaded the BC Court of Appeal in *College of Physicians* already decided s. 13(2)(k) does not apply to a report prepared for a regulatory body, as argued by the College.

[85] To conclude, I find the College's general arguments about why s. 13(2)(k) does not apply in these circumstances are not persuasive. The question of whether s. 13(2)(k) applies to the Report is an unresolved issue between the parties, which I will consider below.

Test and analysis for s. 13(2)(k)

[86] As noted, s. 13(2)(k) applies to "a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body." Therefore, I conclude for s. 13(2)(k) to apply, the following three conditions must be proven:

1. The record in dispute must be a report.

2. It is the report of a task force, committee, council or similar body.

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[76] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 32-33.
[77] College's reply submission at para. 84.
[78] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at paras. 97-99.

3. The task force, committee, council or similar body was established to consider any matter and make reports or recommendations to a public body.

[87] I will address each of the s. 13(2)(k) requirements below. If any of these conditions are not satisfied, then s. 13(2)(k) does not apply and the College would be authorized under s. 13(1) to withhold any information in the Report that I found would reveal the Investigator's advice or recommendations to the Inquiry Committee.

Is the record at issue a report under s 13(2)(k)?

[88] The Lawyer and the College did not provide submissions on this first condition of the s. 13(2)(k) test. However, I note that past OIPC orders have defined the term "report" under s. 13(2)(k) as "a formal statement or account of the results of the collation and consideration of information"[79] and "an account given or opinion formally expressed after investigation or consideration."[80]

[89] I find the Report meets these definitions since it is a formal statement or account to the Inquiry Committee about the results of the investigation, including the Investigator's evaluation and opinion of the information and evidence they gathered and compiled from the investigation. Therefore, I am satisfied the record at issue in this inquiry is a "report" under s. 13(2)(k).

Is it the report of a task force, committee, council or similar body?

[90] The parties' submissions focus on whether the Investigator is a task force, committee, council or similar body under s. 13(2)(k). None of the parties argued the Report is "a report of the Inquiry Committee" under s. 13(2)(k). I also find the Inquiry Committee was not established to "make reports or recommendations to a public body" as required under s. 13(2)(k). Rather, as previously discussed, the responsive records and evidence show the Report and its recommendations were developed and written for the Inquiry Committee. In other words, the Inquiry Committee was not established to write or develop the Report and make recommendations to a public body. Therefore, I conclude the Report is not "a report of the Inquiry Committee" for the purposes of s. 13(2)(k).

[91] As a result, the next question under s. 13(2)(k) in this case is whether the Investigator is a task force, committee, council or similar body. The College submits an individual investigator is not a task force, committee, council or similar body because those type of entities are "collective in nature."[81] In support of its position, the College notes the word "body" is found in the definition of "public

[79] Order F17-33, 2017 BCIPC 35 (CanLII) at para. 17.
[80] Order F17-39, 2017 BCIPC 43 (CanLII) at para. 46.
[81] College's initial submission at p. 13.

body" under Schedule 1 of FIPPA. The definition of "public body" includes "an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2." The College submits the public bodies listed in Schedule 2 of FIPPA are groups or corporations rather than an individual position.[82] Therefore, the College contends the legislature intended s. 13(2)(k) to apply to reports produced by groups and not reports produced by a single individual.

[92] The College also cites the definition of "body" in *Black's Law Dictionary* (10th Ed.) to argue "a body" includes groups or corporations.[83] As well, the College says that it conducted a search on the BC Laws website for the term "similar body" in other statutes and regulations and that wherever this phrase is used, it refers to corporations or collective entities and not single individuals or officers. Lastly, the College says while it may be possible "as a practical matter" for a task force to have one member, the legislature did not intend s. 13(2)(k) to apply to "an employee who undertakes ordinary-course duties of a regulatory body."[84]

[93] The Lawyer rejects the College's interpretation that s. 13(2)(k) is limited to reports produced by collective entities or multiple persons rather than an individual. The Lawyer says the College's interpretation would produce an absurd result by allowing public bodies to circumvent s. 13(2)(k) by ensuring "that individuals rather than groups are assigned to perform these tasks."[85]

[94] As noted, s. 13(2)(k) applies to a report of a task force, committee, council, or similar body. Therefore, I must determine what these terms mean in the context of s. 13 and FIPPA and whether those terms can apply to an individual. The terms "task force, committee, council, or similar body" are not defined in FIPPA or in BC's *Interpretation Act*. Several OIPC orders have considered s. 13(2)(k) but have not expressly defined those terms.[86]

[95] Where there are no statutory definitions, dictionary definitions may provide a useful starting point in interpreting a statutory provision.[87] The ordinary meaning of the terms "task force" and "council" are commonly associated with a group of individuals. For example, the term "task force" is defined as "a group of people working together on a particular task."[88] Likewise, the term "council" is

[82] College's reply submission at para. 80, the College cites Schedule 2 of FIPPA.
[83] College's reply submission at para. 80.
[84] College's reply submission at para. 78.
[85] Lawyer's submission at para. 80.
[86] For example, Order F21-41, 2021 BCIPC 49 (CanLII) at para. 41 and Order 01-14, 2001 CanLII 21568 (BCIPC) at para. 34.
[87] Order F17-39, 2017 BCIPC 43 (CanLII) at para. 85. *Ontario v. Canadian Pacific Ltd*., 1995 CanLII 112 (SCC) at para. 67.
[88] https://www.collinsdictionary.com/dictionary/english/task-force.

defined as “a group of people called together for consultation, discussion, advice, etc.”[89] or “a group elected or appointed as an advisory or legislative body.”[90]

[96] However, the term “committee” includes an individual and a group of people. The term “committee” is defined in *Black’s Law Dictionary* (10th Ed.) to mean, "A subordinate group to which a deliberative assembly or other organization refers business for consideration, investigation, oversight or action."[91] However, it is also defined in *Barron’s Canadian Law Dictionary* (6th Ed.) to include “an individual or a body to which others have committed or delegated a particular duty.”[92]

[97] While dictionary definitions are a useful starting point, I note the modern approach to statutory interpretation requires the words of s. 13(2)(k) to be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature.[93] The intent of FIPPA and its legislative purposes are identified in s. 2(1) which are to “make public bodies more accountable to the public” and to “protect personal privacy.” Those purposes are achieved, in part, by “giving the public a right of access to records” and by “specifying limited exceptions to the right of access.”[94]

[98] Section 13(1) is a limited exception to the right of access, while s. 13(2) speaks to FIPPA’s purpose of making public bodies more accountable to the public. The Supreme Court of Canada has described the purpose of Ontario’s equivalent to s. 13(2) as ensuring public bodies cannot withhold certain types of “objective information” and “very specific and precisely defined” categories of records “even if they contain advice or recommendations.”[95] For example, in terms of Ontario’s equivalent to s. 13(2)(k), the Supreme Court of Canada has said “reports of committees” must be disclosed “if the purpose of the committee was to prepare such reports.”[96] Given the similar wording of Ontario and BC’s provisions, I find the Supreme Court of Canada’s reasoning applies equally to the provisions under BC’s s. 13(2).

[99] Therefore, while the terms task force, committee or council are normally associated with a group of people, I find interpreting those terms under s. 13(2)(k) to mean one or more people is consistent with the legislative intent of

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[89] https://www.collinsdictionary.com/dictionary/english/council.
[90] https://www.merriam-webster.com/dictionary/council.
[91] *Black’s Law Dictionary*, 10th ed. by Bryan A. Garner, ed. St. Paul, Minn.: Thomson Reuters, 2014.
[92] *Barron’s Canadian Law Dictionary*, 6th ed. by John A. Yogis and Catherine Cotter. Hauppauge, N.Y.: Barron’s Educational Series, 2009, emphasis mine.
[93] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21.
[94] Sections 2(1)(a) and (c).
[95] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 31-32.
[96] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at para. 32.

s. 13(2) and FIPPA's purpose of making public bodies more accountable. Otherwise, I agree with the Lawyer that the alternate interpretation argued by the College could defeat the purpose and intent of s. 13(2)(k) and FIPPA by allowing public bodies to assign the task of creating the report to an individual rather than a group.

[100] Another consideration in this case is that this interpretation is consistent with s. 25.2(1) of the *HPA* which allows for the creation of a one-person committee. Section 25.2(1) of the *HPA* allows the board responsible for regulating medical practitioners to "appoint an investigating committee of one or more persons" for the purpose of "investigating whether a registrant has and applies adequate skill and knowledge to practise medicine." Therefore, I find interpreting a committee under s. 13(2)(k) to be one person or a group of people is consistent with both FIPPA and the *HPA*.

[101] I am not persuaded by the College's argument that the definition of "public body" in Schedule 1 of FIPPA and the nature of the public bodies listed in Schedule 2 is evidence that the legislature intended "a task force, committee or council" in s. 13(2)(k) to mean a collective entity rather than an individual position or person. As noted, the definition of "public body" in Schedule 1 of FIPPA includes "an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2". The entities listed in Schedule 2 are not the same type of entities listed under s. 13(2)(k). While there are several entities in Schedule 2 with the word "committee" in their name, I am not satisfied this means s. 13(2)(k) is limited only to groups of people. As noted, I find committees may consist of one or more people. Therefore, I do not find Schedule 2 a useful interpretive aid in understanding s. 13(2)(k). Instead, for the reasons discussed previously, I conclude "a task force, committee or council" under s. 13(2)(k) can be one person or a group of people.

[102] I also find the term "similar body" under s. 13(2)(k) can be one person or a group of people. This interpretation is based on a principle of statutory interpretation known as the "associated word" rule. The Supreme Court of Canada has described the "associated word" rule as follows:

> …The well-known "associated words" or "*noscitur a sociis*" rule of interpretation…states that a term or an expression should not be interpreted without taking the surrounding terms into account. "The meaning of a term is revealed by its association with other terms: it is known by its associates."
>
> Professor Sullivan defines the "associated words" rule as follows:
>
> > The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve as an analogous, grammatical and logical function within a provision. This parallelism invites the

> reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator….[97]

[103] In other words, the term "similar body" appears as part of the phrase "task force, committee, council or similar body"; therefore, "their definitions influence each other and it is appropriate to consider their commonalities."[98] As a result, I find a "similar body" under s. 13(2)(k) must have characteristics like those of a task force, committee or council. As discussed previously, I found "a task force, committee or council" under s. 13(2)(k) can be one person or a group of people; therefore, I conclude a "similar body" can also be one person or a group of people.

[104] The College submits the term "similar body" in other statutes and regulations refers to corporations or collective entities and not individuals. However, the College did not identify or discuss which specific statutes or regulations it is referring to, their context and purpose or how that legislation would be relevant to interpreting provisions under FIPPA. Therefore, without more, I find a similar phrase used in an unidentified statute or regulation is of no assistance here in interpreting the term "similar body" in s. 13(2)(k).

[105] I also find a shared characteristic or common feature amongst the terms "task force, committee or council" is the focus on the completion of a particular task, duty or function. Therefore, based on the "associated word" rule, I find a "similar body" under s. 13(2)(k) means one or more persons given the responsibility of completing a particular task, duty or function. Applying that definition and based on the evidence in this case, I conclude the Investigator is a "similar body" under s. 13(2)(k) because he was responsible for completing the task of investigating the complaint involving the Pharmacist.

[106] I am also satisfied the Report was created and prepared by the Investigator. The College says the Investigator "prepared the Report in the ordinary course of his functions and duties as an Investigator."[99] The College also provided an affidavit from the Investigator who attests to investigating the complaint and creating the Report.[100] I accept this evidence. My own review of the Report and its contents confirms the Investigator prepared and wrote the Report.[101] As a result, I conclude the record at issue in this inquiry is a report of a similar body under s. 13(2)(k).

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[97] *Opitz v. Wrzesnewskyj*, 2012 SCC 55 (CanLII) at paras. 40-41, citations omitted.
[98] Order F17-39, 2017 BCIPC 43 (CanLII) at para. 85, discussing s. 22(4)(e) of FIPPA.
[99] College's initial submission at p. 6.
[100] Affidavit of N.C. at para. 15.
[101] The Report is found at pp. 147-167 of the records.

Was the similar body established to consider any matter and make reports or recommendations to a public body?

[107] The third requirement of the s. 13(2)(k) test has several components. The similar body must have been: (1) established to consider any matter, and (2) make reports or recommendations to a public body. I will consider each of these requirements below.

Has been established to consider any matter

[108] I will first address the requirement under s. 13(2)(k) for the similar body "to consider any matter." The College submits s. 13(2)(k) applies only when the public body is inquiring into and reporting about a matter "that does not fall within the usual course of a public body's operational performance of its statutory duties or functions to investigate matters."[102] The College draws a distinction between matters that concern the College's "usual or ordinary statutory investigative functions and duties" versus "cases in which a body is created to consider a matter that is not within the usual course of such things."[103]

[109] However, s. 13(2)(k) clearly states that it applies to a task force, committee, council or similar body that was established "to consider any matter." The words "any matter" are clear and unambiguous. It indicates that, contrary to the College's assertions, the legislature did not distinguish or limit the kinds of matters that may fall under s. 13(2)(k). If the legislature intended to narrow the scope of the matters that could be considered by the task force, committee, council or similar body under s. 13(2)(k), then it could have used appropriate language to do so as it did, for instance, with s. 15(1)(a) of FIPPA which specifically applies to "a law enforcement matter."

[110] I do note, however, that there must be a connection between the report and the matter under consideration by the task force, committee, council or similar body. Previous OIPC orders have concluded that the task force, committee, council or similar body must have been established for the purpose of considering the matter that is the subject and focus of the report under s. 13(2)(k).[104] I agree with that approach since s. 13(2)(k) is about ensuring the task force, committee, council or similar body's report to a public body about the matter under consideration is available to the public under FIPPA. Applying that approach to the facts of this case, the evidence indicates the Investigator was responsible for investigating the matter of the complaint involving the Pharmacist and that the Report was about that matter. As a result, I find this part of the s. 13(2)(k) test is satisfied.

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[102] College's initial submission at p. 12.
[103] College's initial submission at p. 12.
[104] Order F20-37, 2020 BCIPC 43 (CanLII) at para. 45 and Order 01-14, 2001 CanLII 21568 (BC IPC) at para. 34.

[111] The next question is whether the Investigator had been "established" to consider the complaint involving the Pharmacist. The College argues s. 13(2)(k) does not apply because the word "established" means "the creation of a body" and the Investigator was already employed by the College so he cannot have been created to consider the complaint.[105] The College says the Investigator did the investigation as part of "his assigned ordinary-course duties" and the Report was "created by the Investigator in the course of his 'daily work.'"[106] The College submits the legislature did not intend s. 13(2)(k) to apply "where an employee is performing the public body's ordinary-course statutory duties."[107]

[112] In support of its position, the College cites several OIPC decisions to argue s. 13(2)(k) does not apply to records created by public body employees as part of their daily work.[108] For instance, the College cites Order F18-41 where Adjudicator Lott found some of the information withheld by two provincial ministries in emails and attachments to those emails (letters, briefing notes and speaking notes) qualified as advice and recommendations. Adjudicator Lott then considered whether any of the categories under s. 13(2) applied. She concluded the following about s. 13(2)(k):

> I have also considered whether s. 13(2)(k) applies. However, none of the records are a report of a task force, committee, council or similar body. The records were created by ministry employees in their daily work. As a result, s. 13(2)(k) does not apply.[109]

[113] The College also emphasizes the Inquiry Committee did not assign or appoint the Investigator as an inspector or give him instructions or directions "for the purpose of investigating the specific complaint in question."[110] I understand the College is referring to ss. 27 and 28 of the *HPA* which partly reads:

> 27(1) The inquiry committee may appoint persons as inspectors for the college.
> …
>
> 28(2) The inquiry committee may direct an inspector to act under subsection (1) or undertake any aspect of an investigation under section 33.

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[105] College's reply submission at para. 81, citing Order F21-39, 2021 BCIPC 47 (CanLII) at para. 38.
[106] College's initial submission at p. 14.
[107] College's reply submission at para. 79.
[108] College's initial submission at pp. 14-16, citing for example Order 01-14, 2001 CanLII 21568, Order F13-08, 2013 BCIPC 9 (CanLII), Order F20-37, 2020 BCIPC 43 (CanLII), Order F21-41, 2021 BCIPC 49 (CanLII).
[109] Order F18-41, 2018 BCIPC 44 (CanLII) at para. 38.
[110] College's initial submission at p. 13.

> 28(3) If an inspector acts under this section as a consequence of a direction given under subsection (2), the inspector must report the results of those actions in writing to the inquiry committee.

[114] The College contends s. 13(2)(k) does not apply because the Inquiry Committee did not personally assign or pick the Investigator to do the investigation under s. 27(1), give him instructions or directions under s. 28(1) or get involved in the investigation in any way.[111] The College says the Investigator was assigned to undertake the investigation by its Complaints and Investigation Manager (Manager) and "the Inquiry Committee merely directed that an investigation be undertaken and did not direct this specific employee to conduct the investigation."[112]

[115] The Lawyer disagrees with the College's position. The Lawyer argues the Investigator was "established" to consider the complaint because the Investigator could not have done the investigation without the Inquiry Committee exercising its statutory powers under ss. 27 and 28 of the *HPA*. The Lawyer submits those powers allowed the Inquiry Committee to direct the Investigator "to investigate a particular matter" using the full powers of an inspector and to report the results of the investigation in writing to the Inquiry Committee.[113] Moreover, the Lawyer emphasizes that even if it was the Manager who assigned the task to the Investigator, the Manager was doing so on behalf of the College and, therefore, was "clearly exercising the powers of the College" under the *HPA*.[114]

[116] The Lawyer also challenges the OIPC orders cited by the College because they are "distinguishable, wrongly decided, or lack justification…interpretation or analysis."[115] For instance, the Lawyer says Order F18-41 is not applicable because the records at issue in that inquiry were not reports and the public body employees in that case "had not been assigned to consider and prepare a report or recommendation on any particular matter."[116]

[117] The Lawyer further submits that "Order F18-41 does not stand for a general proposition that reports produced by employees in their daily work are immune from freedom of information" requests.[117] If that were the case, the Lawyer says "several public bodies whose sole or primary purpose is to make inquiries and issue reports to the public regarding matters of public interest" could refuse to disclose the reports produced by their employees "doing their daily work in the ordinary course of their duties" such as the offices of the

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[111] College's initial submission at p. 12.
[112] College's reply submission at para. 86.
[113] Lawyer's submission at para. 76.
[114] Lawyer's submission at para. 78.
[115] Lawyer's submission at paras. 86-87.
[116] Lawyer's submission at para. 82.
[117] Lawyer's submission at para. 82.

Ombudsperson and the Auditor General and the OIPC.[118] The Lawyer contends the College's proposed interpretation of s. 13(2)(k) would be contrary to the object and purposes of FIPPA and "contrary to the very purpose for which such public bodies exist."[119]

[118] First, contrary to the College's assertions, I find the Inquiry Committee did exercise its statutory authority to "appoint" the Investigator as an inspector under s. 27(1) and authorized him to conduct the investigation under s. 28(2) of the *HPA*. The Investigator provided a sworn affidavit where he attests "the Inquiry Committee appointed me as an 'inspector' under section 27 of the HPA."[120] The evidence and records also indicate the Inquiry Committee approved the following recommendation about the complaint involving the Pharmacist:

> Pursuant to s.33(4) of the Health Professions Act, R.S.B.C. 1996, c.183 ("HPA"), it is recommended that the following file be made the subject of an investigation, and that the Inquiry Committee direct an Investigator as a designated inspector to investigate the file in its entirety and report back to the [Inquiry Committee] with findings, pursuant to HPA s.28(2).[121]

[119] Therefore, contrary to the College's claims, it does not matter that the Inquiry Committee did not personally pick or assign the Investigator to the file or get involved in the investigation in any way because only an inquiry committee has the statutory authority under ss. 27 and 28 of the *HPA* to "appoint" inspectors and authorize an investigation of a matter on its own motion. The appointment and investigation could not have happened without the Inquiry Committee's direction.

[120] However, for the reasons that follow, I am not satisfied that the Inquiry Committee's appointment and approval of the Investigator means the Investigator was "established" to consider the complaint in accordance with s. 13(2)(k). I note the word "established" is not defined in FIPPA or BC's *Interpretation Act*. However, the *Merriam-Webster Online Dictionary* defines the verb "establish" to mean, among other things, "to bring into existence."[122] I find this usual and ordinary meaning is consistent with past orders from BC and Ontario that have interpreted "established" to mean the reporting body was "created" to consider the matter and make reports or recommendations.[123]

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[118] Lawyer's submission at paras. 84-85.
[119] Lawyer's submission at para. 85.
[120] Affidavit of N.C. at para. 6.
[121] Pages 1-2 of the records and Applicant's Document #2 titled "Memo to IC – Motion to Investigate." Section 28(2) of the *HPA* authorizes an inquiry committee to direct an inspector to undertake any aspect of an investigation under section 33. The relevant provision in this case is s. 33(4)(a) which allows an inquiry committee, on its own motion, to investigate a registrant regarding a contravention of the *HPA* and its regulations or the bylaws.
[122] https://www.merriam-webster.com/dictionary/establish.
[123] Order F21-39, 2021 BCIPC 47 (CanLII) at para. 38. Ontario Order PO-3111, 2012 CanLII 58082 (ON IPC) at para. 165, which considered Ontario's legislative equivalent to s. 13(2)(k).

In other words, the task force, committee, council or similar body did not exist before, but was created for the purposes identified under s. 13(2)(k).

[121] I also find this interpretation of "established" is reflected in Order F18-41 where Adjudicator Lott found s. 13(2)(k) did not apply because the "records were created by ministry employees in their daily work."[124] Likewise, in Order F21-41, Adjudicator Francis determined s. 13(2)(k) did not apply to a City of Vancouver employee's comments and recommendations on a proposed rezoning project because they were carrying out their "normal, routine duties."[125] I find these orders mean a public body employee performing their normal, routine tasks and duties will not have been "established" for the purposes of s. 13(2)(k). In other words, a public body employee will usually not have been created to consider the matter, that is the focus of the report under s. 13(2)(k), if those responsibilities are part of their normal, everyday job duties and functions.

[122] I am satisfied that this interpretation of "established" is consistent with the purpose of the advice and recommendations exemption under FIPPA. The BC Court of Appeal has described the purpose of s. 13 as recognizing "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."[126] I find protecting advice and recommendations given by a public body employee as part of their normal job duties fosters that decision-making process and permits "public servants to provide full, free and frank advice" to public bodies as intended under s. 13(1).[127]

[123] This interpretation also recognizes the legislative intent and purpose of s. 13(2) which is to ensure public bodies cannot withhold "very specific and precisely defined" categories of records.[128] I find interpreting the word "established" under s. 13(2)(k) to mean the task force, committee, council or similar body did not exist before but was created to consider the matter is consistent with the legislature's intention to provide the public with access to very specific and precisely defined categories of records under s. 13(2). In other words, I find s. 13(2)(k) does not apply to reports created for a public body by *any* reviewing body but is limited to a report produced by a task force, committee, council or similar body that was created for the purpose of considering the matter.

[124] The Lawyer argues s. 13(2)(k) should apply to reports produced by public body employees in their daily work so the public can have access to reports on

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[124] Order F18-41, 2018 BCIPC 44 (CanLII) at para. 38.
[125] Order F21-41, 2021 BCIPC 49 (CanLII) at para. 41.
[126] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 105.
[127] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at para. 43.
[128] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 31-32.

matters of public interest such as those produced by the offices of the Ombudsperson and the Auditor General and the OIPC.[129] However, I note that the Information and Privacy Commissioner, the Ombudsperson and the Auditor General are each an "officer of the Legislature" as defined under Schedule 1 of FIPPA. Except for certain sections set out under ss. 3(4) and 3(4.1), FIPPA does not apply to records created by or for an officer of the Legislature in accordance with ss. 3(3)(f) and 3(3)(g). Therefore, it is unclear how this interpretation of s. 13(2)(k) would impact those independent offices and the work that they do.

[125] As a result, for the reasons discussed previously, I conclude a task force, committee, council or similar body "has been established" under s. 13(2)(k) when it was created for the purpose of considering any matter and making reports or recommendations to a public body. I find this interpretation achieves the appropriate balance between the public accountability goals of FIPPA and the legislative intent of providing public bodies with the discretion to withhold advice or recommendations under s. 13(1).

[126] To be clear, this interpretation of s. 13(2)(k) does not mean reports that a public body employee was involved in creating or preparing will never fall under s. 13(2)(k). Section 13(2)(k) may apply when a public body employee is, or is a part of, a task force, committee, council or similar body that has been created for the purpose of considering any matter and reporting their results or recommendations to a public body. In that situation, the public body may not withhold that report under s. 13(1).

[127] Turning now to the facts of this case, the College submits the Investigator was not created to consider and investigate the complaint but did so as part of his regular job duties. The College provided documentation to support its position, including a sworn affidavit from the Investigator and a copy of the Investigator's job description and profile. This combined information indicates a College "investigator's main responsibilities are to plan and conduct investigations relating to the practice, conduct or actions of registrants in an unbiased manner."[130]

[128] As part of that responsibility, among other things, an investigator "analyzes evidence, prepares documentation, and develops recommendations and rationale of disposition of complaint files and for presentation to the Inquiry Committee" in the form of a report titled, "Complaint Assessment Recommendation and Rationale."[131] The Investigator deposes that he prepared the Report "in the ordinary course" of his "functions and duties as an Investigator."[132] The Investigator also attests that he has been employed by the

[129] Lawyer's submission at para. 84.
[130] Exhibit "A" to the affidavit of N.C.
[131] Exhibit "A" to the affidavit of N.C.
[132] Affidavit of N.C. at para. 15.

College as an investigator in the Complaints and Investigations department for several years.

[129] Given the College's evidence, I am satisfied the Investigator considered the complaint involving the Pharmacist and produced the Report as part of his regular job duties. As noted, one of the main responsibilities of a College investigator is to undertake these investigations and develop recommendations for the purpose of assisting the Inquiry Committee in determining how to deal with complaints forwarded for the committee's consideration and disposition. Therefore, although the Investigator could only act with the Inquiry Committee's authorization, I find the Investigator was already employed by the College to conduct these types of investigations which were a regular part of his professional duties and functions. As a result, I find s. 13(2)(k) does not apply to the Report because the Investigator had not been established to consider the matter involving the Pharmacist.

To make reports or recommendations to a public body

[130] Given my earlier findings, it is not necessary to consider the remaining part of the s. 13(2)(k) test. However, I will do so for the sake of completeness and to provide some guidance to the parties. The remaining part of the s. 13(2)(k) test considers whether the "similar body" was also required "to make reports or recommendations to a public body" about the matter under consideration. For the reasons that follow, I am satisfied the Investigator was also required "to make reports or recommendations to a public body" under s. 13(2)(k).

[131] The Investigator attests to completing the following process in investigating the complaint:

> The Investigator analyzes evidence, prepares documentation and develops recommendations for presentation to the Inquiry Committee. The Investigator alone is responsible for gathering evidence, offering conclusions about relevant facts for the purposes of the investigation report itself, and developing advice or recommendations, which are offered to the Inquiry Committee for its determination.[133]

[132] The Investigator also deposes that he developed and provided confidential advice and recommendations in the Report "to enable the Inquiry Committee to arrive at a disposition of the complaint and determine what if any further steps should be taken under the HPA and the College's bylaws."[134] Therefore, as part of the investigation, I find the Investigator was required to develop and provide recommendations about how to deal with the concerns and issues identified in the complaint and include those recommendations in the Report.

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[133] Affidavit of N.C. at paras. 9 and 15.
[134] Affidavit of N.C. at para. 17.

[133] I also found the Inquiry Committee exercised its statutory authority to "appoint" the Investigator as an inspector under s. 27(1) and authorized him to conduct the investigation under s. 28(2) of the *HPA*. Under s. 28(3) of the *HPA*, the Investigator was then required to report the results of his investigation about the complaint in writing to the Inquiry Committee. As a result, I find the Investigator was required to report to the Inquiry Committee. Since the Inquiry Committee is a part of the College and the College is a public body under FIPPA, I conclude the Investigator was also required to "make reports or recommendations to a public body" about the matter under consideration.

Conclusion on s. 13(2)(k)

[134] To conclude, I find the record at issue in this inquiry is a report of a similar body that was required to make reports and recommendations to a public body. However, I find s. 13(2)(k) does not apply to the Report because the Investigator had not been established to consider the matter involving the Pharmacist. Instead, the evidence establishes the Investigator conducted the investigation as part of his regular job duties. Accordingly, the College is authorized to withhold, under s. 13(1), the information in the Report that I found would reveal advice or recommendations developed by the Investigator for the Inquiry Committee.

Information in existence for 10 or more years – s. 13(3)

[135] Under s. 13(3), any information in a record that has been in existence for 10 or more years cannot be withheld under s. 13(1). None of the parties made any submissions about s. 13(3). Nevertheless, I find s. 13(3) does not apply because I can see that the information in the Report dates back to 2020. Therefore, at the time of this inquiry, this information has been in existence for under 10 years.

Exercise of discretion under s. 13

[136] The Lawyer submits the College did not exercise its discretion properly under s. 13. Section 13 is a discretionary exception 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."[135] 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."[136]

[137] If the head of the public body has failed to exercise their 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

[135] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144.
[136] Order No. 325-1999, October 12, 1999, [1999] BCIPCD No. 38 at p. 4.

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."[137]

[138] Previous OIPC orders have also found that when exercising discretion to refuse access under a discretionary exception, a public body should typically consider relevant factors such as the age of record, the general purposes of FIPPA, the public interest in disclosure and the nature and sensitivity of the record.[138]

[139] The Lawyer submits the College did not exercise its discretion properly and did not provide any valid reasons for withholding the information at issue under s. 13(1). The Lawyer contends, among other things, that the College's decision was "based entirely on a pre-determined policy of non-disclosure."[139] The Lawyer says the College appears to have adopted a policy "whereby disclosure would be automatically refused unless specifically required under FIPPA" which the Lawyer contends "has the effect of negating" the discretion conferred under s. 13(1) and "undermining the object of FIPPA."[140]

[140] The Lawyer provided copies of correspondence with College employees, one of which informs the Lawyer that "the registrant will not typically be provided with any recommendations made to the Inquiry Committee under section 15(1)(a) of the Act."[141] Ultimately, the Lawyer submits the College's approach was unreasonable because it was "required to exercise its discretion judicially before making a decision and to justify its decision with cogent reasons."[142]

[141] The College submits it exercised its discretion appropriately under s. 13(1) at the time of the access request and again in preparing for this inquiry. The College says it considered the following factors in deciding to withhold the information at issue under s. 13(1):

- The purpose of s. 13(1) and the interests that it seeks to protect.
- Its duty to regulate pharmacy professionals in the public interest.
- The effect of the disclosure on the College's complaint, investigation and inquiry process, its public interest mandate, and the public's confidence in the College and its processes.

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[137] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52. Also see Order 02-50, 2002 CanLII 43486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 147.
[138] See Order 02-38, 2002 CanLII 42472 at para. 149, for a full list of non-exhaustive factors that a public body may consider in exercising its discretion.
[139] Lawyer's submission at para. 89.
[140] Lawyer's submission at para. 91.
[141] Lawyer's supporting document identified as "Applicant's Document #4."
[142] Lawyer's submission at para. 92.

- The fact the College has not historically disclosed this kind of information in response to access requests.

- There was no sympathetic or compelling reason to release the information because the resolution of the complaint was completed some time ago.

- The fact that its decision would be consistent with previous OIPC orders.[143]

[142] The College also notes that it has not refused to disclose the entire Report, but "thoughtfully applied section 13(1) in a conversative and minimal fashion to sever only that content which is explicitly advice and recommendations and to respect the legislative policy that underpins section 13 as a whole."[144]

[143] I am satisfied the College did exercise its discretion under s. 13(1). I accept the College considered the above-noted factors in determining whether to withhold information under s. 13(1). I can also see that the College did a commendable line-by-line severing of the Report and did not withhold the entire Report. Therefore, I am satisfied that the College turned its mind to consider whether information should be disclosed or withheld under s. 13(1).

[144] There is also no evidence before me to suggest the College exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. I understand the Lawyer believes it was improper for the College to rely on its past practices in withholding the information at issue or what the Lawyer describes as a "policy of non-disclosure."[145] However, in Order 02-38, former Commissioner Loukidelis noted that one of the factors a public body should typically consider when exercising discretion to refuse access under a discretionary exemption is "the historical practice of the public body with respect to the release of similar types of documents."[146] Therefore, I do not find this factor to be an irrelevant or improper consideration. Instead, I find the College's decision under s. 13(1) was consistent with its historical practice of not disclosing any recommendations made to an inquiry committee by a College investigator.

[145] While the Lawyer may disagree with the College's practice, it is not my role in this inquiry to determine whether that policy is reasonable or fair or whether the College should have exercised its 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."[147] Rather, I must be satisfied that the public body considered whether to exercise its

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[143] College's initial submission at pp. 17-18.
[144] College's reply submission at para. 92.
[145] Lawyer's submission at para. 89.
[146] Order 02-38, 2002 CanLII 42472 at para. 149.
[147] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.

discretion and that it did so upon proper considerations.[148] I find that to be the case here. Therefore, I conclude this is not a situation which requires me to order the College to reconsider the exercise of its discretion in applying s. 13(1) to the records.

[146] I also note the Lawyer contends the College did not provide any valid reasons for withholding the information at issue under s. 13(1). However, I find the Lawyer's concern is about the content and quality of the College's response to their access request rather than the College's exercise of its discretion under s. 13(1). This kind of concern would fall under s. 6(1) as a complaint that the College failed in its duty to respond openly, accurately and completely to their access request.[149]

[147] Where an applicant complains that a public body has not performed a duty under FIPPA, the OIPC requires the applicant to raise the issue with the public body first to allow the public body an opportunity to respond and attempt to resolve the complaint, prior to making a complaint to the OIPC. Furthermore, once the OIPC has accepted a complaint, it is usually investigated and resolved by a case review officer or an investigator and not at a formal inquiry.

[148] As a result, if the Lawyer wishes to pursue a complaint about the content and quality of the College's response to their access request, then they have the option of submitting a written complaint to the College and allowing the College an opportunity to resolve the complaint. If the Lawyer is not satisfied with the College's response, then the Lawyer has the option of seeking a resolution through the OIPC's complaint process.

Local public body confidences – s. 12(3)(b)

[149] The College applied s. 12(3)(b) to the same information that it withheld under s. 13(1). I found s. 13(1) applied to most of this information; therefore, it is not necessary for me to also consider whether s. 12(3)(b) applies. However, I found s. 13(1) did not apply to the heading for section four of the Report because disclosing this information would not reveal any advice or recommendations.[150] Therefore, I will consider whether s. 12(3)(b) applies to this information.

[150] Section 12(3)(b) authorizes a local public body to refuse to disclose information that would reveal "the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body if

[148] Order F18-17, 2018 BCIPC 20 at para. 33.
[149] How public bodies meet their s. 6(1) duty in terms of a response is partly set out under s. 8 which identifies the necessary contents of a public body's response to an access request.
[150] Information located on p. 165 of the records. Heading to section 4 of the Report.

an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public."

[151] The College says that it qualifies as a "local public body" under FIPPA and that the Inquiry Committee is "a committee of the College Board."[151] The College submits disclosing the information at issue would reveal the substance of the Inquiry Committee's deliberations at a meeting that was closed to the public.

[152] For the College to rely on s. 12(3)(b), the College must be a "local public body" under FIPPA. Schedule 1 of FIPPA defines a "local public body" to include "a governing body of a profession or occupation, if the governing body is designated in, or added by regulation to, Schedule 3." The College is a governing body designated in Schedule 3 of FIPPA. Therefore, I find the College qualifies as a "local public body" under FIPPA and for the purposes of s. 12(3)(b).

[153] The College must also show that the Inquiry Committee is a committee of the College's governing body. The College submits the Inquiry Committee is "created under section 15(1) of the College's bylaws as an exercise of the authority of the Board under section 19(1)(t) of the HPA to create such a committee by bylaw." I understand the College is arguing that it is governed by a board and that this board created the Inquiry Committee through a bylaw.

[154] Under ss. 17 and 18 of the *HPA*, I can see that every health profession college is governed by a board. The board must "govern, control and administer the affairs of its college in accordance with this Act, the regulations and the bylaws."[152] This board has the authority under s. 19(1)(t) of the *HPA* to create a bylaw to establish an inquiry committee. I am satisfied that the College's governing board created such a bylaw. Section 15(1) of the College's bylaws states, "The inquiry committee is established consisting of at least 6 persons appointed by the board."[153] Therefore, I conclude the Inquiry Committee is a committee of the College's governing body for the purposes of s. 12(3)(b).

[155] The next stage of the s. 12(3)(b) analysis requires the College to prove the following conditions:

1. The Inquiry Committee had the statutory authority to meet in the absence of the public, that is, to meet *in camera*;

2. The meeting must have taken in place *in camera*, in the absence of the public; and

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[151] College's initial submission at pp. 6-7.
[152] Section 18(1) of the *HPA*.
[153] https://library.bcpharmacists.org/6_Resources/6-1_Provincial_Legislation/5076-HPA_Bylaws.pdf.

3. The information would, if disclosed, reveal the substance of deliberations at the *in camera* meeting.

[156] Previous OIPC orders have consistently found those three conditions must be met for a local public body to withhold information under s. 12(3)(b).[154] If a local public body fails to prove all three of those conditions are satisfied, then it cannot use s. 12(3)(b) to refuse to disclose information to an access applicant.[155] I agree with this approach.

[157] The parties made extensive submissions on s. 12(3)(b), but I find in this case that I need only consider whether disclosing the information at issue would reveal the substance of the Inquiry's Committee's deliberations. I have taken this approach because, as set out below, I conclude my findings about this third condition are determinative of the s. 12(3)(b) issue and it is not necessary to consider the other conditions.

[158] The question I must consider at this point is whether disclosing the heading for section four of the Report would reveal the substance of the Inquiry Committee's deliberations. Previous OIPC orders have clarified that the phrase "substance of deliberations" under s. 12(3)(b) refers to what was discussed or decided at the *in camera* meeting such as the different views and various possible courses of actions being expressed and suggested by the meeting attendees.[156] It does not include the topic of those deliberations or the materials or documents considered at the *in camera* meeting where it is not possible to conclude what the meeting attendees thought, said or decided regarding those materials.[157]

[159] The College submits s. 12(3)(b) applies when disclosure of the information at issue "would permit the drawing of accurate inferences about the substance of deliberations of a closed meeting."[158] It argues this reasoning applies here because "the disputed information is inextricably linked to the deliberations at that meeting" and its disclosure "would inevitably reveal the substance of deliberations of the Inquiry Committee respecting the Investigator's advice and his specific recommendations to the Inquiry Committee."[159]

[160] The Lawyer submits s. 12(3)(b) does not apply because disclosing the information withheld in the Report would reveal only the subject of the Inquiry Committee's deliberations and not the substance of those deliberations. The Lawyer defines the substance of deliberations as "the actual discussions held by

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[154] For example, Order 00-14, 2000 CanLII 10836 (BCIPC) and Order F20-10, 2020 BCIPC 12 (CanLII) at para. 8.
[155] Order 00-11, 2000 CanLII 10554 (BCIPC) at p. 5.
[156] Order F23-57, 2023 BCIPC 67 (CanLII) at paras. 27- 35, and the cases cited therein.
[157] *Ibid*.
[158] College's initial submission at p. 7, citing Order F22-51, 2022 BCIPC 58 (CanLII) at para. 27.
[159] College's initial submission at p. 7.

the inquiry committee concerning whether or not to accept the Inspector's recommendations" or "what was said at a meeting."[160]

[161] The information at issue here under s. 12(3)(b) is the heading or title for section four of the Report. It is unclear and the College does not sufficiently explain how disclosing this section heading would disclose or allow someone to accurately infer the substance of the Inquiry Committee's deliberations about the complaint involving the Pharmacist or the Investigator's advice or recommendations. Instead, I find the section heading reveals only a general, broad description of section four of the Report, which is like the other headings already disclosed in the Report. Therefore, I am not persuaded that disclosing this section heading would reveal the substance of the Inquiry Committee's deliberations.

[162] Given this finding, it is not necessary to consider the other conditions because all three conditions of the s. 12(3)(b) test must be satisfied for a local public body to refuse access under this provision. Therefore, I conclude s. 12(3)(b) does not apply to this information.

CONCLUSION

[163] For the reasons discussed previously, under s. 58 of FIPPA, I make the following order:

1. Except for the information discussed under item 2 below, I confirm the College's decision to refuse access to the information withheld under s. 13(1).

2. The College is not authorized under ss. 13(1) or 12(3)(b) to refuse access to the heading for section four of the Report which is located on page 165 of the responsive records.

3. I require the College to give the Lawyer a copy of the Report with the information discussed under item 2 unredacted. The College must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order.

[164] Under s. 59 of FIPPA, the College is required to give the Lawyer access to the information that it is not authorized to withhold by February 23, 2024.

[160] Lawyer's submission at paras. 64-65.

January 11, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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