Order F24-73

MINISTRY OF HEALTH

Lisa Siew
Adjudicator

August 2, 2024

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Ministry of Health (Ministry) provide access to a report and other records. The Ministry provided the applicant with partial access to the responsive records, but withheld information under ss. 12(1) (cabinet confidences) and 13(1) (advice or recommendations) of FIPPA. The applicant requested the Office of the Information and Privacy Commissioner review the Ministry's decision and the matter was later forwarded to inquiry. At the inquiry, Simon Fraser University was granted approval to participate in the inquiry as an appropriate person. As well, the applicant and the Ministry made submissions about the impact of a recent Supreme Court of Canada decision for the analysis under s. 12(1) of FIPPA. The adjudicator determined the court decision did not significantly change the current s. 12(1) analysis. Applying that analysis, the adjudicator found the Ministry had correctly applied ss. 12(1) and 13(1) to withhold some of the redacted information in the responsive records, but ordered the Ministry to disclose the information that it was not required or authorized to withhold under ss. 12(1) and 13(1). As part of the s. 13(1) decision, the adjudicator developed and clarified the analysis under s. 13(2)(j) (field research report) and s. 13(2)(m) (information publicly cited). Lastly, the adjudicator ordered the head of the Ministry to reconsider its decision to withhold information under s. 13(1) because there was insufficient evidence to demonstrate that the Ministry's head had properly exercised their discretion under s. 13(1).

Statutes and sections considered in the order: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 12(1), 12(2)(c), 12(5), 13(1), 13(2), 13(2)(a), 13(2)(j), 13(2)(m), 66(1), 66(2) and Schedule 1 (definition of "head"). *Committees of the Executive Council Regulation*, B.C. Reg. 156/2017.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), a non-profit organization (applicant) requested the Ministry of Health (Ministry) provide access to a report which a research centre at Simon Fraser University

(University) prepared for the Ministry, and records related to a youth stabilization care program at BC Children's Hospital for a certain timeframe.[1]

[2] The Ministry provided the applicant with partial access to the requested records but withheld information under ss. 12(1) (cabinet confidences), 13(1) (advice and recommendations), 14 (solicitor client privilege), 17(1) (harm to financial or economic interests) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.[2] The Ministry consulted with the University as part of its decision to refuse access. The University supported the Ministry's decision to refuse access to the redacted information in the responsive records.

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The OIPC's investigation and mediation process clarified that the applicant was not interested in accessing the information that the Ministry withheld under s. 22(1),[3] but did not resolve the remaining issues between the parties and those matters proceeded to this inquiry.[4]

[4] Both parties provided inquiry submissions. The Ministry's submissions include *in camera* materials approved by the OIPC. Where information in a public body's submission is approved *in camera*, the OIPC adjudicator considers this information privately and the applicant receives those inquiry submissions with the *in camera* material redacted.

[5] During the inquiry, the University contacted the OIPC and requested that it be allowed to participate in the inquiry as an appropriate person under s. 54. The OIPC granted the University's request and provided it with a copy of the applicant's request for review.[5] The University made submissions to support the Ministry's decision to withhold information in the responsive records under s. 13(1). The University also requested s. 3(3)(i) (a record containing teaching or research materials) be added as an issue to the inquiry. As the Commissioner's

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[1] The applicant initially made a request for a variety of records but later revised their request for access to these specific records.

[2] The Ministry did not respond the applicant's request within the required statutory deadlines under FIPPA. After a lengthy process, which required intervention by the OIPC, the Ministry eventually provided the applicant with a response. Those details are set out in the applicant's submission dated November 3, 2023 at paras. 18-34.

[3] Applicant's submission at para. 46.

[4] I will not consider any of the information withheld by the Ministry under s. 22(1) as part of this inquiry since it is no longer in dispute between the parties and was also not identified in the notice of inquiry as an issue to be determined in this inquiry.

[5] Under s. 54(b) of FIPPA, the OIPC has the authority to provide a copy of the applicant's request for review to any person the Commissioner considers appropriate. Under s. 56(3), that person must be given an opportunity to make representations to the Commissioner or their delegate during the inquiry.

delegate on that matter, I refused the University's request to add s. 3(3)(i) to the inquiry.[6]

[6] Also, during the inquiry, the Ministry reconsidered its decision to refuse access to some of the information withheld in the responsive records and released more information to the applicant. As part of that reconsideration, the Ministry withdrew its reliance on s. 17(1) to withhold information in the records.[7] Therefore, I conclude s. 17(1) is no longer at issue in this inquiry. Moreover, as part of its submissions for this inquiry, the applicant said it is no longer seeking access to the information withheld by the Ministry under s. 14.[8] Therefore, I also conclude that information and s. 14 are no longer at issue in this inquiry.

ISSUES AND BURDEN OF PROOF

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

1. Is the public body required to refuse to disclose the information at issue under s. 12(1)?

2. Is the public body authorized to refuse to disclose the information at issue under s. 13(1)?

[8] Section 57 of FIPPA establishes the burden of proof in an inquiry. Section 57(1) of FIPPA places the burden on the public body to prove the applicant has no right of access to the information withheld under ss. 12(1) and 13(1).

DISCUSSION

Background

[9] In 2017, the BC government established a Ministry of Mental Health and Addictions (MMHA).[9] Both the Ministry and the MMHA have been involved in efforts by the BC government to address substance use disorders amongst youth in the province. The two ministries worked together to explore and develop options to address this issue.

[10] In 2018, the Ministry commissioned a study led by the University's Centre for Applied Research in Mental Health and Addictions (CARMHA) into treatment services and care options for people with severe substance use disorders at

[6] OIPC letter to the University, copied to the other parties, dated June 2, 2023.
[7] Ministry's initial submission at para. 4(d).
[8] Applicant's submission at para. 50. Information located on p. 250 of the records.
[9] The information in this background section is compiled from the parties' open submissions and evidence and information disclosed in the records.

imminent risk of death and disability, including the use of involuntary care under the *Mental Health Act*.[10] The results of the study were compiled into a 184-page report titled "Exploring Care Options for Individuals with Severe Substance Use Disorders in British Columbia: Final Report" (Report).

[11] Between 2018 and 2020, several physicians piloted clinical programs that provided short-term, involuntary care to youths following life-threatening overdoses. Some of those programs took place at the BC Children's Hospital or the Kelowna General Hospital. As part of their work on addressing substance use disorders amongst youth in the province, the Ministries consulted with the physicians conducting those pilot programs and other experts.

[12] In 2020, the BC government sought to amend the *Mental Health Act* to improve the care and safety of youth who require emergency hospital care after experiencing an overdose. The focus of the amendments was to establish short-term, stabilization care to reduce the risk of immediate injury, disability and death for youths struggling with substance use issues. Stabilization care involves detaining a youth, who has received emergency medical care after suffering a life-threatening overdose, to provide health care and community support to assist the youth with treating problematic substance use. The Ministry is responsible for the *Mental Health Act* and was part of the work leading to the proposed amendments to that Act.

[13] In June 2020, the MMHA issued a press release about the proposed amendments to the *Mental Health Act*. In the press release, the MMHA outlined the intended benefits and goals of those amendments and stated that the proposed changes were based on the expert advice of the BC Children's Hospital and other renowned child and youth advocates. The press release provided quotes from several people who supported the proposed amendments, including two physicians from the BC Children's Hospital. One of the physicians referred to the hospital piloting a practice called stabilization care in which adolescents are admitted on a short-term basis following life-threatening overdoses.

[14] The news media reported on the proposed amendments. Several independent offices and organizations expressed concerns about those amendments, including BC's Chief Coroner, the British Columbia Centre on Substance Use and the BC Representative for Children and Youth.

[15] In July 2020, the MMHA held a virtual meeting about the proposed amendments for community-based organizations. The now former Assistant Deputy Minister of the MMHA (Assistant DM) spoke at the virtual meeting about the amendments. A PowerPoint slide deck was presented and discussed at the meeting and later distributed to the meeting attendees.

[10] *Mental Health Act*, RSBC 1996, c. 288.

[16] The applicant is a non-profit, charitable organization that uses research, education and advocacy to improve the laws and policies that govern coercive mental health and substance use health care in BC. Representatives of the applicant were made aware of the proposed legislative amendments based on the press release and they also attended the virtual meeting hosted by the Assistant DM.

[17] The applicant's representatives understood from the Assistant DM's presentation and the accompanying slide deck that the proposed legislative amendments were based on the Report and the BC Children's Hospital's stabilization care pilot program conducted between June 2018 and May 2020, which involved 17 youths. After several unsuccessful informal requests to obtain the Report and information about the pilot program, the applicant made the access request that is the focus of this inquiry. Ultimately, the proposed legislative amendments to the *Mental Health Act* were not approved by the Legislature.

Records and information at issue

[18] The responsive records total 251 pages and consist of the 184-page Report, which includes 8 appendices, and 66 pages of other records related to the youth stabilization care program at BC Children's Hospital such as emails, a meeting summary, a slide deck presentation, a flow chart and other documents. The Ministry withheld information on approximately 52 pages of the Report and 24 pages of the other responsive records.

[19] With two exceptions, the Ministry applied both ss. 13(1) and 12(1) to the same information that it withheld in the disputed records. I will first consider the Ministry's decision to refuse access under s. 12(1).

Cabinet confidences – s. 12(1)

[20] The Ministry relied on s. 12(1) to refuse access to almost all the information at issue in the disputed records.[11] Section 12(1) requires a public body to withhold information that would reveal the substance of deliberations of Executive Council (also known as Cabinet) and any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[11] The Ministry relied only on s. 13(1) to withhold some information on pp. 227 and 248 of the records.

[21] The purpose of s. 12(1) is to protect the confidentiality of the deliberations of Cabinet and its committees, including committees designated under s. 12(5).[12] The Supreme Court of Canada has identified Cabinet confidentiality as essential to good government because it promotes deliberative candour, ministerial solidarity and governmental efficiency by protecting Cabinet's deliberations.[13]

[22] In 1998, the phrase "substance of deliberations" under s. 12(1) was judicially considered by the BC Court of Appeal in *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner)*. I will refer to this case as *Aquasource*. In *Aquasource*, the BC Court of Appeal determined that "substance of deliberations" in s. 12(1) refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.[14] According to the BC Court of Appeal, the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee's deliberations.[15] In other words, according to *Aquasource*, the term "substance of deliberations" includes any recorded information that Cabinet or one of its committees considered in its deliberations. Previous OIPC orders have consistently followed the approach set out in *Aquasource*.

[23] In February 2024, the Supreme Court of Canada (SCC) provided its judgment in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*.[16] In that decision, the Supreme Court considered s. 12(1) of Ontario's FIPPA which also creates an exception to access "where the disclosure would reveal the substance of deliberations" of Cabinet or its committees.[17] I will refer to this case as *Ontario*.

[24] For different reasons, both the applicant and the Ministry argue the SCC's decision in *Ontario* altered the interpretation or application of the *Aquasource* test for s. 12(1).[18] I will first consider the Ministry's submissions and objections.

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[12] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.
[13] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para. 3.
[14] *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BCCA) [*Aquasource*] at para. 39.
[15] *Ibid* at para. 48.
[16] 2024 SCC 4 [*Ontario*].
[17] RSO 1990, c F. 31. However, unlike BC's FIPPA, Ontario's s. 12(1) sets out a list of records that are expressly exempt from disclosure under s. 12(1) and "which need not meet the standard set out in s. 12(1)'s opening words to qualify for protection" [*Ontario* at para. 14].
[18] The OIPC's registrar of inquiries gave the parties an opportunity to provide submissions about *Ontario* and only the applicant and the Ministry provided submissions. Both of those parties' submissions also included arguments about a recent BC Supreme Court case that interpreted *Ontario*: *British Columbia (Minister of Public Safety) v. British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 345 (CanLII).

Is Aquasource still the applicable test under s. 12(1)?

[25] In *Ontario*, the records at issue were mandate letters issued by the Premier of Ontario to his cabinet ministers, which set out the Premier's views on policy priorities for the government's term in office.[19] The majority of the SCC concluded s. 12(1) applied to the mandate letters partly because the context indicated that, "The communication of the Premier's initial views to other members of Cabinet are part of Cabinet's decision-making process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action."[20]

[26] The Ministry says the SCC's findings in *Ontario* apply to s. 12(1) of BC's FIPPA and is binding on the OIPC because the phrase "would reveal the substance of deliberations" appears in both Ontario and BC's FIPPA.[21] Among other things, the Ministry interprets *Ontario* to mean s. 12(1) protects the full continuum of Cabinet deliberations, from the setting of priorities to the decision about how and when to announce that priority,[22] and all the information that is part of that "dynamic and fluid continuum of executive decision-making."[23] Therefore, based on *Ontario*, the Ministry argues the s. 12(1) analysis is now a broader "functional test" which replaces *Aquasource's* narrow "substantive test."[24] The Ministry says the test under s. 12(1) has changed to answering two questions: (1) Does the information form part of the continuum "(i.e. is it protected by Cabinet confidence)"? and, (2) If so, "would releasing the information reveal the substance of Cabinet deliberations"?[25]

[27] The applicant submits the Ministry has misinterpreted and inflated the impact of *Ontario* for BC's s. 12(1) and that the SCC's findings do not support the Ministry's proposed approach. The applicant argues "the test under s. 12 is not, as the Ministry suggests, limited to a question of whether information becomes cloaked in Cabinet confidence simply because a public body identifies a continuum of subject matter deliberations in which the information sought may fall."[26] The applicant says *Ontario* did not propose a blanket exclusion over any item that falls within the continuum of Cabinet decision-making, but instead calls for a "substantive analysis of the requested record…to determine whether

[19] *Ontario*, *supra* note 16 at para. 5.
[20] *Ontario*, *supra* note 16 at para. 57.
[21] Ministry's submission dated February 20, 2024 at para. 5.
[22] Ministry's submission dated February 20, 2024 at para. 7.
[23] *Ibid* at para. 11.
[24] Ministry's submission dated February 20, 2024 at para. 15, including the heading directly above, and para. 19.
[25] Ministry's submission dated February 20, 2024 at para. 19 and Ministry's submission dated March 27, 2024 at paras. 11 and 23.
[26] *Ibid* at para. 10.

disclosure of the record would shed light on Cabinet deliberations, rather than categorically excluding certain types of information from protection."[27]

[28] The applicant further contends the Ministry is misguided in artificially distinguishing between a functional and substantive test and interpreting *Ontario* to mean *Aquasource* is no longer the applicable test. The applicant notes *Ontario* was recently considered by Justice Gomery of the BC Supreme Court in *British Columbia (Minister of Public Safety) v. British Columbia (Information and Privacy Commissioner)*.[28] I will refer to this case as *Public Safety*. The applicant says Justice Gomery concluded that "*Aquasource*'*s* interpretation of the Cabinet confidences exception contained in s. 12(1) of FIPPA is consistent with the decision in [*Ontario*] and remains good law."[29] Therefore, the applicant submits *Ontario* did not change the law in BC, but "simply served to reiterate pre-existing principles regarding s. 12" and reinforces its position that s. 12(1) does not apply to any of the information at issue.[30]

[29] In response, the Ministry reiterates its interpretation of *Ontario*, the impact it has on s. 12(1) of BC's FIPPA and what it argues is now the proper two-part test under s. 12(1). The Ministry submits the test is no longer "was the information itself considered by Cabinet as proven by reference to a Cabinet submission" which it says some OIPC adjudicators have incorrectly required.[31] The Ministry contends *Ontario* "recognizes that more than just Cabinet submissions are protected by section 12 – any information within the continuum (if it permits an accurate inference) may be protected."[32] The Ministry says the test in *Aquasource* was intended to be broad and "to consider the information rather than its distribution (i.e. could the information enable an inference, regardless of whether it ever went to Cabinet or appeared in a Cabinet submission)."[33] Therefore, the Ministry submits *Ontario* has replaced and expanded the test under s. 12(1) of FIPPA.

[30] As I will explain, I find *Aquasource* is still the appropriate test under s. 12(1). As noted by the applicant, the impact of *Ontario* on s. 12(1) of FIPPA was recently considered by Justice Gomery in *Public Safety*. Justice Gomery concluded "*Aquasource*'*s* interpretation of the Cabinet confidences exception contained in s. 12(1) of FIPPA is consistent with the decision in [*Ontario*] and remains good law."[34] Justice Gomery specifically noted that the decision in *Ontario* "does not call into question the interpretation of the statute adopted in

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[27] Applicant's submission dated March 15, 2024 at paras. 10 and 12, citing *Ontario* at para. 62.
[28] 2024 BCSC 345 (CanLII) [*Public Safety*].
[29] Applicant's submission dated March 15, 2024 at para. 14, citing *Public Safety* at para. 69.
[30] Applicant's submission dated March 15, 2024 at para. 2.
[31] Ministry's submission dated March 27, 2024 at paras. 19 and 23.
[32] Ministry's submission dated March 27, 2024 at para. 14.
[33] *Ibid* at para. 22.
[34] Applicant's submission dated March 15, 2024 at para. 14, citing *Public Safety* at para. 69.

Aquasource" and that the majority decision in *Ontario* was based on the specific facts and records in that case.[35]

[31] Moreover, as noted by the applicant, both *Ontario* and *Aquasource* endorse a substantive approach that requires the decision-maker to consider whether the information withheld under s. 12(1) would, directly or indirectly, reveal the substance of Cabinet or one of its committee's deliberations.[36] Rather than changing the test under s. 12(1), the Supreme Court's decision in *Ontario* makes it clear that the context surrounding the disputed records is an important part of the required analysis.[37] The decision also clarifies that Cabinet deliberations "are not confined to discussions in a meeting room"[38] but may extend to "conversations in the corridors", in the Premier's office, "over the phone, or however and wherever they may take place."[39]

[32] Therefore, taking all the above into account, I am not persuaded that *Ontario* has displaced or changed the test for s. 12(1) of FIPPA, as argued by the Ministry. Consistent with Justice Gomery's findings in *Public Safety*, I conclude *Aquasource*'*s* interpretation of s. 12(1) of FIPPA aligns with *Ontario* and is still the applicable test for BC's s. 12(1).

Has the evidentiary burden under s. 12(1) changed?

[33] Both the Ministry and the applicant agree the public body bears the burden of proving s. 12(1) applies to the redacted information.[40] However, the Ministry interprets *Ontario* to mean public bodies now have a lower evidentiary burden under s. 12(1).

[34] In *Ontario*, Justice Karakatsanis, writing for the majority, concluded Ontario's Commissioner made the following error in ordering the disclosure of the mandate letters:

> Relatedly, to the extent the IPC required evidence linking the Letters to "actual Cabinet deliberations at a specific Cabinet meeting", that approach was unreasonable. Such a requirement is far too narrow and does not account for the realities of the deliberative process, including the Premier's priority-setting and supervisory functions, which are not necessarily performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet's deliberative process. Accordingly, it would be unreasonable for the Commissioner to establish a heightened test for

[35] *Public Safety*, *supra* note 28 at para. 72.
[36] *Ontario*, *supra* note 16 at para. 62 and *Aquasource*, *supra* note 14 at para. 48.
[37] For example, *Ontario*, *supra* note 16 at paras. 56-57.
[38] *Public Safety*, *supra* note 28 at para. 78.
[39] *Ontario*, *supra* note 16 at para. 49.
[40] Applicant's submission dated March 15, 2024 at para. 26 and Ministry's submissions dated February 20, 2024 at para. 22 and March 27, 2024 at para. 49.

> exemption from disclosure that would require evidence linking the record to "actual Cabinet deliberations at a specific Cabinet meeting".[41]

[35] I understand the Ministry interprets this statement, and other parts of the majority's reasons, to mean the following:

- Public bodies are no longer required to provide evidence that a specific issue was discussed at a certain Cabinet or committee meeting for s. 12(1) to apply.[42]

- The amount of evidence a public body will need to provide under s. 12 falls on a spectrum, requiring less evidence from the public body when the information at issue is closer to the "core of Cabinet deliberations" such as "a Cabinet submission."[43]

[36] The applicant disputes the Ministry's claim that *Ontario* reduces the burden on the public body to prove that s. 12(1) applies. The applicant argues both *Ontario* and *Public Safety* did not lower the public body's burden of proof, but "simply confirmed that there is no requirement to provide evidence of 'actual Cabinet deliberations at a specific Cabinet meeting.'"[44] The applicant says the court decisions establish that the test is "substantive and contextual" and "it is not simply a question of whether information might or did find its way to Cabinet, but whether disclosure would reveal the substance of Cabinet deliberations, such that the underlying purpose of Cabinet confidence – enabling effective government – is adversely impacted."[45] Therefore, the applicant submits the evidentiary burden under s. 12(1) has not changed.

[37] For the reasons that follow, I agree with the applicant that *Ontario* has not reduced or changed the evidentiary burden under s. 12(1). Contrary to the Ministry's position, I find *Ontario* does not mean public bodies are no longer required under s. 12(1) to provide evidence that a specific issue was discussed at a certain Cabinet or committee meeting. Instead, in my opinion, *Ontario* means public bodies do not always need to prove the information at issue was considered at an actual Cabinet meeting for s. 12(1) to apply because of the "dynamic and fluid nature of Cabinet's deliberative process" which "means that not all stages of the process takes place sitting around the Cabinet table behind a closed door."[46] Therefore, I find *Ontario* requires decision-makers to be attentive to "the realities of the deliberative process…which are not necessarily

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[41] *Ontario*, *supra* note 16 at para. 54.
[42] Ministry's submission dated March 27, 2024 at paras. 20 and 23. Ministry's submission dated February 20, 2024 at paras. 20-21.
[43] Ministry's submission dated March 27, 2024 at para. 33.
[44] Applicant's submission dated March 15, 2024 at para. 26.
[45] Applicant's submission dated March 15, 2024 at para. 26.
[46] *Ontario*, *supra* note 16 at para. 49.

performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet's deliberative process."[47]

[38] Furthermore, *Ontario* makes it clear that public bodies need to show how disclosing the information at issue would reveal the substance of Cabinet or one of its committee's deliberations for s. 12(1) to apply.[48] In *Ontario*, the majority concluded s. 12(1) applied to the mandate letters partly because the context indicated that, "The communication of the Premier's initial views to other members of Cabinet are part of Cabinet's decision-making process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action."[49] Therefore, rather than changing the evidentiary burden, as argued by the Ministry, I find *Ontario* stands for the principle that Cabinet deliberations can take place outside a formal meeting room and confirms that the analysis under s. 12(1) is substantive and contextual.

[39] I also do not agree with the Ministry that *Ontario* means there is a new evidentiary standard under s. 12(1) based on a spectrum that considers how close the information at issue is to the core of Cabinet deliberations. I find the type and amount of evidence needed to prove s. 12(1) applies has always depended on the specific records at issue and the surrounding circumstances. For example, in *Aquasource*, the record at issue was a document referred to as a "Cabinet submission."[50] Justice Donald accepted that "a Cabinet submission, by its nature and content, comes within the ambit of s. 12(1)."[51] The surrounding circumstances also established that the Cabinet submission had been submitted to Cabinet by a provincial ministry and reviewed by Cabinet.[52]

[40] On the other hand, in *Public Safety*, the public body in that case provided affidavits in support of its position, made submissions, and relied on the records themselves to prove s. 12(1) applied. However, Justice Gomery concluded the public body's affidavit evidence "only goes so far" and did not establish that disclosing the withheld information in the disputed records would reveal the substance of the Treasury Board's deliberations.[53] Therefore, by comparing those two decisions, it is clear that the amount and quality of evidence needed to support a public body's decision to refuse access under s. 12(1) will depend on the context and the records at issue. Ultimately, it is up to the public body to provide sufficient evidence and explanation to support its decision to refuse access under s. 12(1) and I conclude *Ontario* has not changed or reduced that burden.

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[47] *Ontario*, *supra* note 16 at para. 54.
[48] For example, *Ontario*, *supra* note 16 at para. 62.
[49] *Ontario*, *supra* note 16 at para. 57.
[50] *Aquasource*, *supra* note 14 at para. 48.
[51] *Aquasource*, *supra* note 14 at para. 48.
[52] *Aquasource*, *supra* note 14 at paras. 3-4.
[53] *Public Safety*, *supra* note 28 at para. 75.

Has Ontario changed the way the Aquasource test should be applied?

[41] The applicant submits the Ministry and previous decision-makers have incorrectly interpreted *Aquasource* to mean a public body must withhold information that was considered by Cabinet or one of its committees under s. 12(1), irrespective of whether that information would permit the drawing of accurate inferences about Cabinet deliberations.[54] The applicant argues such an approach is inconsistent with *Ontario* which makes it clear that the analysis under s. 12(1) is substantive rather than a categorical approach that assumes certain types of information are protected under s. 12(1).[55] Therefore, the applicant submits the proper approach is to only withhold information under s. 12(1) that would permit the drawing of accurate inferences with respect to Cabinet or one of its committee's deliberations, either on its own or in combination with other "publicly available" information.[56]

[42] The Ministry argues the applicant's narrow approach to s. 12(1) is not supported by *Aquasource*, which the Ministry says, "expressly rejects a narrow interpretation" of s. 12(1) and "affirms that the provision must be 'read widely.'"[57] The Ministry further argues that *Ontario* supports *Aquasource's* approach because *Ontario* calls for a broad, functional and contextual interpretation of Cabinet confidentiality, which the Ministry says protects Cabinet submissions and meeting minutes and all the information that is part of the "dynamic and fluid" continuum of executive decision-making.[58]

[43] As I will explain, I am not persuaded that *Ontario* has changed the way the *Aquasource* test should be applied. To start, it is important to understand how *Aquasource* has interpreted s. 12(1). In *Aquasource*, Justice Donald determined that the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee's deliberations.[59] In other words, according to *Aquasource*, the term "substance of deliberations" not only protects information that reveals Cabinet thinking out loud but also covers any recorded information that Cabinet or one of its committees considered in its deliberations. Justice Donald accepted that disclosing information considered by Cabinet would reveal something about Cabinet's deliberations.[60] Previous OIPC adjudicators have followed and consistently applied *Aquasource*'s broad approach to s. 12(1).

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[54] Applicant's submission dated February 20, 2024 at para. 20.
[55] Applicant's submission dated March 15, 2024 at para. 12, citing *Ontario* at para. 62.
[56] Applicant's submission dated November 3, 2023 at para. 74.
[57] Ministry's submission dated November 20, 2023 at paras. 17-18, citing *Aquasource* at paras. 39-41 and 48.
[58] Ministry's submission dated February 20, 2024 at para. 11.
[59] *Aquasource*, *supra* note 14 at para. 48.
[60] *Aquasource*, *supra* note 14 at para. 48.

[44] The question now is whether *Ontario* changes *Aquasource's* interpretation of s. 12(1). According to Justice Gomery in *Public Safety*, the answer to that question is no and *Aquasource* "…remains good law."[61] Moreover, in *Public Safety*, Justice Gomery applied the current test in *Aquasource* to conclude s. 12(1) did not apply because "The evidence does not establish that any version of the priority paper was ever considered by the Treasury Board itself, or that there is any real likelihood that it will be presented to the Treasury Board in the future."[62] Therefore, consistent with *Aquasource*, Justice Gomery considered whether the information at issue in that case formed the basis for Cabinet or any of its committee's deliberations. Ultimately, Justice Gomery upheld *Aquasource* and, for the most part, distinguished *Ontario* on its facts. Accordingly, *Aquasource* is still the prevailing authority when it comes to the interpretation and application of s. 12(1) of FIPPA. As a result, I am required to follow and apply it.

[45] Having addressed the parties' preliminary arguments about s. 12(1) and concluded there is no change to the *Aquasource* test, I will now move on to consider the parties' main positions and the analysis required under s. 12(1).[63]

[46] Previous OIPC orders have established and relied on a two-part analysis to determine whether information is properly withheld under s. 12(1).[64] The first question is whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) applies. If so, then the information cannot be withheld under s. 12(1).

Ministry's position on s. 12(1)

[47] The Ministry submits s. 12(1) applies to the information that it redacted in the Report and the other responsive records because that information was either considered by, or used to create other documents that were then considered by, Cabinet and two Cabinet committees, specifically the Mental Health and Addictions Working Group, and the Legislative Review Committee.[65] The Ministry says it "provided [*in camera*] exhibits where the adjudicator can see firsthand where the information withheld from the records is discussed by Cabinet (and its committees) with specific reference to meeting dates and submissions."[66] Therefore, it argues the redacted information is part of the body of information considered by Cabinet or a Cabinet committee. In accordance with *Aquasource*, the Ministry contends disclosing the redacted information would, therefore, permit

[61] Applicant's submission dated March 15, 2024 at para. 14, citing *Public Safety* at para. 69.
[62] *Public Safety*, *supra* note 28 at para. 75.
[63] The University made no submissions on s. 12.
[64] Order F18-23, 2018 BCIPC 46 (CanLII) at paras. 13-16.
[65] Ministry's submissions dated June 16, 2023 at para. 8 and March 27, 2024 at para. 39.
[66] Ministry's submission dated March 27, 2024 at para. 40.

the drawing of accurate inferences with respect to the deliberations of Cabinet or a Cabinet committee.

[48] In support of its position, the Ministry provided an affidavit from the Assistant DM who attests to being "responsible for direction and oversight of the policy and legislative work undertaken with respect to care options for youths in the aftermath of an overdose emergency" during the relevant period.[67] Among other things, the Ministry relies on the Assistant DM's affidavit to show how the redacted information in the responsive records were relied on to draft submissions to the committees and then to Cabinet as a whole. The Ministry also provided an affidavit from a records management officer (Records Officer) with Cabinet Operations in the Office of the Premier. The Ministry relies on this evidence to establish, among other things, there were Cabinet or committee meetings that occurred on certain dates where certain documents were considered, and deliberations took place. I will consider and discuss the contents of these affidavits in my analysis further below.

[49] Additionally, the Ministry says it "does not argue that simply because information was part of a Cabinet submission that was considered by Cabinet that it is automatically protected by section 12."[68] It submits the information that it withheld in the responsive records can be traced through its initial consideration by the Ministry to Cabinet records and to a decision by Cabinet about draft legislation titled Bill 22: Mental Health Amendment Act, 2020.[69] The Ministry provided a table which it relies on to show "specific decision points…where those decision points are discussed in the Cabinet records, where the information in the [responsive records] relating to those decision points has been withheld and then the section in Bill 22 that reflects Cabinet's public decision."[70] The Ministry seems to be arguing Cabinet made a decision and because the redacted information was a part of that deliberative process, then disclosing that information would reveal "the specific decision points - the substance of the deliberations completed by Cabinet."[71]

Applicant's position on s. 12(1)

[50] The applicant says the Report was commissioned on the basis that its authors or the University would be free to publish the information in the Report. The applicant also contends the other responsive records were not subject to any confidentiality requirements and that some of the information may have already been publicly disclosed. Therefore, the applicant submits s. 12(1) does not apply when the public body has agreed to unrestricted public disclosure of that

[67] Assistant DM's affidavit at para. 5.
[68] Ministry's submission dated November 20, 2023 at para. 25.
[69] Exhibit E of Assistant DM's affidavit.
[70] Ministry's submissions dated June 16, 2023 at para. 43.
[71] Ministry's submissions dated June 16, 2023 at para. 49.

information, the information has been publicly disclosed or there is no evidence of any confidentiality restrictions. In those circumstances, the applicant submits the public body should be prevented from relying on s. 12(1) or has waived Cabinet confidence.[72]

[51] Although the applicant seems to accept that s. 12(1) applies to Cabinet submissions and materials considered by Cabinet,[73] it argues s. 12(1) does not apply to any and all information that was conveyed to Cabinet and that a public body still needs to prove that the information, alone or in connection with other available information, would permit the drawing of accurate inferences about the substance of Cabinet's deliberations. The applicant contends the "available" information must be publicly available and should not include *in camera* or confidential information which emerges at an inquiry. The applicant says without the benefit of this inquiry evidence, it cannot draw any inferences about Cabinet deliberations, including the basis on which it proceeded or the role that the responsive records played.[74]

[52] Ultimately, the applicant says the Ministry did not "discharge its burden of proof with respect to the application of s. 12" because the Ministry failed to explain, "(i) what inferences that could be drawn with respect to Cabinet's deliberations from disclosure of the Records (as opposed to merely demonstrating that the Ministry staff referred to them in Cabinet submissions)" and "(ii) which inferences would need to follow from the information sought…alone or in combination with available information (as opposed to confidential Cabinet documents)."[75]

Ministry's response on s. 12(1)

[53] The Ministry disputes the applicant's arguments about the inapplicability of s. 12(1). It says the test to determine whether section 12 applies to the withheld information is: (a) Whether the disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees? and, b) Do any of the circumstances in section 12(2) apply? The Ministry argues that analysis does not consider whether or not the information is publicly available and, therefore, the ability to publish the information is irrelevant to the s. 12 analysis.[76]

[54] Citing two OIPC orders, the Ministry also argues waiver has no applicability to the s. 12 analysis.[77] Alternatively, it argues, if waiver was

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[72] Applicant's submission dated November 3, 2023 at para. 65.
[73] Applicant's submission dated November 3, 2023 at paras. 88 and 90.
[74] Applicant's submission dated November 3, 2023 at para. 93.
[75] Applicant's submission dated November 3, 2023 at para. 94.
[76] Ministry's submission dated November 20, 2023 at para. 9.
[77] Ministry's submission dated November 20, 2023 at para. 11, citing Order F22-51, 2022 BCIPC 58 (CanLII) at paras. 43-45 and Order F22-43, 2022 BCIPC 48 (CanLII) at paras. 35-37.

applicable then "only the party who enjoys the privilege may waive it" and Cabinet has not waived privilege over the redacted information and no other party can do so on its behalf even if the information had been published.[78] The Ministry also disagrees with the Applicant's argument that to avoid waiver, the information "must be explicitly confidential and disclosed on a limited basis."[79] The Ministry argues this requirement "would be a significant departure from long-standing jurisprudence and is without legal foundation" and relies on a "hypothetical publication" of the redacted information which it says "is irrelevant to the section 12 analysis in this inquiry."[80]

Section 12(1) – substance of deliberations

[55] As mentioned, the first question in the s. 12 analysis is to consider whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. The term "substance of deliberations" includes any recorded information that Cabinet or one of its committees considered in its deliberations.[81] With one exception, the Ministry is relying on this principle to prove s. 12(1) applies to the redacted information. The one exception is a record that is described as a "flow chart" which I will discuss further below.

[56] The Ministry acknowledges that the Report and the other responsive records, such as emails, a meeting summary, a slide deck presentation and other documents, were not submitted to Cabinet or a committee for consideration nor were these documents prepared for submission to Cabinet or a committee.[82] Instead, part of the Ministry's position is that s. 12(1) applies because the redacted information was used to create the following documents that were then considered by either Cabinet, the Mental Health and Addictions Working Group (Working Group) or the Legislative Review Committee:

- "Cabinet Submission – Request for Decision" dated April 1, 2019.[83]
- "Cabinet Submission – Request for Legislation" dated Nov. 8, 2019.[84]
- "Legislative Review Committee Briefing Note" dated March 24, 2020.[85]

[57] Section 12 only applies to the Executive Council (Cabinet) or one of its committees; therefore, the question I must address at this point is whether the Working Group and the Legislative Review Committee were Cabinet committees. Section 12(5) of FIPPA allows the Lieutenant Governor in Council to designate

[78] Ministry's submission dated November 20, 2023 at para. 12.
[79] Ministry's submission dated November 20, 2023 at para. 14.
[80] Ministry's submission dated November 20, 2023 at para. 14.
[81] *Aquasource*, *supra* note 14 at para. 48.
[82] Ministry's submission dated March 27, 2024 at para. 39.
[83] Exhibit B of Assistant DM's affidavit, mostly provided *in camera*.
[84] Exhibit C of Assistant DM's affidavit, mostly provided *in camera*.
[85] Exhibit D of Assistant DM's affidavit, mostly provided *in camera*.

a committee for the purposes of s. 12. The *Committees of the Executive Council Regulation* [*Regulation*][86] in force at that time lists the "Legislative Review Committee" and the "Cabinet Working Group on Mental Health, Addictions and Homelessness" as designated committees under s. 12(5) of FIPPA.

[58] I am satisfied the Legislative Review Committee was a Cabinet committee because it is clearly listed in the *Regulation*. On the other hand, the Working Group is not listed in the *Regulation*. However, the Records Officer attests that the "Mental Health and Addictions Working Group" is a shortened name for the Cabinet committee formally known as the "Cabinet Working Group on Mental Health, Addictions and Homelessness" which, as noted, is listed in the *Regulation*.[87] I accept the Records Officer's evidence and, therefore, also find the Working Group was a Cabinet committee for the purposes of s. 12.

[59] With that in mind, previous OIPC orders have found s. 12(1) applies to information that would reveal the same or similar information considered by Cabinet or one of its committees.[88] In those cases, the adjudicator first concluded there was information in a document that was submitted to Cabinet or one of its committees for consideration. Using that document as a comparison, the adjudicator was then able to determine there was information in a different document that was the same or similar. On this basis, the adjudicator was satisfied disclosing this information would reveal information considered by Cabinet or one of its committees.

[60] Accordingly, the next question is whether Cabinet, the Working Group or the Legislative Review Committee considered the two Cabinet submissions, or the Briefing Note. Based on their review of historical records within "Cabinet Operations",[89] the Records Officer attests to the following:

- The Working Group reviewed a Cabinet Submission dated "April 1, 2019" at a meeting held on "July 9, 2019."[90]

- The Working Group reviewed a Cabinet Submission dated "November 8, 2019" at a meeting held on "November 19, 2019".[91]

- The Legislative Review Committee reviewed a Briefing Note at a meeting held on "May 14, 2020."[92]

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[86] B.C. Reg. 156/2017.
[87] Records Officer's affidavit at para. 12.
[88] Order F09-26, 2009 CanLII 66959 (BC IPC) at paras. 21-23. Order F21-63, 2021 BCIPC 72 (CanLII) at paras. 69-71 and 84-85.
[89] Records Officer's affidavit at para. 13.
[90] Records Officer's affidavit at para. 16.
[91] Records Officer's affidavit at para. 19.
[92] Records Officer's affidavit at para. 22.

[61] The Records Officer provided *in camera* evidence that confirms the Working Group's meetings took place.[93] The Assistant DM also confirms the Review Officer's evidence that the Working Group met on the specified dates to review the two Cabinet Submissions.[94] The Ministry's *in camera* evidence also supports some of the Records Officer's statements.[95] The Assistant DM does not discuss whether the Legislative Review Committee reviewed the Briefing Note, but says his team prepared the Briefing Note.[96] Taking all this into account, I accept the Working Group considered the two Cabinet submissions and that the Legislative Review Committee considered the Briefing Note.

[62] However, contrary to the Ministry's position mentioned further above, I am not satisfied Cabinet considered the relevant documents. The Ministry submits Cabinet considered the "April 1, 2019" Cabinet Submission at a meeting held on "September 4, 2019" and that it considered the November 8 Cabinet Submission at a meeting held on November 27;[97] however, I find there is insufficient evidence to support the Ministry's statements. Neither the Records Officer, nor the Assistant DM say whether Cabinet itself considered the Cabinet Submissions or the Briefing Note. Instead, the Assistant DM explains how Cabinet considered and discussed a different document which contained the proposed legislative amendments, specifically "Bill 22: Mental Health Amendment Act, 2020".[98] There is no evidence the two Cabinet Submissions were included with Bill 22 for Cabinet members to review.

[63] Moreover, the Records Officer's evidence also indicates Cabinet considered different information at their September and November meetings than the information at issue here.[99] This other information was provided *in camera* for my review so I am unable to openly describe it, but I can see that it is not the two Cabinet Submissions or the Briefing Note but was instead created after the Working Group's July 2019 and November 2019 meetings.[100] There is no evidence the two Cabinet Submissions were also included with this other information for Cabinet members to review. Therefore, I find there is insufficient explanation or evidence that indicates Cabinet considered the two Cabinet submissions and the Briefing Note.

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[93] Exhibit A and B of the Records Officer's affidavit.
[94] Assistant DM's affidavit at paras. 27 and 29.
[95] Exhibit C at p. 7 and Exhibit D at p. 3 of the Assistant DM's affidavit.
[96] Assistant DM's affidavit at para. 31.
[97] Ministry's submission dated June 16, 2023, openly discussed at para. 39. For the November dates the Ministry cited the year as "2020" but I assume this is a mistake because the November Cabinet submission which was provided *in camera* for my review is dated "November 8, **2019**" and the Records Officer's evidence (at para. 20 of their affidavit) indicates Cabinet met on "November 27, **2019**" and not on "November 27, 2020."
[98] Assistant DM's affidavit at paras. 34-35 and 39.
[99] Exhibit A and B of the Records Officer's affidavit.
[100] This information is identified at Exhibits A and B of the Record Officer's affidavit.

[64] The remaining question is whether the redacted information is the same or similar to the information in the two Cabinet submissions considered by the Working Group and the Briefing Note considered by the Legislative Review Committee. The Assistant DM's affidavit includes a table which, among other things, "traces the information from the Requested Records through the Cabinet records."[101] I have reviewed this table and the relevant documents. As I will explain, I find some but not all the information in the records at issue here is the same or similar to information that was submitted to the Working Group or the Legislative Review Committee for consideration or would allow someone to accurately infer that information. Along with considering the parties' submissions and evidence, I have reached this conclusion by comparing the information withheld in the responsive records to the information in the two Cabinet submissions and the Briefing Note.

[65] I can see there is information in the Report that is mentioned in the two Cabinet Submissions and the Briefing Note. As one example, the Ministry withheld information on page 1 of the Report[102] that I can see is the same information withheld in the Cabinet Submission which was considered by the Working Group at its November 2019 meeting.[103] Moreover, I can see that some of the information withheld in the other responsive records[104] is similar to information withheld in the Cabinet Submission which was considered by the Working Group at its July 2019 meeting.[105] Therefore, in accordance with *Aquasource*, I find disclosing this redacted information would reveal the substance of the Working Group's deliberations.

[66] However, I find some of the redacted information does not appear anywhere in the two Cabinet submissions and the Briefing Note, nor is it apparent how any accurate inferences about Cabinet or a committee's deliberations can be obtained from disclosing the redacted information. I can see the Report and some of the consultations that are part of the other responsive records are generally mentioned in the two Cabinet Submissions and the Briefing Note, but not all the information redacted by the Ministry in the Report and the other responsive records appears in these documents. These differences make sense considering the intended audience and objectives of the Report and the other responsive records are different from the two Cabinet Submissions and the Briefing Note which naturally impacts what information is included, how it is presented, and the level of detail provided.

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[101] Ministry's submissions dated November 20, 2023 at para. 25. Table located at Exhibit "G" of Assistant DM's affidavit.
[102] Page 5 of the records.
[103] Information located on p. 36 of the Cabinet Submission dated November 2019 located at Exhibit C of the Assistant DM's affidavit.
[104] For example, information located on p. 185 of the records.
[105] Information located on pp. 112-113 of the Cabinet Submission dated April 2019 located at Exhibit B of the Assistant DM's affidavit.

[67] As one example, the Ministry withheld detailed information on page 11 of the Report under the heading "Identifying the Population in Need Prior to Imminent Risk of Death and Disability."[106] According to the table, the Ministry submits this redacted information in the Report is the same or similar to information located on pages 2, 3, 5-6, 7-9 and 12 of the Cabinet Submission dated April 2019 and pages 4-6, 9-10, 19, 21, 23, 26, 36, 41, 42, 47, 48, 51 and 56 of the Cabinet Submission dated November 2019 and pages 2 and 4 of the Briefing Note, or would allow someone to accurately infer that information.[107] However, having reviewed this information, it does not appear in either of the Cabinet submissions or the Briefing Note. The redacted information in the Report is completely different from the information located on the pages noted by the Ministry in the table and, from what I can see, it does not appear anywhere else in the two Cabinet Submissions or the Briefing Note.

[68] Moreover, I find there is nothing in the broader context surrounding the disputed records that suggests disclosing this information would reveal anything about the substance of the committee's deliberations. This redacted information does not reveal the type of information that past orders have considered to be the "substance of deliberations" under s. 12(1) such as a Cabinet or committee member's thoughts, opinions or arguments about a matter.[108] Therefore, I am not satisfied disclosing this redacted information would reveal the substance of a Cabinet committee's deliberations as directed by *Aquasource* or as required under s. 12(1).

Whether a flow chart was considered by Cabinet or a Cabinet committee

[69] The Ministry made an alternative argument regarding a record that is described as a "flow chart" that "compares the then-current *Mental Health Act* to the proposed changes."[109] For the flow chart, the Ministry relies on the Assistant DM's evidence to prove this record was considered by Cabinet and two of its committees. The Assistant DM says his team created the flow chart which he describes as an "illustration of the recommendations made to Cabinet."[110] The Assistant DM also says the flow chart "would have been provided to and considered by" Cabinet and two specific committees "in the period immediately prior to the tabling of" the relevant legislative amendments.[111] However, the Assistant DM does not identify the source of his belief or provide sufficient evidence to support this assumption.

[106] Information located on p. 15 of the records and heading has not been withheld.
[107] The table is located at Exhibit "G" to the Assistant DM's affidavit.
[108] For example, Order F08-17, 2008 CanLII 57360 at para. 19.
[109] Page 249 of the records. Description from Ministry's table of records and Ministry's submission dated June 16, 2023 at para. 77(f).
[110] Assistant DM's affidavit at paras. 66 and 67.
[111] Assistant DM's affidavit at para. 67.

[70] Moreover, the Records Officer does not discuss the flow chart in their affidavit. The Records Officer explains Cabinet Operations distributes any meeting materials to be considered by Cabinet or a committee prior to the meeting.[112] The Records Officer attests to reviewing "Cabinet Operations' records" to confirm other documents, specifically the two cabinet submissions and the briefing note, were considered by Cabinet and two named committees at certain meetings.[113] Therefore, I find the absence of any corroboration by the Records Officer about the flow chart, which was provided for other documents, lessens the weight of the Assistant DM's beliefs and assumptions that the flow chart was considered by Cabinet or a cabinet committee.

[71] I also note that elsewhere in its submissions the Ministry has said the responsive records, which includes the flow chart, were not submitted to Cabinet or a committee for consideration.[114] This statement contradicts the Ministry's current argument that the flow chart was considered by Cabinet and two of its committees and the Ministry does not explain this inconsistency in its position. Given these inconsistencies in the Ministry's evidence, I am not persuaded the flow chart was considered by Cabinet or any of its committees and would, therefore, reveal the substance of deliberations in accordance with *Aquasource*.

Does "waiver" apply to the s. 12(1) analysis?

[72] The applicant submits the Ministry has waived any protection allowed under s. 12(1) because the public body has contractually agreed to unrestricted public disclosure of the information in the Report. For the other records, the applicant says there are no confidentiality requirements thus "it is presumably open to third parties to publish the information contained in those records."[115]

[73] Citing two previous OIPC orders, the Ministry argues waiver has no applicability to the s. 12 analysis because s. 12 is not a privilege.[116]

[74] As I will explain, I find the concept of waiver does not apply to s. 12(1). The term "waiver" has been judicially considered and partly defined as "the act of waiving, or not insisting on some right, claim or privilege; a foregoing or giving up of some advantage, which but for such waiver, the party would have enjoyed; an election to dispense with something of value…waiver involves both knowledge and intention."[117] In my view, s. 12(1) is not some right nor is there an advantage or value to be claimed under s. 12(1).

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[112] Records Officer's affidavit at paras. 5-9.
[113] Records Officer's affidavit at paras. 13-23.
[114] Ministry's submission dated March 27, 2024 at para. 39.
[115] Applicant's submission dated November 3, 2023 at para. 56.
[116] Ministry's submission dated November 20, 2023 at para. 11, citing Order F22-51, 2022 BCIPC 58 (CanLII) at paras. 43-45 and Order F22-43, 2022 BCIPC 48 (CanLII) at paras. 35-37.
[117] *Crump v. McNeill*, 1918 CanLII 696 (AB CA) at p. 211.

[75] I also conclude s. 12 is not a privilege, nor does it import all the requirements of public interest immunity, which is a common law doctrine that also "protects the confidentiality of Cabinet deliberations."[118] Rather, subject to s. 12(2), if s. 12(1) applies, then the public body must refuse to disclose that information to an applicant. Whereas public interest immunity is a "qualified" immunity from disclosure that requires the decision maker to assess whether the injury to the public interest that might arise from disclosure outweighs the injury that might arise from non-disclosure.[119] In my opinion, due to its mandatory nature, s. 12(1) affords a higher protection for Cabinet confidentiality than the common law because it does not require the decision maker to assess whether the public interest in keeping the document confidential outweighs the public interest in its disclosure.[120] Therefore, while s. 12(1) may share a similar purpose to public interest immunity, I conclude it is not a common law privilege and thus waiver is not applicable to the s. 12(1) analysis.

Information withheld under s. 12(1) that has already been disclosed

[76] The applicant submits s. 12(1) does not apply to some of the information in dispute because the information has already been publicly disclosed. In support of this position, the applicant provided a copy of a slide deck presentation.[121] The applicant submits, and I accept, that the slide deck was presented by the Assistant DM at a virtual meeting about the proposed legislative amendments for community-based organizations and later distributed to the meeting attendees.

[77] The Ministry argues the s. 12(1) analysis does not consider whether the information is publicly available.

[78] Based on my review of the records, I can see the Ministry redacted information in the Report and the other records that were disclosed elsewhere in the responsive records or is easily inferable from other available information.[122]

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[118] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para. 98.
[119] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paras. 99-100.
[120] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paras. 99 and 101.
[121] Presentation found at Exhibit B to L.J.'s affidavit in applicant's submission.
[122] Information withheld on pp. 15 and 19 but disclosed on p. 91 of the records. Information withheld on p. 19 but disclosed on pp. 59-60. Information withheld on p. 91 but disclosed on pp. 84, 86-90. Information withheld on p. 19 but disclosed on pp. 59-60. Information withheld on p. 21 but disclosed on p. 84. Information withheld on p. 24 but disclosed on p. 168. Information withheld on p. 20 but disclosed on p. 161. Information withheld on p. 25 but disclosed on p. 175. Information withheld on p. 180 but disclosed on p. 175. Information withheld on p. 227 but disclosed or inferable from info on pp. 229 and 238. Information withheld on p. 208 but disclosed on p. 232. Information withheld on pp. 232, 249 and 251 but similar info disclosed on pp. 49-50, 229, 250-251. Information withheld on p. 232 but disclosed on p. 235. Information withheld on

Furthermore, having compared the information in dispute to the information in the slide deck provided by the applicant, I can see that some of the information redacted in the Report and the other records are reproduced on several slides of this public presentation.[123] Therefore, I find some of the information at issue under s. 12(1) has already been disclosed.

[79] These disclosures and the parties' arguments raise the question of whether it would "reveal" the substance of Cabinet's deliberations under s. 12(1) when the redacted information has already been disclosed in the responsive records or another public document. Section 12(1) specifically states "the head of a public body must refuse to disclose to an applicant information that would *reveal* the substance of deliberations of the Executive Council or any of its committee…."[124] The ordinary meaning of the verb "reveal" means, among other things, "to make (something secret or hidden) publicly or generally known."[125] Accordingly, you cannot "reveal" information that has already been disclosed.[126] There is nothing in my review of FIPPA that contradicts the ordinary meaning of the word "reveal" in s. 12(1). Instead, previous OIPC adjudicators have applied this same logic to s. 13(1) which also contains the verb "reveal" as part of that exception to disclosure.[127]

[80] Moreover, I find the disclosure of this information would not defeat the legislative purpose of s. 12(1). As noted, the purpose of s. 12(1) is to protect the *confidentiality* of the deliberations of Cabinet and its committees.[128] There are no confidentiality concerns when the public body or Cabinet has already disclosed the redacted information to the applicant or made it accessible and available to the public. Simply put, it makes no logical sense to protect information under s. 12(1) that the applicant or the public already knows, or can easily determine, was considered by Cabinet or one of its committees. As a result, I find it would not "reveal" the substance of Cabinet's deliberations, as intended under s. 12(1), when the redacted information in the responsive records has already been disclosed elsewhere in the response records or in another public document, as has occurred in this case for some of the information at issue.

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p. 251 but disclosed in footnote 1 on same page. Information withheld on pp. 162, 164, 166, 168-173, 176, 177, 179, 180, but disclosed on p. 161.

[123] Information withheld on p. 23 of the records disclosed on p. 10 of the presentation. Info withheld on p. 29 of the records disclosed on p. 12 of the presentation. Information withheld on pp. 29-30 of the records disclosed on p. 13 of the presentation. Information withheld on pp. 211 and 230 of the records disclosed on p. 14 of the presentation. Information withheld on p. 243 of the records disclosed on p. 18 of the presentation.

[124] Emphasis mine.

[125] Merriam-Webster's online dictionary: <https://www.merriam-webster.com/dictionary/reveal>.

[126] For a similar finding about information withheld under s. 12(1) but already disclosed in the responsive records, see Order F24-37, 2024 BCIPC 45 (CanLII) at para. 78.

[127] Order F23-58, 2023 BCIPC 68 (CanLII) at para. 20 and Order F20-32, 2020 BCIPC 38 (CanLII) at para. 36 and the cases cited there.

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

[81] I am aware of a previous OIPC order that reached a different conclusion. In Order F12-07, the adjudicator concluded s. 12(1) applied to an entire report even though some information in that report had already been publicly disclosed by the public body. The adjudicator found the following:

> The fact that the Ministry might have disclosed information relating to a record does not negate the application of s. 12(1) of FIPPA to any parts of the record. The issue is whether the information might reveal the substance of the deliberations of the meeting; it is not just whether it would reveal the substance of the deliberations for the first time. Section 12(1) of FIPPA does not involve a harms test with respect to the disclosure of the information at issue. Moreover, in this case, at the close of submissions to this inquiry, the deliberations had not yet occurred. The parties could not know, at that time, what precisely the deliberations would be. In order to protect the constitutional principle of Cabinet confidentiality that is inherent in s. 12(1) of FIPPA, it is necessary to withhold the entire record, in cases where the deliberations have not yet occurred by the time of the decision whether to apply the exception.[129]

[82] However, in that order, there was no interpretation of what the word "reveal" means in s. 12(1). I also find the circumstances of this case are different. In Order F12-07, the deliberations related to the report had not yet taken place when the public body decided to refuse access to the report under s. 12(1). Whereas in this case, the relevant deliberations regarding Bill 22, and thus the redacted information at issue here, have already occurred and concluded. Therefore, in these circumstances, I find the Ministry cannot withhold under s. 12(1) the redacted information in the responsive records that has already been disclosed to the applicant or the public.

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

[83] The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) apply to the redacted information in the responsive records. Where I have decided the Ministry cannot withhold the redacted information under s. 12(1), it is not necessary for me to consider whether s. 12(2) applies to that information. Therefore, the information that I am considering under s. 12(2) is the redacted information in the Report and the other records that is the same or similar to the information considered by the Working Group or the Legislative Review Committee or would allow someone to accurately infer that information.

[84] Section 12(2) states:

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

[129] Order F12-07, 2012 BCIPC 10 (CanLII) at para. 16.

> (a) information in a record that has been in existence for 15 or more years,
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered.

[85] I find ss. 12(2)(a) and (b) clearly do not apply in this case and neither party argues they do.[130] The only relevant provision is s. 12(2)(c). The Ministry and the applicant disagree on the applicability of s. 12(2)(c).

[86] Citing *Aquasource*, the Ministry submits information can only be released under s. 12(2)(c) when the purpose of the information is to provide background or analysis and it is not interwoven with any items listed in s. 12(1), such as recommendations or policy considerations submitted to Cabinet or any of its committees. The Ministry acknowledges a decision was made, as required under s. 12(2)(c), and describes this decision as "Cabinet decided it was necessary to explore legislative options to respond to this policy challenge,"[131] specifically "the decision to develop and draft Bill 22: Mental Health Amendments Act which was tabled in June 2020."[132] Given that decision, the Ministry says it has already disclosed all the background explanations and analysis that was not interwoven "with policy proposals."[133] The Ministry describes the already disclosed background explanations and analysis in the responsive records as "information about the population in need, the current Mental Health Act, practices in other jurisdictions and legal/ethical considerations."[134]

[87] The applicant submits the operative question under s. 12(2)(c) is "for what purpose was the information in the Requested Records *presented to Cabinet*?"[135] The applicant notes Cabinet did not commission the Report and the Report does not make any recommendations to Cabinet. Instead, the applicant says it was

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[130] For example, Ministry's submission dated June 16, 2023 at para. 50.
[131] Ministry's submission dated June 16, 2023 at para. 40.
[132] Ministry's submission dated June 16, 2023 at paras. 8 and 9 of page 7. The Ministry misnumbered the paragraph numbers in its June 2023 submission, so I have provided the page numbers for clarity where needed.
[133] Ministry's submission dated June 16, 2023 at para. 50(e).
[134] Ministry's submission dated June 16, 2023 at para. 40.
[135] Applicant's submission dated November 3, 2023 at para. 99, emphasis in original.

Ministry staff who commissioned the Report, sought the advice of experts, authored the Cabinet records and made recommendations and presentations to Cabinet; therefore, the applicant submits "the task is to ascertain *their* purpose in doing so."[136] The applicant argues "to the extent that the Requested Records were presented to Cabinet, the purpose for doing so was to supply background information and analysis for the recommendations and advice of Ministry staff."[137]

[88] The applicant also argues it is impossible for the redacted information in the responsive records to be interwoven with the items listed in s. 12(1) because the redacted information does not contain the recommendations or advice submitted to Cabinet, which the applicant says is found in the Cabinet submissions and not the responsive records. The applicant submits there is no risk of revealing the recommendations made by Ministry staff in the Cabinet submissions when the information at issue is not located in those records but found in entirely different records. Therefore, the applicant submits s. 12(2)(c) applies so that the entire Report and the other records should be disclosed.

[89] In response to the applicant's comments about the Ministry and not Cabinet commissioning the Report, the Ministry says the applicant is falsely distinguishing between the Ministry and Cabinet. The Ministry submits the Ministry is "a branch of Cabinet, it is an Executive Office with a particularized function, and it conducted policy research to support direction from Cabinet to address a particular issue."[138] The Ministry argues, among other things, that the "ultimate purpose of the information was for issues to be framed and policy options delineated for deliberation by Cabinet."[139]

[90] As noted, s. 12(2)(c) applies to information in a record the purpose of which is to present background explanations or analysis to Cabinet or any of its committees for its consideration in making a decision. Therefore, the analysis under s. 12(2)(c) first involves answering the following questions:

1) Did Cabinet or a Cabinet committee make or consider a decision, and if so, what was that decision?

2) Was any of the information at issue provided to Cabinet or a Cabinet committee for their consideration in making that decision?

3) If so, was the purpose of providing that information to present background explanations or analysis to Cabinet or the Cabinet committee?

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[136] Applicant's submission dated November 3, 2023 at para. 102, emphasis in original.
[137] Applicant's submission dated November 3, 2023 at para. 97.
[138] Ministry's submission dated November 20, 2023 at para. 39.
[139] Ministry's submission dated November 20, 2023 at para. 39.

[91] I found some of the information at issue in the responsive records is the same or similar to information contained in the two Cabinet Submissions considered by the Working Group and in the Briefing Note considered by the Legislative Review Committee. Therefore, the question at this point is whether the Working Group or the Legislative Review Committee made or considered a decision for the purposes of s. 12(2)(c), and if so, what was that decision?

[92] The Assistant DM's evidence indicates the Working Group reviewed the April 2019 Cabinet Submission which is described as "a Request for Decision" that sets out three options for consideration.[140] The Assistant DM then says his team completed the November 2019 Cabinet Submission which is described as "Request for Legislation…Mental Health Act" that contains "drafting instructions to Legislative Counsel."[141] Therefore, it is clear the Working Group decided to choose one of the three options and that its choice was to request the drafting of legislation related to the *Mental Health Act*, specifically what the Ministry describes as the decision "to develop and draft Bill 22: Mental Health Amendments Act."[142]

[93] Regarding a decision by the Legislative Review Committee, the Records Officer says the Legislative Review Committee met and reviewed the Briefing Note and describes *in camera* a decision made by that committee related to the Briefing Note.[143] Taking this evidence into account, I find the Legislative Review Committee made a decision.

[94] The next question is whether the information at issue was provided to the Working Group or to the Legislative Review Committee for their consideration in making their decisions. The information at issue here is information that I found was the same or similar to information found in the two Cabinet Submissions and the Briefing Note. As discussed above, the Ministry's affidavit evidence establishes the Working Group considered the two Cabinet submissions and the Legislative Review Committee considered the Briefing Note. Therefore, I find the information at issue was either provided to the Working Group or to the Legislative Review Committee for their consideration in making those decisions.

[95] The next question at this point in the s. 12(2)(c) analysis is to determine whether the purpose of providing that information to the Working Group or the Legislative Review Committee was to present background explanations or analysis for their consideration in making their decisions.

[96] Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and have also

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[140] Assistant DM's affidavit at paras. 25 and 29.
[141] Assistant DM's affidavit at paras. 28 and 30.
[142] Ministry's submission dated June 16, 2023 at paras. 8 and 9 of page 7.
[143] Records Officer's affidavit at para. 22.

said that analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."[144] Furthermore, in *Aquasource*, Justice Donald clarified s. 12(2)(c) relates "to the purpose for which the information is given: if it is to provide background or analysis and is not interwoven with any of the items listed in s. 12(1), the information can be disclosed."[145] In other words, any information of a factual nature that is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).

[97] The focus under s. 12(2)(c) is on the "information in a record." I find the purpose of providing the information at issue was not to present background explanations or analysis as required under s. 12(2)(c). Instead, its purpose was to present and discuss options to address the issue of caring for youth living with severe substance use disorder. I note that some of the redacted information at issue is of a factual nature, but I find it is the same or similar to information that is interwoven with recommendations and policy considerations submitted to a Cabinet committee. Therefore, in accordance with *Aquasource*, this information is not background explanations or analysis that can be disclosed under s. 12(2)(c). Given my finding, it is not necessary to consider the remaining requirements under ss. 12(2)(c)(i), (ii) or (iii).

Conclusion on s. 12(1)

[98] To conclude, I find the Ministry has established that it is required under s. 12(1) to refuse to disclose some of the redacted information in the responsive records because it is the same or similar to information in other documents that were considered by either the Working Group or the Legislative Review Committee or would allow someone to accurately infer that information. Therefore, in accordance with *Aquasource*, I find disclosing this redacted information would reveal the substance of a Cabinet committee's deliberations.

[99] However, I conclude s. 12(1) does not apply to the redacted information in the responsive records that does not appear anywhere in the two Cabinet submissions and the Briefing Note and for which it is not apparent how any accurate inferences about Cabinet or a committee's deliberations can be obtained from disclosing that redacted information.

[100] I also find the Ministry cannot withhold under s. 12(1) the information that was already publicly disclosed in the slide deck presentation and that the Ministry already disclosed elsewhere in the responsive records or is easily inferable from other available information. I conclude the Ministry is not required to withhold this information under s. 12(1) because it would not *reveal* the substance of Cabinet or a Cabinet committee's deliberations as required under s. 12(1).

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[144] Order 01-02, 2001 CanLII 21556 (BC IPC) at para. 15, citing Order No. 48-1995, July 7, 1995.
[145] *Aquasource*, *supra* note 14 at para. 50.

Advice and recommendations – s. 13

[101] The Ministry relied on s. 13(1) to refuse access to all the information at issue in the responsive records. As a result, there was some overlap with the Ministry's application of ss. 13(1) and 12(1) to most of the information in the responsive records.[146] For that information, I will not consider under s. 13(1) the information that I found the Ministry could withhold under s. 12(1). Where I have already determined that a FIPPA exception applies, it is not necessary for me to consider whether another FIPPA exception also applies to that information.

[102] 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. A public body is authorized to refuse access to information under s. 13(1) when the information itself directly reveals advice or recommendations or when disclosure would permit accurate inferences about any advice or recommendations.[147] 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."[148]

[103] 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 so, then the next step is to determine whether any of the categories or circumstances listed in ss. 13(2) or 13(3) apply to that information. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under 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). If the information falls under a s. 13(2) category or s. 13(3) applies, then the public body must not refuse to disclose that information under s. 13(1).

Step one: would disclosure reveal advice or recommendations?

[104] To determine whether s. 13(1) applies, I must first decide if disclosure of the information at issue 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.[149]

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[146] The Ministry only relied on s. 13(1) to withhold information on pp. 227 and 248 of the records.
[147] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.
[148] For example, Order 01-15, 2001 CanLII 21569 at para. 22.
[149] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

[105] The term "advice" has a distinct and broader meaning than the term "recommendations."[150] "Advice" usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable.[151] The term "advice" also includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact on which a public body must make a decision for future action.[152]

[106] The information at issue under s. 13(1) is in the following records that are openly described as:

- The Report and four of its eight appendices (Appendices 1, 4, 5, and 8).
- Meeting Summary dated "November 26, 2018" and titled "Case Scenarios of Youth at Risk of Imminent Harm due to Substance Use Disorder".[153]
- Slide deck presentation titled "Stabilization Care for Youth Presenting with Life-Threatening Substance Use" and dated "September 18, 2019".[154]
- An email from an MMHA employee.[155]
- Email and one attachment titled "Stabilization Care at BCCH Practice Brief".[156]
- A document titled "Stabilization Process – Further Clarification Needed".[157]
- A flow chart that "compares the then-current *Mental Health Act* to the proposed changes".[158]
- A document titled "Fact Sheet, Amendments to the *Mental Health Act* – Youth Stabilization Care".[159]

[107] In my analysis under s. 12(1), I found the Ministry could not withhold some of the redacted information in these records because that information had already been disclosed or is easily inferable from other available information.

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[150] *Ibid* at para. 24.
[151] Order 01-15, 2001 CanLII 21569 at para. 22.
[152] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 113.
[153] Pages 185-186 of the records.
[154] Pages 187-226 of the records.
[155] Page 248 of the records.
[156] Email located on p. 227 and email attachment located on pp. 229-237 of the records.
[157] Pages 243-247 of the records.
[158] Page 249 of the records.
[159] Information at issue only located on p. 251 of the records.

I also conclude the Ministry is not required to withhold this information under s. 13(1) because disclosing this information would not "reveal" any advice and recommendations for the purposes of s. 13(1).[160] This finding is consistent with previous OIPC orders that have found a public body cannot rely on s. 13(1) to withhold information which it has already revealed elsewhere.[161] I will discuss and consider the other redacted information at issue under s. 13(1) below.

The Report and four appendices

[108] The Ministry submits the information that it redacted in the Report and the four appendices contains advice and recommendations that it says was developed by "Simon Fraser University/CARMHA" for the Ministry.[162] As part of its submissions, the Ministry discusses the redacted information in detail to argue that the disclosure of the redacted information would directly or indirectly reveal advice or recommendations of technical and clinical experts, community focus groups, advisory committees, and the Report's authors.

[109] The University supports the Ministry's severance of the Report. Among other things, the University submits the Ministry correctly applied s. 13(1) to the redacted information because that information qualifies as expert opinion, advice or recommendations about severe substance use disorders. The University says the researchers who wrote the Report "identified key issues to consider or areas that required attention and improvement within the field of severe substance use disorders" such as "prevention strategies, early intervention, treatment approaches, recovery support, policy gaps, or community-level interventions."[163]

[110] Furthermore, the University says the Report was created because of a contract between "SFU and Vancouver Coastal Health in collaboration with the [Ministry]."[164] The University cites part of that contract to argue there is "no obligation to publicize the Report."[165] It contends that disclosure of the Report "by this access request would be tantamount to publication without the authors' permission."[166] The University also discusses how disclosing the Report would be harmful to the Report's authors, their careers, their institution and the scientific community.[167]

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[160] Information identified at footnote 122 of this order.
[161] For example, Order F23-58, 2023 BCIPC 68 (CanLII) at para. 20 and Order F20-32, 2020 BCIPC 38 (CanLII) at para. 36 and the cases cited there.
[162] Ministry's submission dated June 16, 2023 at para. 73.
[163] University's submission dated June 16, 2023 at para. 32.
[164] University's submission dated June 16, 2023 at para. 20. The issue of which public body has custody or control of the Report was not in dispute between the parties.
[165] University's submission dated June 16, 2023 at para. 21.
[166] University's submission dated June 16, 2023 at paras. 42-44.
[167] University's submission dated June 16, 2023 at para. 40.

[111] The applicant accepts that "pursuant to the terms of the Contract, the Report appears to have been commissioned by or in collaboration with the Ministry and contains information that, at least in part, would fall under the definition of 13(1) to provide advice and/or recommendations."[168] However, the applicant believes the Ministry has applied s. 13(1) too broadly by withholding the recommendations of the Report's authors "as well as the author's summaries of recommendations, observations, considerations, and advocacy positions provided by independent groups."[169] The applicant argues the author's summaries in the Report of what these other groups have said does not properly fall within the scope of s. 13(1) because it was not developed for the Ministry. The applicant contends it is only the advice and recommendations of the Report's authors themselves that were developed for the Ministry as required under s. 13(1).

[112] In response, the Ministry argues s. 13(1) not only protects advice or recommendations developed by a public body but also applies to advice or recommendations developed for a public body. The Ministry submits the focus groups worked together to prepare recommendations for CARHMA which the Ministry says is a part of the University. Therefore, the Ministry contends those recommendations from the focus groups were prepared for a public body, specifically the University, in accordance with s. 13(1).

[113] The applicant also disputes the University's position that the redacted information in the Report should be withheld because of the potential harmful effects on the Report's authors, the University and the scientific community. The applicant says the University's position "is speculative, unsupported by evidence and an improper basis on which to withhold" information under s. 13(1) since it is not a harms-based exception.[170] The applicant also notes there is no evidence from the Report's authors themselves about any potential harm that could occur from disclosing the Report. Neither the Ministry nor the University responded to the applicant's submissions about this specific argument.

[114] As I will explain, I am satisfied that some but not all the redacted information in the Report is advice or recommendations developed for a public body under s. 13(1). To start, I accept Vancouver Coastal Health Authority, on behalf of the Ministry and other stakeholders, hired a research team based at the University's CARMHA to prepare and write the Report. I am also satisfied those researchers had several objectives, including assessing the appropriateness of involuntary treatment for people with substance use disorders, and obtaining and summarizing feedback and recommendations from technical and clinical experts, community focus groups and advisory committees "regarding the implementation of involuntary care in BC under the current legal framework and system of

[168] Applicant's submission dated November 3, 2023 at para. 117.
[169] Applicant's submission dated November 3, 2023 at para. 119.
[170] Applicant's submission dated November 3, 2023 at para. 131.

care."[171] There is information disclosed in the Report that openly confirms all those details.[172]

[115] With that background in mind, I can see the Ministry withheld information in the Report that would reveal what the research team suggested the Ministry and other stakeholders should do or consider regarding care options for individuals in BC who suffer from substance use disorder.[173] I find this information is advice or recommendations under s. 13(1). As openly noted in the Report, this information was developed "to assist the decision making process with respect to improving care for people with [substance use disorder] at imminent risk of death or disability in BC."[174] Moreover, as previously mentioned, the applicant does not dispute that some of the information in the Report may be the research team's advice and recommendations to the Ministry about this issue.

[116] The Ministry also withheld information that would reveal the various opinions and suggestions provided by the technical and clinical experts, the community focus groups, and the advisory committees about what to do or consider regarding care options in BC for people with substance use disorder.[175] I am satisfied this information is advice and recommendations under s. 13(1) as interpreted by prior jurisprudence. Furthermore, as previously noted, the term "advice" under s. 13(1) includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact on which a public body must make a decision for future action.[176] I find some of the redacted information fits within that definition of "advice", such as the opinions of the technical and clinical experts about matters related to voluntary and involuntary care.

[117] As noted above, the applicant argues the observations and recommendation of the experts, the focus groups and the committees were not developed by or for the Ministry as required under s. 13(1). I understand this information was provided directly to the research team and not the Ministry. However, the evidence indicates one of the research team's goals was to "collate, analyze and summarize a range of recommendations and perspectives related to involuntary care for [substance use disorders], within the context of the wider suite of voluntary services, in order to inform decision-making in the province."[177] Among other things, it accomplished this goal by interviewing experts, creating the focus groups and then organizing their discussions, and meeting with the various advisory committees to obtain feedback and input. All this work done by the research team was to prepare and write the Report for the

[171] Page 5 of the records.
[172] For example, information located on pp. 5, 29 and 38-40 of the records.
[173] For example, information located on pp. 183-184 of the records.
[174] Page 29 of the records.
[175] For example, information located on pp. 1, 15, 19-29 of the records.
[176] *College*, supra note 152 at para. 113.
[177] Page 7 of the records.

Ministry and other stakeholders, which included obtaining and then summarizing this information for the Ministry. In my view, this means the research team developed the recommendations provided by the experts, the focus groups and the advisory committees for the Ministry. Therefore, I find the redacted information in this case qualifies as recommendations developed *for* a public body under s. 13(1).

[118] However, I find the Ministry redacted the following information in the Report that is not advice or recommendations under s. 13(1):

- Section headings that do not reveal any advice or recommendations and which was disclosed or easily inferable from the Ministry's submissions.[178]

- General descriptions of actions taken by the research team that does not reveal any advice or recommendations.[179]

- Factual statements that introduce other information such as a list of recommendations.[180] In other places, the Ministry has disclosed this type of information in the Report[181] and does not explain how this redacted information is different.

- A list of activities that the research team will undertake as a part of the work required to complete the Report, some of which is easily inferable from other information already disclosed in the Report such as section headings.[182]

- Information that only reveals what information was being sought from the various expert panels or focus groups without revealing any advice or recommendations.[183]

[119] It is not apparent, and the Ministry and the University do not sufficiently explain, how the disclosure of this information would reveal advice or recommendations developed by or for a public body as required under s. 13(1). The University argues disclosing all the redacted information in the Report would potentially harm the Report's authors, the University and the scientific community. However, as noted by the applicant, and the Ministry as part of its submissions, s. 13(1) is not a harms-based exception; therefore, considerations

[178] Information located on p. 5 of the records and discussed in Ministry's submission dated June 16, 2023 at para. 74.
[179] For example, information located on p. 15 of the records.
[180] For example, information located on p. 19, 21, 22, 164, 166 of the records.
[181] For example, information disclosed on p. 21 of the records under "Involuntary Care: Clinical Recommendations" and information disclosed on p. 28 of the records under "Community Recommendations."
[182] Information located on p. 40 of the Report.
[183] For example, information located on pp. 162 and 168 of the Report.

of harm are not relevant to the s. 13(1) analysis.[184] For information to be withheld under s. 13(1), it must reveal advice or recommendations developed by or for a public body, which I conclude has not been established for this information.

Meeting Summary

[120] The Ministry redacted information in a document titled "Case Scenarios of Youth at Risk of Imminent Harm due to Substance Use Disorder Meeting Summary (November 26, 2018)."[185] The Ministry describes this document as a "collaboration" between the Ministry and three named physicians.[186] It argues disclosing the redacted information would reveal "factual information, advice and recommendations" developed for and by Ministry employees in consultation with those physicians "who developed advice/recommendation for the Ministry."[187]

[121] However, contrary to the Ministry's submission, the Assistant DM says the Meeting Summary was a collaboration between the physicians and the MMHA and not the Ministry. The Assistant DM says the Meeting Summary summarizes "information provided to the Ministry of Mental Health and Addictions by three physicians treating youth with severe substance use disorders."[188] The Assistant DM deposes that it was his team at the MMHA who circulated the Meeting Summary to the three physicians for their input, with two of the physicians providing their comments in the margins of the document.[189] He says the information in the Meeting Summary includes information "summarizing the current clinical situation and practices at BC Children's Hospital and Kelowna General Hospital" including "criteria for admission."[190] The Assistant DM states, "this factual information is interwoven with recommendations and advice provided by the physicians and sometimes modified by public servants."[191]

[122] I accept the Assistant DM's evidence about which public body was involved in this record over the Ministry's statements. There is information disclosed in the Meeting Summary which confirms the Assistant DM's evidence that it was employees at the MMHA who "engaged" with the named physicians "to discuss their current practices regarding youth presenting with substance overdoses."[192] I also accept the Assistant DM's evidence that employees at the MMHA provided the Meeting Summary to the named physicians for their comments and input. I can see that two of the three physicians provided comments in the body of the proposed summary or in comment boxes.

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[184] Ministry's submission dated June 16, 2023 at para. 57.
[185] Meeting Summary located on pp. 185-186 of the records.
[186] Ministry's submission dated June 16, 2023 at para. 77(a).
[187] Ministry's submission dated June 16, 2023 at para. 76.
[188] Assistant DM's affidavit at para. 46.
[189] Assistant DM's affidavit at para. 46.
[190] Assistant DM's affidavit at paras. 47-48.
[191] Assistant DM's affidavit at para. 49.
[192] Page 185 of the records.

[123] Turning now to the information at issue in the Meeting Summary, previous OIPC orders have found editorial advice and recommendations regarding the content and wording of documents or correspondence may be withheld under s. 13(1).[193] In this case, I find there is some information that would reveal the editorial suggestions or comments of the two physicians who provided their feedback to MMHA employees. Therefore, consistent with past orders, I conclude some of the redacted information would reveal the physicians' advice to those employees about the contents of the Meeting Summary.

[124] However, I find the rest of the redacted information at issue in the Meeting Summary only reveals a summary of information of a factual nature obtained from the physicians and not any advice and recommendations to a decision-maker. As noted by the Assistant DM, I can see the redacted information in the Meeting Summary captures the then current clinical situation and practices at BC Children's Hospital and Kelowna General Hospital regarding treating youth with severe substance use disorders. I find none of this information is suggesting a preferred course of action, or providing an expert opinion, to be accepted or rejected by a decision-maker but is instead capturing and conveying information about the hospitals' existing practices. Therefore, I conclude the disclosure of this redacted information would not reveal advice or recommendations under s. 13(1).

Slide Deck Presentation

[125] The Ministry withheld information in a slide deck presentation titled "Stabilization Care for Youth Presenting with Life-Threatening Substance Use" that is dated "September 18, 2019."[194] The Ministry says the presentation was prepared by physicians from BC Children's Hospital for that hospital's Chief Operating Officer. The Ministry describes in detail why the redacted information should be withheld under s. 13(1). It generally submits disclosing the redacted information would reveal advice and recommendations that the physicians provided in the presentation to the Chief Operating Officer, information that informed their advice and recommendations, and an implied recommendation about how the Ministry should approach stabilization care.[195]

[126] In support of the Ministry's position, the Assistant DM confirms the presentation was drafted by three named physicians from BC Children's Hospital for the Chief Operating Officer. The Assistant DM says between April 2018 to June 2020, his team conducted "policy research and consulted extensively with technical and medical experts in relation to how to best care for those with

[193] For example, Order F14-44, 2014 BCIPC 47 at para. 32 and Order F18-41, 2018 BCIPC 44 at para. 29.
[194] Slide deck located at pp. 187-226 of the records.
[195] Ministry submission dated June 16, 2023 at para. 77.

severe substance use disorders."[196] The Assistant DM submits the disclosure of the redacted information would reveal advice and recommendations identified in the presentation and advice and recommendations being provided to "the Provincial Health Services Authority" and "then to the Ministries."[197]

[127] On the other hand, the applicant questions how the presentation can be an implied recommendation to the Ministry when it "appears to be internal to [BC Children's Hospital]."[198] I understand the applicant is arguing the presentation was not developed by or for the Ministry since it is a BC Children's Hospital's internal document.

[128] I can see there is information in the record itself that confirms three named physicians prepared the presentation for the Chief Operating Officer of BC Children's Hospital. However, there is insufficient evidence that helps me understand what decision the Chief Operating Officer was making about stabilization care at BC Children's Hospital at that time, and it is not apparent from the record itself.

[129] The Ministry also argues the disclosure of the redacted information would reveal an "implied" recommendation that the physicians provided to the "Provincial Health Services Authority" and to the "Ministries."[199] However, the Ministry did not specify which other ministries it means and there is insufficient evidence that establishes those unidentified ministries or the Provincial Health Services Authority were involved in any decisions at that time about stabilization care at BC Children's Hospital.[200]

[130] Moreover, I find the redacted information at issue in the presentation simply conveys or communicates information about the pilot program at the hospital and does not recommend a proposed course of action. On its own, the conveying of information to others is not advice or recommendations under s. 13(1).[201] I find the physicians are presenting information, including decisions already made about the program, rather than providing advice or recommendations. Therefore, contrary to the Ministry's position, I conclude none of the redacted information at issue in the presentation would reveal advice or recommendations to a decision-maker.

Email from a MMHA employee

[196] Assistant DM's affidavit at para. 21.
[197] Assistant DM's affidavit at para. 53.
[198] Applicant's submission dated November 3, 2023 at para. 126.
[199] Assistant DM's affidavit at para. 53.
[200] I note the Provincial Health Services Authority is a separate entity from the Ministry and from BC Children's Hospital: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) at paras. 8-11.
[201] Order F23-91, 2023 BCIPC 107 (CanLII) at para. 51.

[131] The Ministry withheld information in an email from a MMHA employee to two other public body employees with the subject line "Stabilization talk."[202] In their email, the Ministry employee provides a link to "this talk on stabilization care" and recommends the other employees view the talk.[203] The Assistant DM believes, and I accept, that the "Stabilization talk" referred to by the Ministry employee in their email is the BC Children's Hospital slide deck presentation discussed above.[204] The Ministry employee cites some information from the slide deck presentation in their email, which the Ministry has redacted under s. 13(1).

[132] The Ministry's position is that the redacted information in this email would reveal advice and recommendations that it withheld in the slide deck presentation.[205] I found none of the redacted information in the slide deck presentation would reveal advice and recommendations. Therefore, for the same reasons, I also find the disclosure of the redacted information in this email would not reveal any advice or recommendations.

Forwarded email and attachment (practice brief)

[133] The Ministry withheld information in an email where a named Ministry employee forwarded an email that they received from a named physician to two other Ministry employees and several MMHA employees.[206] It also withheld information in a document attached to the email titled "Stabilization Care at BCCH Practice Brief" dated "March 20, 2020."[207] The Ministry describes the attached practice brief as "a document prepared before formal policy is put in place."[208] It says the practice brief is not a final document or "a fixed policy and does not mandate or obligate particular action" but is a "temporary capture of best practices to date."[209]

[134] The Ministry submits the redacted information in the practice brief would reveal advice and recommendations because it is contained in a practice brief and would reveal "preliminary positions…current recommendations…what care actually looks like in practice…and what medical orders should likely be made when a patient is admitted."[210] The Ministry also argues the suggestive language in the practice brief supports its position because it uses words like "should"

[202] Email located at p. 248 of the records.
[203] Information disclosed in email.
[204] Assistant DM's affidavit at para. 54.
[205] Ministry's submission dated June 16, 2023 at para. 77(b)(i), citing p. 226 of the records as the location of the advice and recommendations in the presentation.
[206] Email located at p. 227 of the records.
[207] Attachment located at pp. 229-337 of the records.
[208] Ministry's submission dated June 16, 2023 at para. 77(c).
[209] Ministry's submission dated June 16, 2023 at paras. 77(c)(ii).
[210] Ministry's submission dated June 16, 2023 at paras. 77(c)(ii).

rather than "must" and phrases like "usually be best", "please consider the following" and "current recommendations."[211]

[135] The applicant argues the Ministry has inappropriately applied s. 13(1) because the analysis under s. 13(1) is substantive and does not depend on the language used in a record. The applicant says that "the use of commonplace words such as…'should'…cannot automatically classify information as 'advice or recommendations developed by or for a public body or minister" and doing so "would allow a public body to apply s. 13(1) without due regard to the substance of the information itself."[212]

[136] Considering the record itself and other related information, I can see that the Ministry employee first requests information from several hospital employees, including the physician, on the "policy work done at [BC Children's Hospital] on youth stabilization care."[213] In response, the physician provides the Ministry employee with the practice brief and provides some comments about its contents, which I find does not reveal any advice or recommendations but simply conveys information. However, in their email, the physician also makes some suggestions to the Ministry employee, which I find qualifies as advice to the Ministry employee about specific courses of action that are preferred or desirable.[214]

[137] Regarding the information in the practice brief, the Ministry redacted information in several sections of the practice brief that addresses "What happens when a youth with serious life-threatening illicit drug overdoes presents to [BC Children's Hospital]?" and "What Stabilization Care Looks Like on the Inpatient Medical Ward" and "Medical orders during admission."[215] I find some of the redacted information at issue would reveal suggestions to hospital employees, which they could have accepted or rejected, about how to care and treat "youth with severe illicit drug overdose."[216] The practice brief was developed by employees at BC Children's Hospital and the hospital is a public body under FIPPA.[217] Therefore, I am satisfied disclosing this information would reveal advice or recommendations developed by a public body in accordance with s. 13(1).[218]

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[211] Ministry's submission dated June 16, 2023 at paras. 77(c)(ii).
[212] Applicant's submission dated November 3, 2023 at para. 119. The applicant made this argument regarding the Report, but I find it equally applicable here given the Ministry's position.
[213] Page 228 of the records.
[214] Information located on p. 227 of the records.
[215] Information located on pp. 232-234 of the records.
[216] Information disclosed on p. 229 of the records.
[217] The definition of "public body" in schedule 1 of FIPPA includes "a local public body." A "local public body" is defined to include "a health care body" which partly means "a hospital as defined in section 1 of the *Hospital Act*", RSBC 1996 c 200. The BC Children's Hospital meets this definition and is, therefore, a public body under FIPPA.
[218] Information located on pp. 233 and 234 of the records.

[138] However, I find most of the redacted information at issue in the practice brief either conveys information to the reader[219] or provides directions and instructions rather than advises or recommends a course of action to a decision-maker. I note previous OIPC orders have found s. 13(1) does not apply to directions or instructions to staff where the recipient has no latitude or discretion to accept or reject its contents but are expected to follow and comply with the directions on how to approach an issue.[220] The Ministry's position is that the practice brief is not a "a fixed policy" that requires or "mandates or obligates" its recipients to follow "a particular action."[221] I understand the Ministry is arguing the recipients of the practice brief had the discretion to decide whether to follow the instructions and directions outlined in the brief, therefore, it is advice or recommendations under s. 13(1).

[139] However, based on my review of the redacted information, I find some of this information consists of clinical instructions or steps to follow about how to treat youth with severe illicit drug overdose.[222] I note that some of the instructions are preceded by permissive language such as "please consider the following" or the phrase "the following are the current recommendations."[223] However, given what the instructions say or the potential consequences of non-compliance, I conclude the recipients of this information did not have the discretion to accept or reject those instructions but were expected to comply and follow the directions. For example, there is information under the section titled "Medical orders during admission" that I find was expected to be followed because the failure to do so could have an adverse consequence on the patient.[224] Therefore, I am satisfied that this information is not advice or recommendations under s. 13(1) but directions or instructions to staff, which previous OIPC orders have consistently found could not be withheld under s. 13(1).[225]

[140] As noted above, the Ministry also describes the practice brief as "a document prepared before formal policy is put in place."[226] I can see from information in the practice brief that "future" work is planned for "developing stabilization care" at BC Children's Hospital.[227] However, I do not find this future work changes the prescriptive nature of the instructions or the directions in the practice brief. As its title indicates, the document briefs the reader about the hospital's "specific practice" regarding the treatment of "youth with severe illicit drug overdose and alcohol poisoning."[228] There is information in the practice brief

[219] For example, information located at the bottom of p. 233 to the top of p. 234 of the records.
[220] For example, Order F14-34, 2014 BCIPC 37 (CanLII) at paras. 18-19 and 31-32.
[221] Ministry's submission dated June 16, 2023 at paras. 77(c)(ii).
[222] Information located on pp. 232-234 of the records.
[223] Information disclosed on pp. 233 and 234 of the records.
[224] Information located on p. 234 of the records.
[225] For example, Order F19-27, 2019 BCIPC 29 (CanLII) at para. 32.
[226] Ministry's submission dated June 16, 2023 at para. 77(c).
[227] Page 235 of the records.
[228] Information disclosed on p. 229 of the records.

that confirms the hospital was using this practice at that time.[229] Therefore, while the hospital's practice about treating youth with severe illicit drug overdose may evolve and develop, I find the redacted information at issue summarizes what the hospital decided at that time was its specific practice about how to care for this patient group. As such, I find the disclosure of this redacted information would only reveal the hospital's decided policy or position at that time about how to approach this issue rather than any advice or recommendations.

[141] To conclude, I find some but not all the redacted information at issue in the email and the attached practice brief is advice or recommendations under s. 13(1).

"Stabilization Process – Further Clarification Needed" document

[142] The Ministry withheld information in a document titled "Stabilization Process – Further Clarification Needed."[230] The Assistant DM says, and I accept, that the document was drafted by members of his team at the MMHA and "the leadership at BC Children's Hospital" including two named physicians.[231] The document contains a series of questions with answers to those questions and comments provided in the body or margins of the document via the track changes feature of Microsoft word. The Assistant DM identifies two of the commentators as physicians with BC Children's Hospital.[232]

[143] The Ministry redacted most of the answers and comments in the document and a couple of the questions. The Assistant DM says the redacted information "reflects the advice and recommendations of both the public servants and practitioners at BC Children's hospital."[233] The Ministry describes the redacted information as "the perspectives of practitioners" and says, "their perspectives (advice/recommendations) are reflected in answers to the questions" and "form the foundation of the advice/recommendations they provide to the Ministries and the Ministries in turn provided to its leadership."[234]

[144] I find a small amount of the redacted information reveals advice that two commentators provided to MMHA employees about matters related to stabilization care.[235] For example, in response to the question "What additional factors are considered?", two commentators provide their opinions and identify specific courses of action that MMHA employees should consider. I am satisfied that this information is advice under s. 13(1).

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[229] Information on p. 231 of the records.
[230] Located on pp. 243-247 of the records.
[231] Assistant DM's affidavit at para. 62.
[232] Assistant DM's affidavit at para. 62.
[233] Assistant DM's affidavit at para. 65.
[234] Ministry's submission dated June 16, 2023 at para. 77(e).
[235] Information located on pp. 244 and 245 of the records.

[145] However, I find the rest of the redacted information only reveals the gathering and conveying of information between MMHA employees and hospital personnel instead of any advice or recommendations. Based on my review of the record and the Assistant DM's evidence, I can see that the purpose of the document was for MMHA employees to obtain further information and clarification about the process of stabilization care at BC Children's Hospital from individuals that the Ministry describes as "practitioners at BC Children's Hospital," including the two physicians identified by the Assistant DM. I conclude most of the redacted information captures this exchange of information and does not reveal advice or recommendations to a decision-maker.

Flow chart

[146] The Ministry withheld all the information in a document that it is described as a "flow chart" that "compares the then-current *Mental Health Act* to the proposed changes."[236] The Assistant DM attests that his team at the MMHA created the flow chart and describes the flow chart as an "illustration of the recommendations made to Cabinet" and a "visualization of the advice/recommendations made by my team and practitioners [from BC Children's Hospital]."[237]

[147] The flow chart is divided into two sections with one section outlining the process under the then-current *Mental Health Act*, as noted by the Ministry, and the other section capturing the proposed changes. I accept the Assistant DM's evidence that MMHA employees created the flow chart. I also find the proposed legislative changes reveal a suggested course of action for consideration. Therefore, I find the proposed changes to the *Mental Health Act* identified in the flow chart qualifies as recommendations developed by a public body under s. 13(1).

[148] However, I conclude the rest of the redacted information does not reveal any advice or recommendations. This redacted information only reveals the title of the second section and information of a factual nature about the process under the then-current *Mental Health Act*. It is not apparent how the disclosure of this information would reveal any advice or recommendations developed by or for a public body as required under s. 13(1). Instead, I find this redacted information only outlines and summarizes an existing process, which the Ministry has already disclosed elsewhere in the records.[238]

Fact Sheet

[236] Page 249 of the records. Description from Ministry's table of records and Ministry's submission dated June 16, 2023 at para. 77(f).
[237] Assistant DM's affidavit at paras. 66 and 67.
[238] Page 49-50 of the records.

[149] The Ministry withheld information in a two-page document titled "Fact Sheet, Amendments to the Mental Health Act – Youth Stabilization Care."[239] The Assistant DM says his team at the MMHA prepared the fact sheet to support the Minister of MMHA "during Estimates debates in the Legislature."[240] The Assistant DM emphasizes that the fact sheet "is not a communications document and does not contain key messages that the Minister may rely on publicly."[241] He describes the fact sheet as "an internal document that is intended to provide the Minister with background information about a specific policy file" and, therefore, argues "not all the information in the record is appropriate for public consumption."[242]

[150] The information at issue under s. 13(1) is located on the second page under the section titled "Background."[243] The Assistant DM describes the redacted information at issue as outlining "a history of the work done by the Ministry of Mental Health and Addictions."[244] I find none of this redacted information reveals any advice or recommendations to a decision-maker. Instead, as described by the Assistant DM, the redacted information only reveals background information and facts about the work done on the proposed legislative amendments and not any advice or recommendations developed by or for a public body or minister as required under s. 13(1).

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

[151] 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 or for a public body. The relevant information is in the Report and some appendices, the meeting summary, the practice brief and a related email, the clarification document, the flow chart and the fact sheet.[245]

[152] Subsections 13(2) and 13(3) identify certain types of records and information that a public body may not withhold under s. 13(1). The Ministry and the University both submit that none of the categories listed under s. 13(2) apply. In particular, the Ministry says none of the redacted information is factual material under s. 13(2)(a). The applicant argues ss. 13(2)(j) (field research report) and 13(2)(m) (publicly cited information) are relevant. The parties did not identify any other s. 13(2) provisions for my consideration, and I conclude there are no other

[239] Located at pp. 250-251 of the records.
[240] Assistant DM's affidavit at para. 69.
[241] Assistant DM's affidavit at para. 70.
[242] Assistant DM's affidavit at paras. 70-71.
[243] Information located on p. 251 of the records and heading disclosed in the fact sheet.
[244] Assistant DM's affidavit at para. 75.
[245] Information located on pp. 5, 6, 15, 19-30, 84-92, 96-98, 161-186, 227, 233, 234, 244-246, 249 of the records.

relevant provisions that may apply. Therefore, I will consider ss. 13(2)(a), (j) and (m) below, along with s. 13(3).

Factual material – s. 13(2)(a)

[153] 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" has been judicially considered and defined to mean materials that existed "prior to its use in service of a particular purpose or goal" and includes "source materials" accessed by an expert or "background facts not necessary to an expert's 'advice' or the deliberative process at hand."[246] The BC Supreme Court has clarified that "factual material" under s. 13(2)(a) does not include facts that are an integral and necessary component of the advice or recommendations, specifically factual material that "is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created."[247] 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.[248]

[154] The Ministry submits it has already disclosed any factual material in the responsive records and only withheld "factual information" that must be protected under s. 13(1).[249] The University made no submissions on s. 13(2)(a). The applicant did not identify s. 13(2)(a) as a category for consideration or make arguments disputing the Ministry's position on s. 13(2)(a).

[155] I can see the Ministry withheld some information of a factual nature related to the information that I found would reveal advice or recommendations developed for the Ministry or developed by a public body. However, I am satisfied these facts are an integral part of the advice or recommendations or would reveal that information. As one example, the Ministry withheld some factual statements or comments made by panel members in the Report, but I find this information is a necessary part of the panel members' recommendations.[250] As a result, I conclude this information is not factual material under s. 13(2)(a). Ultimately, I find none of the redacted information that I determined was advice or recommendations qualifies as factual material under s. 13(2)(a).

Report on the results of field research - s. 13(2)(j)

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[246] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 93-94.
[247] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52.
[248] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 52.
[249] Ministry's submission dated June 16, 2023 at paras. 63 and 65.
[250] For example, information located on p. 89 of the records.

[156] Section 13(2)(j) says the head of a public body must not refuse to disclose under s. 13(1) "a report on the results of field research undertaken before a policy proposal is formulated." For s. 13(2)(j) to apply, I conclude the following three conditions must be proven:

1. The record in dispute must be a report.

2. The report contains the results of field research.

3. The field research was undertaken before a policy proposal was formulated.

[157] If any of these conditions are not satisfied, then s. 13(2)(j) does not apply.

[158] I will first consider whether the records at issue are a report. There is no definition of the word "report" under FIPPA. However, previous OIPC orders have defined a "report" under s. 13(2)(k) as "a formal statement or account of the results of the collation and consideration of information"[251] and "an account given or opinion formally expressed after investigation or consideration."[252] I adopt these definitions of a "report" for the purposes of s. 13(2)(j).

[159] Furthermore, past orders have also found that s. 13(2)(k) requires the information at issue be contained in a record that has the formal structure of a report with the appropriate formatting and attention to grammar that one expects of a report.[253] I also agree that these requirements must be met for a record to qualify as a "report" under s. 13(2)(j).

[160] The relevant records for consideration under s. 13(2)(j) are the Report, the meeting summary, the practice brief and a related email, the clarification document, the flow chart and the fact sheet. I find most of these records either lack the structure and formatting ordinarily expected of a report or were not a formal statement, account or opinion given after investigation or after the collation and consideration of information. In some cases, the records fail to satisfy both requirements, such as the email. However, I am satisfied the Report qualifies as a report under s. 13(2)(j) considering its contents, formatting and structure. The Report is the research team's formal account of the result of compiling and considering information about care options for individuals with severe substance use disorders in BC.

[161] Therefore, the next question is whether the Report contains the results of field research. The term "field research" is not defined in FIPPA. The parties made submissions on what they think the term means. The applicant cites the

[251] Order F17-33, 2017 BCIPC 35 (CanLII) at para. 17.
[252] Order F17-39, 2017 BCIPC 43 (CanLII) at para. 46.
[253] For example, Order F17-33, 2017 BCIPC 35 (CanLII) at para. 18.

following definition of "field research" from the provincial government's *FOIPPA Policy & Procedures Manual* (the Manual):

> "Field research" means research that is conducted outside the normal office environment, but does not include library research. For the purposes of this paragraph, the field research must have been undertaken (conducted, attempted, carried out) before a policy proposal is formulated.[254]

[162] The applicant submits the Report contains the results of field research because it "involved expert research into current and potential future treatment options for severe Substance Use Disorder" which included "conducting clinical focus groups and sourcing professional opinions from various Advisory Committees, indicating that this research extended beyond the internal opinions of the experts in charge of the Report and into the 'field.'"[255]

[163] The Ministry defines "field research" by relying on the term "field work" which it defines as "work performed outside, typically on the land."[256] Applying that definition, the Ministry submits the Report was not the result of any field research because it "was limited to a survey of academic literature (library research) and focus groups led by the team at CARHMA."[257]

[164] The University interprets "field research" to mean "observational field research, i.e. field research specifically referring to research conducted in real-world settings, often outside of a controlled laboratory environment" which it says "involves observing and systematically recording behaviours, events, or phenomena of participants" for the purpose of providing "a contextual and in-depth understanding of a particular social, cultural, or natural phenomenon within its real-world context."[258] Applying that interpretation, the University acknowledges "original research involving clinical experts" was conducted and collected, but argues "no research outside the normal office environment was performed" and "no observation or systematic behavioral, event, or phenomena of participants was recorded or observed in the course of creating the Report."[259]

[165] The University also provided an affidavit from an individual who identified themselves as "a Research Scientist with the BC Centre on Substance Use", an Associate Professor in the University's Faculty of Health Sciences and "a principal investigator involved in the creation of the Report."[260] I will refer to this individual as the Researcher. The Researcher attests that no field research,

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[254] Applicant's submission dated November 3, 2023 at para. 134.
[255] Applicant's submission dated November 3, 2023 at para. 138.
[256] Ministry submission dated November 20, 2023 at para. 53.
[257] Ministry submission dated November 20, 2023 at para. 54.
[258] University's submission dated November 2023 at para. 10.
[259] University's submission dated November 2023 at paras. 11 and 12.
[260] Researcher's affidavit at paras. 1 and 2.

as defined in the Manual and interpreted by the University, was conducted in creating the Report.

[166] I am not aware of any previous OIPC order or court case that has considered and defined the term "field research" under s. 13(2)(j). However, other jurisdictions have considered its meaning under their legislative equivalent to s. 13(2)(j) of FIPPA. In Ontario Order P-763, the term "field research" was defined as "a systematic investigation, conducted away from the laboratory and in the natural environment, of the study of materials and sources for the purpose of establishing facts and new conclusions."[261] I note this definition was developed from dictionary definitions; therefore, I find it useful to also consider how this term is defined by the research community. In the field of social sciences, field research is similarly defined as "a qualitative method of data collection aimed at understanding, observing, and interacting with people in their natural settings."[262] This research method usually includes observing, interviewing, and interacting with participants in their natural environment,[263] which includes "sites" or "social locations" familiar to the research subject.[264] This combined information helps me to understand the usual and ordinary meaning of "field research."

[167] Taking all the above into account, I conclude "field research" under s. 13(2)(j) of FIPPA means a systematic investigation or study conducted in a natural environment or in a setting familiar to the research subject for the purpose of collecting data or to establish facts and reach new conclusions. I find this definition is broad enough to encompass the study of people, plants, animals or another subject matter. There is also nothing in my review of FIPPA that contradicts this ordinary meaning of the term "field research" under s. 13(2)(j). Instead, I find this definition of "field research" 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).[265]

[168] As well, I find this definition is consistent with some of the parties' arguments regarding where the research should occur such as outside the office, library or laboratory environment but does not limit the method or purpose of the research, as suggested by the University, to only "observational field research" about "particular social, cultural, or natural phenomenon of participants."[266] The usual and ordinary meaning of "field research" indicates that this research

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[261] 1994 CanLII 6683 (ON IPC). This definition has been followed and applied in Order MO-1767, 2004 CanLII 56208 (ON IPC) and Order FI-02-107, 2003 CanLII 49821 (NS FOIPOP).
[262] https://pressbooks.bccampus.ca/jibcresearchmethods/chapter/12-1-field-research-what-it-is/
[263] *Ibid.*
[264] https://pressbooks.bccampus.ca/jibcresearchmethods/chapter/12-4-getting-in-and-choosing-a-site/
[265] Order F24-03, 2024 BCIPC 4 (CanLII) at para. 98, citing *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) at paras. 31-32.
[266] University's submission dated November 2023 at para. 10.

method includes other techniques besides observation such as interviewing and interacting with participants.

[169] Applying that definition, as previously noted, the Report is the research team's formal account of the result of compiling and considering information about care options for individuals with severe substance use disorders in BC. The research conducted by the CARHMA team consisted of reviewing literature, documents, case law and existing data, as well as interviews with focus groups, committees and experts. The Report indicates these activities took place within an office environment or a similar setting such as a conference room or meeting room.[267] It is also clear to me that this setting was not a natural environment for the focus groups, committees or experts who were instead invited into these places to participate in the research. Therefore, I find the Report does not contain the results of field research because the research was not conducted in a natural environment or setting. Accordingly, I conclude s. 13(2)(j) does not apply to the Report.

Information cited publicly - s. 13(2)(m)

[170] Section 13(2)(m) says the head of a public body must not refuse to disclose under s. 13(1) "information that the head of the public body has cited publicly as the reason for making a decision or formulating a policy."[268]

[171] The applicant submits s. 13(2)(m) applies because there was a press release about Bill 22 that specifically cites the past research conducted at BC Children's Hospital. The applicant quotes the press release as saying the proposed legislative amendments were "based on the expert advice of the BC Children's Hospital and other renowned child and youth advocates."[269] The applicant submits this information is found in the some of the responsive records and, therefore, s. 13(2)(m) requires the Ministry to disclose it.

[172] The applicant provided a copy of the press release which I note contains the following quote from the then Minister of MMHA about the proposed legislative amendments to the *Mental Health Act*:

> This is a new and much needed tool in our toolbox to help youth with severe substance use challenges and their families…Experts are telling us this emergency measure is vital to ensure the immediate safety of young people in crisis. We are taking that advice and we are enabling hospitals to extend the care they provide to help youth stabilize and leave the hospital

[267] Examples of research methods are identified on pp. 40, 44, 54-55, 59, 65-66, 83-84, 91, 96, 102, 149, 159 of the records.
[268] The University made no submissions on s. 13(2)(m).
[269] Applicant's submission dated November 3, 2023 at para. 147.

> with a clear plan to access voluntary services and supports in the community.[270]

[173] The applicant also submits the slide deck presentation that the Assistant DM used as part of his presentation at a virtual meeting about the proposed legislative amendments for community-based organizations "extensively cites, quotes, and discusses both the information sourced from the Additional Records and the findings of the Report."[271] The applicant says the slide deck presentation "indicates that the 'policy work' of Bill 22 was 'informed by [the] research and clinical experience' of CARMHA and [BC Children's Hospital], while also providing specific research findings from the [BC Children's Hospital's] experiment as support for the proposed amendments."[272] Therefore, the applicant submits s. 13(2)(m) applies in these circumstances.

[174] The Ministry seems to accept that the Minister of MMHA made certain public statements in a press release; however, the Ministry interprets s. 13(2)(m) to mean the head of the public body to whom the access request was directed, in this case the Ministry of Health, must have been the one to publicly cite the information at issue as the basis for making a decision or formulating a policy. The Ministry adopts this interpretation of s. 13(2)(m) partly because it says the legislature chose to use the definitive article "the" in the phrase "information that the head of the public body has cited publicly," instead of the indefinite article "a" which the Ministry says is used "to refer to non-specific or non-particular nouns."[273] The Ministry argues the scheme of FIPPA supports its interpretation because certain sections in FIPPA use the phrase "a public body" or just "public body", while other sections specifically use "the public body" which the Ministry interprets as "referring to the actions of a single public body" rather than all public bodies.[274]

[175] I am not aware of any previous OIPC orders that have considered arguments like the Ministry's proposed interpretation of s. 13(2)(m). However, as I will explain, I agree with the Ministry's interpretation of s. 13(2)(m). Section 13(2)(m) says the head of a public body must not refuse to disclose under s. 13(1) information that the head of the public body has cited publicly as the reason for making a decision or formulating a policy. As noted by the Ministry, s. 13(2)(m) first uses the indefinite article "a" to refer to "a public body" and then the definite article "the" to refer to "the public body."

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[270] Applicant's submission dated November 3, 2023 at para. 146. Press release is Exhibit A to LJ's affidavit in applicant's submission.
[271] Applicant's submission dated November 3, 2023 at para. 146. Presentation is Exhibit B to LJ's affidavit in applicant's submission.
[272] Applicant's submission dated November 3, 2023 at para. 147.
[273] Ministry's submission dated November 20, 2023 at para. 60. Emphasis mine.
[274] Ministry's submission dated November 20, 2023 at para. 61.

[176] The indefinite article "a" is typically used "before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified or unspecified, [especially] when the individual is being first mentioned or called to notice."[275] On the other hand, the definite article "the" is used "to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or already understood from the context or the situation."[276]

[177] There are various provisions in s. 13(2) which mirror s. 13(2)(m) in its use of the indefinite and definite article such as ss. 13(2)(h), (i) and (l). In contrast, s. 13(2)(g) only uses the indefinite article "a" to refer to "a final report or final audit on the performance or efficiency of a public body." Regarding the use of the indefinite and definite article in legislation, the courts have said:

> When the legislation uses a word such as "the", it is presumed to do so precisely and for a purpose. It represents a choice of the definite article over the indefinite article. Considerable weight must be given to its clear and ordinary meaning.[277]

[178] The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through."[278] Therefore, considering its clear and ordinary meaning, I find the use of the definite article in s. 13(2)(m) represents a choice by the legislature that it is referring to a particular public body, specifically a public body previously mentioned or already understood from the context or the situation. There is nothing in my review of FIPPA that contradicts the ordinary meaning of s. 13(2)(m). As a result, I agree with the Ministry that the use of the indefinite article "the" before the words "public body" in s. 13(2)(m) is intended to tell the reader that the "public body" being referred to in s. 13(2)(m) is the public body identified in the opening words of s. 13(2).

[179] In other words, for s. 13(2)(m) to apply, the head of the public body to whom the access request was directed and that is responsible for determining whether to refuse access under s. 13(1), in this case the Ministry of Health, must have been the one to have publicly cited the information at issue as the basis for making a decision or formulating a policy.

[180] Furthermore, for s. 13(2)(m) to be invoked, the individual who cites the information publicly must be the "head" of the public body. Schedule 1 of FIPPA partly defines the term "head" as, "if the public body is a ministry or office of the government of British Columbia, the member of the Executive Council who presides over it." In this case, the head of the Ministry would be the Minister of

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[275] *Arch Equipment v. Houbein and Houbein*, 1985 CanLII 2752 (SK KB) at para. 15.
[276] *Ibid*.
[277] *A. A. v. B. B.*, 2003 CanLII 2139 (ON SC) at para. 34.
[278] *Oliveira v. Ontario (Disability Support Program Director)*, 2008 ONCA 123 (CanLII) at para. 18.

Health. However, s. 66(1) of FIPPA allows the head of a public body "to delegate to any person any duty, power or function of the head of the public body under [FIPPA]," except the power to delegate under s. 66. Section 66(2) requires the delegation to be in writing and allows the head of a public body to specify "any conditions or restrictions the head of the public body considers appropriate."

[181] In the present case, there is no evidence that the Minister of Health or their authorized delegate publicly cited any of the specific information that I found is advice or recommendations under s. 13(1) as the basis for making a decision or formulating a policy. Therefore, I find s. 13(2)(m) does not apply in this case.

[182] Given my finding, it is not necessary for me to consider the applicant's arguments which focus on the press release and on the public statements made by the Assistant DM in his presentation at the community briefing. However, I understand that my finding leaves the applicant with unresolved questions about the applicability of s. 13(2)(m) to the information at issue in the responsive records. Therefore, to provide some guidance to the parties, I make a few observations.

[183] As noted above, for s. 13(2)(m) to be invoked, it must be the "head" identified under FIPPA, or their authorized delegate, who cites the information publicly and not merely any public body employee or official.[279] Therefore, any public statements made by the Assistant DM may not be sufficient to establish the applicability of s. 13(2)(m) because the Assistant DM is not the head of the Ministry of Health, nor is there any evidence that the Assistant DM was the Minister of Health's authorized delegate in that situation.

[184] Applying the definition of "head" under FIPPA though, the head of the MMHA would be the Minister of the MMHA since they are the member of the Executive Council who presides over that ministry. As previously noted, the then Minister of the MMHA made public statements in the press release. However, previous OIPC orders have clarified that, for s. 13(2)(m) to apply, the public statement made by the head of the public body must refer to the specific information at issue in the responsive records rather than any general reference to the records or the redacted information.[280] I agree with that conclusion because the focus under s. 13(2)(m) is on the "information" in the disputed records. From my review of the press release, the only possible reference by the Minister of MMHA about the information as issue is the following: "Experts are telling us this emergency measure is vital to ensure the immediate safety of young people in crisis." Considering the redacted information at issue, this may apply to only a very small amount of information in the Report and the other responsive records.

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[279] For a similar conclusion, see Order F05-17, 2005 CanLII 24733 (BC IPC) at para. 20.
[280] Order F20-31, 2020 BCIPC 37 (CanLII) at para. 42 and Order F17-08, 2017 BCIPC 9 (CanLII) at para. 34.

[185] To conclude, I find s. 13(2)(m) does not apply in this case because there is no evidence before me that the Minister of Health, or their authorized delegate, publicly cited any of the specific information that I found is advice or recommendations under s. 13(1) as the basis for making a decision or formulating a policy. Moreover, even if I were to apply the s. 13(2)(m) analysis to the public statements made by the Minister of MMHA, it would not have resulted in providing the applicant with full access to the entire Report or the other responsive records, but likely to only a small amount of the redacted information.

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

[186] 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 have argued that the information at issue has been in existence for 10 or more years. Based on my own review of the records at issue, I find s. 13(3) does not apply because I can see that the information in the disputed records dates back to 2018-2020. Therefore, I conclude this information has not been in existence for 10 or more years.

Exercise of discretion under s. 13

[187] The applicant submits the Ministry 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."[281] 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."[282] If the head of the public body has failed to exercise their discretion, the Commissioner can require the head to do so.

[188] The Commissioner can also order the head of the public body to reconsider the exercise of discretion where "the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or the decision failed to take into account relevant considerations."[283] Previous OIPC orders have 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 the record, the general

[281] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144.
[282] Order No. 325-1999, October 12, 1999, [1999] BCIPCD No. 38 at p. 4.
[283] *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.

purposes of FIPPA, the public interest in disclosure and the nature and sensitivity of the record.[284]

[189] The applicant argues the Ministry did not properly exercise its discretion under s. 13 because the responsive records "were publicly cited with respect to Bill 22" and a decision had been made "not to proceed with Bill 22," which the applicant says supports "a significant public interest" in the records.[285] The applicant also submits it is unclear why the Ministry would refuse access when the responsive records are not "sensitive" and "where third parties have the discretion to release the information."[286] The applicant says, "withholding information cited as evidence-based support for legislative change serves only to decrease public confidence in the operation of the public body absent compelling explanation."[287]

[190] The Ministry submits that it exercised its discretion appropriately under s. 13 and only withheld "factual information (not material)" and "advice and recommendations prepared by or for a public body that would directly reveal the advice/recommendations or indirectly reveal those advice/recommendations."[288] In response to the applicant's arguments the Ministry notes the applicant was originally refused access to the entirety of the responsive records, but that it later reconsidered that decision and only limited its severance of the records to information that it says was properly withheld under s. 13(1).[289] Citing Order F14-27, the Ministry submits its actions are indicative of a proper exercise of discretion under s. 13.[290]

[191] The University submits the Ministry exercised its discretion properly regarding the Report because "the recommendations were based on possibly flawed assumptions, methodology, and conclusions."[291] The University says it decided not to publish the entire Report because of those concerns and only utilized "certain portions of the project data to develop articles that were later published."[292] The University also discusses how disclosing the Report would be harmful to the Report's authors, their careers, their institution and the scientific community.[293]

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[284] 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.
[285] Applicant's submission dated November 3, 2023 at para. 122.
[286] Applicant's submission dated November 3, 2023 at para. 122.
[287] Applicant's submission dated November 3, 2023 at para. 122.
[288] Ministry's submission dated June 16, 2023 at para. 78.
[289] Ministry's submission dated November 20, 2023 at para. 45.
[290] Ministry's submission dated November 20, 2023 at para. 45, citing Order F14-27, 2014 BCIPC 30 at paras. 26 and 34.
[291] University's submission dated June 16, 2023 at para. 40.
[292] University's submission dated June 16, 2023 at para. 41.
[293] University's submission dated June 16, 2023 at paras. 42-44.

[192] In response, the applicant notes an inconsistency between the Ministry's position and the University's submissions. The applicant says the Ministry position is that the Report contains advice and recommendations that were heavily relied on by various ministries regarding proposed amendments to the *Mental Health Act*. However, on the other hand, the applicant notes the University claims the Ministry exercised its discretion to withhold the Report under s. 13(1) because the recommendations were based on possibly flawed assumptions, methodology, and conclusions.

[193] The applicant notes the Ministry does not mention the potentially flawed contents of the Report as a factor that the Ministry considered when it decided to refuse access under s. 13. The applicant submits the fact that the Ministry does not mention this as a relevant factor contradicts the University's position that it was a relevant consideration. The applicant argues if the Ministry had learned the Report was "possibly flawed", as argued by the University, then "the Ministry should have included that in its own submission and grappled with how that knowledge would impact its exercise of discretion and its various positions on this inquiry."[294]

[194] I agree with the applicant that the Ministry does not corroborate the University's submission that it considered the possibly flawed assumptions, methodology, and conclusions in the Report. The Ministry does not mention this as a relevant factor that it considered when it decided to refuse access under s. 13(1). Instead, as noted by the applicant, the Ministry's submissions emphasize how much several ministries relied on the information in the Report to support an important, proposed legislative change. There is no mention by the Ministry of any problems with the assumptions, methodology, and conclusions in the Report, as argued by the University. Therefore, without more, I am not satisfied that the Ministry took this factor into account when it decided to redact information in the responsive records under s. 13(1).

[195] However, I am satisfied the Ministry did exercise its discretion under s. 13(1). I can see the Ministry did a line-by-line severing of the responsive records and did not withhold the entirety of the records. I agree with the Ministry that its additional disclosure of information to the applicant demonstrates that it exercised its discretion under s. 13(1) to release information to the applicant. Therefore, I am satisfied that the Ministry turned its mind to consider whether information should be disclosed or withheld under s. 13(1).

[196] The remaining question is whether the Ministry exercised its discretion in bad faith or for an improper purpose or the decision failed to take into account relevant considerations.

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[294] Applicant's submission dated November 3, 2023 at para. 129.

[197] The Ministry did not identify what factors it considered when it decided to withhold information under s. 13(1). Instead, the Ministry says that it provided access to any information that was not factual information or that would reveal advice or recommendations under s. 13(1).[295] As noted, 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."[296] I find the Ministry's submissions indicate the Ministry did not consider whether it should disclose information in the responsive records even though it may reveal advice or recommendations developed by or for a public body under s. 13(1).

[198] The Ministry relies on Order F14-27 to demonstrate that it exercised its discretion appropriately under s. 13. However, in Order F14-27, the public body identified what factors it considered when it decided to refuse access under s. 13(1), including the fact that it "exercised its discretion to release information that may have been addressed in the public domain."[297] The adjudicator in Order F14-27 was also satisfied that the public body used its "discretion to disclose some information to the applicant that is advice or recommendations, consistent with the purpose of accountability under s. 2 of FIPPA."[298] I do not have the same type of evidence here and, thus, I am unable to reach the same conclusion. Instead, the Ministry's severance of the responsive records appears to withhold any information that may be considered advice or recommendations.

[199] As noted, the Commissioner may return the matter to the public body for reconsideration where there is no evidence that the public body took into account relevant considerations. I find the Ministry did not identify what factors it considered in exercising its discretion to deny access under s. 13(1) or provide sufficient evidence that it did not consider any irrelevant considerations and that it took into account all relevant considerations. In the absence of any such evidence, I find it is appropriate in this case for me to order the Ministry's head, or their authorized delegate, to reconsider their decision to refuse to disclose the information I found is covered by s. 13(1). As part of that reconsideration, I recommend the Ministry's head, or their authorized delegate, consider the applicant's arguments about its exercise of discretion under s. 13(1).[299]

CONCLUSION

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

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[295] Ministry's submission dated June 16, 2023 at para. 78.
[296] Order No. 325-1999, October 12, 1999, [1999] BCIPCD No. 38 at p. 4.
[297] Order F14-27, 2014 BCIPC 30 at para. 26.
[298] Order F14-27, 2014 BCIPC 30 at para. 34.
[299] The applicant's arguments about this matter are located at paras. 120-122 and 128-132 of its November 3, 2023 submission.

1. Except for the information discussed under item 3 below, I require the Ministry to refuse access to the information withheld under s. 12(1).

2. Except for the information discussed under item 3 below, I confirm the Ministry's decision to refuse access to the information withheld under s. 13(1).

3. The Ministry is not required or authorized under ss. 12(1) and 13(1) to refuse access to the information highlighted *in orange* in a copy of the responsive records that will be provided to the Ministry with this order.

4. I require the Ministry to give the applicant a copy of the responsive records with the information discussed under item 3 unredacted.

5. In accordance with s. 58(5)(c), the OIPC's registrar of inquiries (Registrar) will be providing the University with a copy of this order because the University was an appropriate person given notice under s. 54. As a term under s. 58(4), I require the Ministry to give the University a copy of the responsive records with the information discussed under item 3 unredacted in order for the University to fully understand the order, including what information the Ministry is not required or authorized to withhold under ss. 12(1) and 13(1), and to exercise any right of review under FIPPA.

6. Under s. 58(4), I require the Ministry to provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order.

7. Under s. 58(2)(b), I require the head of the Ministry, or their authorized delegate, to reconsider their decision to refuse access to the information that I found it is authorized to withhold under s. 13(1). A copy of the responsive records with that information highlighted *in purple* will be provided to the Ministry with this order. The head of the Ministry, or their authorized delegate, is required to exercise their discretion and consider whether this s. 13(1) information should be released even though it is technically covered by the discretionary exception. It must deliver their reconsideration decision, along with the reasons and factors it considered for that decision, to the applicant, the University and the Registrar.

[201] Under s. 59 of FIPPA, the Ministry is required to give the applicant access to the information that it is not required or authorized to withhold by **September 17, 2024**. Under s. 58(4), I require the Ministry to deliver the reconsideration decision discussed at item 7 above regarding s. 13(1) to the applicant, the University and the Registrar by this same date.

August 2, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F21-87331

Addendum to Order F24-73

MINISTRY OF HEALTH

Lisa Siew
Adjudicator

September 27, 2024

On August 2, 2024, I issued Order F24-73[1] following an inquiry held pursuant to s. 56 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[2] The inquiry resulted from an applicant's request to the Ministry of Health (Ministry) for access to certain records. With a few exceptions, the Ministry relied on both ss. 13(1) (advice or recommendations) and 12(1) (cabinet confidences) to refuse access to the same information in the disputed records.

As part of Order F24-73, I determined the Ministry incorrectly applied s. 12(1) to some of the information that it refused access to under s. 12(1). I then considered whether this information could be withheld under s. 13(1).[3] I found the Ministry was authorized to withhold some of that information under s. 13(1).[4]

On September 25, 2024, the Ministry brought to my attention that it believes paragraph 200 (item 1) of the Order can be interpreted in a way that I did not intend, and which is inconsistent with the reasons and findings in Order F24-73 and what is required of the Ministry under the Order.

Therefore, to avoid any potential misinterpretation by the parties, I issue this addendum to revise paragraph 200 (item 1) of Order F24-73 as follows:

1. I require the Ministry to refuse access to the information withheld under s. 12(1), except for the following information:

   a) The information discussed in paragraph 200 (item 3), and

[1] Order F24-73, 2024 BCIPC 83 (CanLII).
[2] RSBC 1996, c.165.
[3] Information identified at paras. 106-107 of the order.
[4] Information identified at para. 200 (item 7) of the order.

b) The information discussed in paragraph 200 (item 7) that was withheld under both ss. 12(1) and 13(1).[5]

September 27, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F21-87331

[5] The Ministry applied both ss. 12(1) and 13(1) to the purple-highlighted information discussed at paragraph 200 (item 7), except for some information on pp. 227 and 248 of the records which the Ministry only withheld under s. 13(1).