OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-88

MINISTRY OF ATTORNEY GENERAL

Elizabeth Vranjkovic
Adjudicator

October 2, 2024

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Summary: The applicants requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to information about a complaint they made to the Liquor and Cannabis Regulation Branch of the Ministry of Attorney General (Ministry). The Ministry provided the responsive records to the applicants but withheld some information under a number of FIPPA exceptions. The Ministry also disputed the applicants' claim that the public interest required disclosure under s. 25(1) (public interest disclosure). The adjudicator found that the Ministry was authorized to withhold some of the information at issue under ss. 13(1) (advice or recommendations) and 14 (solicitor-client privilege) and ordered the Ministry to give the applicants access to the information it was not authorized to refuse to disclose. The adjudicator also found that s. 25(1) did not require the Ministry to disclose the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 13(1), 13(2)(a), 13(2)(n), 14, 25(1), 25(1)(a) and 25(1)(b).

INTRODUCTION

[1] The applicants requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to information about a complaint they made to the Liquor and Cannabis Regulation Branch (the Branch) of the Ministry of Attorney General (Ministry).

[2] The Ministry provided the responsive records to the applicants but withheld some information under ss. 3 (scope of FIPPA), 13 (advice or recommendations), 14 (solicitor-client privilege), 15(1) (harm to law enforcement), 16(1) (harm to intergovernmental relations or negotiations) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.

[3] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation by the OIPC did not resolve the issues in dispute and the matter proceeded to inquiry.

[4] Prior to the inquiry, the parties narrowed the issues and information in dispute. As a result, ss. 3, 15(1) and 16(1) are no longer in dispute. Additionally, at the applicants' request, the OIPC added s. 25(1) of FIPPA (public interest disclosure) as an inquiry issue.[1]

PRELIMINARY MATTERS

Scope of inquiry

[5] I can see that the applicants have serious questions and concerns about the Branch's investigation into their complaint and more broadly about the enforcement of liquor laws in BC. That said, my role, as the Commissioner's delegate, is limited to determining the issues identified in the notice of inquiry. Although I have reviewed the parties' entire submissions, I will only refer to those submissions where it is relevant to the issues that I will decide in this inquiry.

Information withheld under s. 22(1)

[6] During the inquiry, I wrote to the applicants to clarify whether they sought access to the information withheld under s. 22(1) because their submissions appeared to indicate they did not.

[7] The applicants confirmed that they were not seeking access to personal information about anyone employed by the Branch, but were seeking access to the names and positions of "any officials or individuals with the [Ministry] and any other ministry that received the Briefing Note and who participated in any way in any assessment, review, oversight or managerial action relating to the failure of the [Branch] to enforce and prosecute the law under the [*Liquor Control and Licensing Act*]."[2]

[8] I have reviewed the Ministry's severing of information under s. 22(1).[3] None of that information is the type of information that the applicants described above. Therefore, I find that s. 22(1) is no longer at issue and it is not necessary

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[1] From this point forward, whenever I refer to section numbers I am referring to sections of FIPPA.

[2] September 9, 2024 letter from the applicants to the OIPC.

[3] The Ministry did not provide some of the information withheld under s. 22(1) for my review because it also withheld that information under s. 14. For the reasons discussed below, I am satisfied the Ministry is authorized to refuse to disclose that information under s. 14. As a result, I do not need to decide whether that information is the type of information the applicants seek access to under s. 22(1).

to make an order about the information withheld under s. 22(1).

ISSUES

[9] The issues to be decided in this inquiry are as follows:

1. Is the Ministry authorized to refuse to disclose the information in dispute under ss. 13(1) or 14?

2. Is the Ministry required to disclose the information in dispute without delay under s. 25(1)?

[10] Under s. 57(1), the Ministry has the burden of proving that the applicant has no right to access the information in dispute under ss. 13(1) and 14.

[11] FIPPA does not say which party has the burden of proving that s. 25(1) applies. However, past orders have said that it is in the best interest of all parties to provide the adjudicator with whatever evidence and argument they have to support their position regarding s. 25(1).[4] I will follow the same approach here.

DISCUSSION

Background

[12] In 2014, the applicants' daughter was killed and a passenger in her vehicle was injured when an impaired driver struck their vehicle (the collision). The impaired driver was subsequently convicted of criminal offences in relation to the collision.

[13] In 2017, the applicants filed a complaint with the Branch alleging that staff of a licensed pub (the pub) violated the *Liquor Control and Licensing Act* (the Liquor Act) by overserving the impaired driver prior to the collision.[5]

[14] The Branch opened an investigation into the applicants' complaint. Upon completion of the investigation, it was determined that there was enough evidence to proceed with enforcement action against the licensee of the pub. However, it was then discovered that the license had been transferred more than six months prior, so the Branch could not take enforcement action. The Branch notified the applicants of the outcome of the investigation in April 2020. The applicants made their access request shortly thereafter.[6]

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[4] Order 02-38, 2002 CanLII 42472 (BC IPC) at para 39; Order F07-03, 2007 CanLII 52748 (BC IPC) at para 9.
[5] Public body's initial submission at para 26. *Liquor Control and Licensing Act*, RSBC 1996, c 267.
[6] Public body's initial submission at paras 2 and 41-43.

Information at issue

[15] The responsive records total 400 pages with 125 pages containing the information in dispute. The information at issue is in emails and attachments, briefing notes, investigation reports and a draft notice of enforcement action.

[16] In some instances, the Ministry applied more than one FIPPA exception to the same information. In going through my analysis, if I found that one exception applied, I did not consider the other cited exceptions.

Solicitor-client privilege, s. 14

[17] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 includes legal advice privilege and litigation privilege. Only legal advice privilege is at issue in this inquiry.

Sufficiency of evidence to substantiate the s. 14 claim

[18] The Ministry did not provide me with any of the information it withheld under s. 14. Instead, it provided affidavit evidence from a manager at the Branch and from a lawyer with the Legal Services Branch of the Ministry of Attorney General (LSB), who I will refer to as Lawyer A. Lawyer A's affidavit also includes a table of records that briefly describes each record, including the number of pages, the date, and the people involved in the communication.

[19] Section 44(1)(b) gives me, as the Commissioner's delegate, the power to order production of records to review them during the inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, I would only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.[7]

[20] In this case, I do not find it necessary to order production of the records under s. 44. Lawyer A's sworn affidavit evidence establishes that he is a practicing lawyer and an officer of the court with a professional duty to ensure that privilege is properly claimed. I can also see that Lawyer A affirms that he has reviewed the records withheld under s. 14. Considering all of the above, I am satisfied that I have a sufficient evidentiary basis on which to make my s. 14 decision.

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[7] Order F14-19, 2019 BCIPC 16 at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.

Legal advice privilege

[21] Legal advice privilege applies to communications that:

1. are between solicitor and client,
2. entail the seeking or giving of legal advice, and
3. are intended to be confidential by the parties.[8]

[22] In addition, legal advice privilege extends to other kinds of documents and communications that do not strictly meet the above test. For example, legal advice privilege applies to the "continuum of communications" between lawyer and client that do not specifically request or offer advice but are "part of the necessary exchange of information between solicitor and client for the purpose of providing advice."[9]

Analysis and findings, legal advice privilege

[23] Based on the descriptions in the table of records, I find that the information at issue under s. 14 is as follows:

- Emails between Branch employees and LSB legal counsel (LSB emails);[10]
- Attachments to LSB emails;[11]
- Emails between Branch employees;[12] and
- Portions of briefing notes.[13]

[24] I will consider each category of records below.

LSB emails

[25] The Ministry withheld 17 emails and email chains between Branch employees and either Lawyer A or another LSB lawyer (Lawyer B) under s. 14.

[26] Lawyer A says that:

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[8] *Solosky v The Queen*, 1979 CanLII 9 (SCC) at p 847.
[9] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 42.
[10] Information on pages 46-50, 51-56, 70-72, 73-74, 243-244, 314-316, 318-320, 325-327, 329-330, 335, 337, 340-341 and 343-348.
[11] Information on pages 75-76, 245-280, 328, 336 and 338-339.
[12] Information on pages 37-40, 77-78, 241, 283-285, 312 and 342.
[13] Information on pages 64 and 353.

- Lawyer B provided legal advice and services to the Branch until July 2019, at which point the Branch became one of his clients;[14]
- The records contain legal advice that either Lawyer A or Lawyer B provided to the Branch;[15] and
- LSB intends its legal advice to be confidential and Lawyer A believes all Branch representatives who received the legal advice understood that it was confidential.[16]

[27] The LSB emails are described in the table of records as "regarding a request for legal advice," "requesting legal advice," "discussing legal advice," "addressing a request for legal advice," "keeping LSB counsel informed to be able to give legal advice," and "providing legal advice."

[28] For the reasons that follow, I find that legal advice privilege applies to the LSB emails.

[29] First, I accept Lawyer A's evidence that he and Lawyer B provided legal advice and services to the Branch. Therefore, I find that there was a solicitor-client relationship between the Branch and Lawyer A or Lawyer B at all relevant times.

[30] Second, based on Lawyer A's evidence and the descriptions in the table of records, I am satisfied that the LSB emails involve the actual giving and seeking of legal advice or they fall within the continuum of communications between lawyer and client.

[31] Finally, I accept Lawyer A's evidence that the LSB emails were intended to be confidential. I can see from the table of records that the communications did not include anyone outside the solicitor-client relationship.

[32] I conclude that the LSB emails were confidential communications between solicitor and client for the purpose of giving or seeking legal advice, so legal advice privilege applies.

Attachments to LSB emails

[33] The Ministry withheld six attachments to LSB emails under s. 14.

[34] An attachment to an email may be privileged on its own, independent of being attached to another privileged record. Alternatively, an attachment may be privileged if it is an integral part of the communication to which it is attached and

[14] Lawyer A's affidavit at paras 4 and 7.
[15] Lawyer A's affidavit at para 12.
[16] Lawyer A's affidavit at para 18.

it would reveal the communication protected by solicitor-client privilege either directly or by inference.[17]

[35] Lawyer A says that the attachments provided by the Branch to legal counsel were "required to inform the advice" sought or "were themselves the subject of the legal advice sought."[18]

[36] The table of records describes the attachments as being attached to emails requesting legal advice, providing legal advice and discussing legal advice.

[37] The applicants say that the attachments include the investigator's Notice of Enforcement Action and Fatal Motor Vehicle Incident Investigation Report.[19]

[38] I do not know what the attachments are because the Ministry did not explain. However, the descriptions of the attachments in the table of records are consistent with Lawyer A's evidence that the attachments were required to inform the advice sought or were the subject of legal advice sought.

[39] I find that legal advice privilege applies to the attachments since they are directly related to the legal advice sought and provided and would allow accurate inferences to be made about the legal advice sought and given.

Emails between Branch employees

[40] The Ministry withheld six entire emails and email chains between Branch employees and portions of two emails between Branch employees under s. 14.

[41] The table of records describes all but one of these emails as "discussing" or "referencing" legal advice. The table of records describes the remaining email as "discussing intention to seek legal advice."

[42] Lawyer A says that where the records reflect the Branch's intention to seek legal advice on certain issues, the Branch "did subsequently seek legal advice from LSB legal counsel on these issues, and LSB legal counsel then provided such legal advice" to the Branch.[20]

[43] The applicants submit that communications between Branch employees are not privileged because they are not confidential and did not include lawyers.[21]

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[17] Order F20-08, 2020 BCIPC 9 at para 27; Order F18-19, 2018 BCIPC 22 at paras 36-40.
[18] Lawyer A's affidavit at para 16.
[19] Applicants' response submission at paras 105(k) and (l).
[20] Lawyer A's affidavit at para 15.
[21] Applicants' response submission at paras 105(a) and (i).

[44] It is well established that legal advice privilege extends to communications between employees of the client which transmit or comment on privileged communications with the client's lawyers.[22]

[45] Previous orders have held that a statement in a record about the intent or need to seek legal advice at some point in the future does not, on its own, suffice to establish that a communication is privileged. In order to establish that legal advice privilege applies, there must be evidence that disclosure of the statement would reveal actual confidential communications between solicitor and client.[23]

[46] To establish such a claim, previous OIPC orders have accepted evidence that the public body did eventually seek and receive legal advice about the particular matter revealed in the withheld information.[24] I agree with that approach as the disclosure of this information would then reveal confidential communications that later occurred between a lawyer and client.

[47] I find that all of the emails described as "referencing" and "discussing" legal advice transmit or comment on privileged communications, so legal advice privilege applies.

[48] With respect to the remaining email about an intention to seek legal advice, I accept Lawyer A's evidence that the Branch sought and received the legal advice it intended to obtain. As a result, I conclude that legal advice privilege applies to the email discussing an intention to seek legal advice.

[49] For these reasons, I find that legal advice privilege applies to the emails between Branch employees.

Portions of briefing notes

[50] The Ministry withheld portions of two briefing notes under s. 14. The briefing notes were authored by the Branch's Manager of Investigations for the Branch's Assistant Deputy Minister and General Manager to provide information about the conclusion of the investigation. Specifically, the Ministry withheld a bullet point in the "background" section and a bullet point in the section titled "Other Ministries impacted/consulted."

[51] From what I can see in the records, I am satisfied that the briefing notes are a draft and final version of the same briefing note.[25] I find it is more likely than

[22] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para 12.
[23] Order F17-23, 2017 BCIPC 24 at paras 46-50; Order F16-26, 2016 BCIPC 29 at para 32.
[24] Order F18-39, 2018 BCIPC 41 at para 37; Order F17-23, 2017 BCIPC 24 at para 50.
[25] The two briefing notes are almost identical. The only differences in the openly disclosed portions of the briefing notes are header information and some administrative information about the briefing note itself. The draft briefing note also contains a bullet point withheld under s. 13(1) that does not appear in the final briefing note.

not that the information withheld under s. 14 is the same in both versions of the briefing note. As a result, my findings below apply to both versions of the briefing note.

[52] The table of records does not describe how the draft briefing note relates to legal advice. The table of records describes the final briefing note as "detailing legal advice sought from legal counsel."

[53] The applicants say that the withheld information is what enforcement action would have been undertaken if not for the failure of the Branch, and that is not legal advice.[26] The applicants also say that the identity of a provincial government ministry is not legal advice.[27]

[54] Considering the context provided by the briefing notes themselves, I am satisfied that the information withheld from the "background" sections "details" legal advice sought from legal counsel. I find that legal advice privilege applies to the information withheld from the "background" section because it would reveal legal advice the Branch sought from legal counsel.

[55] However, I do not see, and the Ministry has not adequately explained, how legal advice privilege applies to the information withheld from the "Other Ministries impacted/consulted" section of the briefing notes. Based on the heading, I find that it is more likely than not that the information withheld here is the identity of a provincial government ministry. I do not see how disclosing the identity of such a ministry would reveal "legal advice sought from legal counsel" like the Ministry says. Therefore, I find that legal advice privilege does not apply to the withheld information in the "Other Ministries impacted/consulted" section of the briefing notes.[28]

Conclusion, s. 14

[56] To summarize, I find the Ministry is authorized to refuse to disclose most of the information at issue under s. 14. However, s. 14 does not apply to the information in the "Other Ministries impacted/consulted" section of the briefing notes.

Advice or recommendations, s. 13

[57] Section 13(1) authorizes the head of a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister, subject to certain exceptions.

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[26] Applicants' response submission at para 105(b).
[27] Applicants' response submission at para 105(d).
[28] Information on pages 64 and 353.

[58] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[29]

[59] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1):

- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[30]

- The terms "advice" and "recommendations" are distinct, so they must have distinct meanings.[31]

- "Recommendations" relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[32]

- "Advice" has a broader meaning than "recommendations."[33] It includes setting out relevant considerations and options, and providing analysis and opinions, including expert opinions on matters of fact.[34] Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.[35]

- "Advice" also includes factual information "compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body."[36]

[60] The first step in the s. 13 analysis is to determine whether the information in dispute would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether the information falls under ss. 13(2) or (3). Section 13(2) identifies certain types of records and information that a public body cannot withhold under s. 13(1). Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years.

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[29] *John Doe v Ontario (Finance)*, 2014 SCC 6 at para 45 [*John Doe*].
[30] Order 02-38, 2022 CanLII 42472 (BC IPC) at para 135.
[31] *John Doe*, *supra* note 29 at para 24.
[32] *John Doe*, *supra* note 29 at paras 23-24.
[33] *Ibid* at para 24.
[34] *Ibid* at paras 27-27 and 46-47; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras 103 and 113 [*College of Physicians*].
[35] *College of Physicians*, *supra* note 34 at para 103.
[36] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94 [*PHSA*].

Would the disputed information reveal advice or recommendations?

[61] The information at issue under s. 13(1) is in emails between Branch employees, a draft briefing note, different versions of an investigation report and a draft notice of enforcement action.

[62] The Ministry says that the disputed information is:

- Information revealing public servants' recommendations as to what if any course of action should be taken;
- Information revealing recommendations for the language to be used and the information to be included in investigative reports, notices and correspondence as part of the drafting process;
- Information revealing opinions involving the exercise of judgment and skill to weigh the significance of facts related to the investigation;
- Information revealing a public servant's view of matters to consider in making a decision related to the investigation; and
- Information revealing factual or background information that is a necessary and integrated part of a public servant's advice related to the investigation.[37]

[63] The applicants dispute the Ministry's characterization of the information at issue.[38]

[64] For the reasons that follow, I find that some, but not all of the information withheld under s. 13(1) would reveal advice or recommendations developed by or for the Branch.

Emails between Branch employees[39]

[65] The Ministry withheld portions of six emails between Branch employees under s. 13(1).

[66] The applicants say that some of this information is administrative policy, which should not be kept from the public.[40] They also say that some of the information is about public relations.[41]

[67] I find that most of the information at issue in the emails between Branch employees would reveal advice or recommendations. I can see that the authors

[37] Public body's initial submission at paras 72-76.
[38] Applicants' response submission at paras 85-91.
[39] Information on pages 2, 20, 151, 303 and 312.
[40] Applicants' response submission at paras 91(a) and (b).
[41] Applicants' response submission at para 91(e).

of those emails have used their expertise and professional judgment to comment on matters related to the applicants' complaint and set out suggested courses of action.[42]

[68] However, some of the withheld information is an employee's explanation of what he considered saying in response to the applicants' complaint and why he did not respond in that manner.[43] I find that information would not reveal advice or recommendations and the Ministry is not authorized to withhold it under s. 13(1).

Portions of investigation reports[44]

[69] The Ministry also relied on s. 13(1) to withhold portions of an undated investigation report and portions of three iterations of a draft investigation report. The Ministry also withheld the Manager of Investigations' handwritten comments on the draft reports.

[70] The applicants say that some of the redacted information relates to evidence that the applicants provided to the Branch and question why the Ministry is withholding information that they already know.[45] They also say that they are particularly interested in the withheld information in the "conclusion" section of the reports.[46]

[71] I find that the following information would reveal advice or recommendations:

- The Manager of Investigations' handwritten comments, which comprise editorial advice.[47] This information is clearly his advice and recommendations.

- The information withheld from the "conclusion" sections of the reports.[48] Some of this information is the author using their expertise and professional judgment to provide advice to the Branch on how to proceed. The rest of the information in these sections is factual information that I find is a necessary and integrated part of that advice.

[72] However, I find that information in the investigation reports that is openly disclosed elsewhere in the responsive records would not reveal advice or

[42] Information on pages 2, 20, 150-151, 303 and 312.
[43] Information on page 2.
[44] Information on pages 161-162, 164-171, 189, 199-200, 207, 388 and 399.
[45] Applicants' response submission at para 91(f) and (g).
[46] Applicants' response submission at para 91(g).
[47] Information on pages 161-162, 164-170, 199-200 and 207.
[48] Information on pages 171, 189, 207, 388 and 399.

recommendations.[49] Previous OIPC orders have found that disclosing information that has already been released would not "reveal" advice or recommendations and I make the same finding here.[50] The Ministry is not authorized to withhold this information.

Draft briefing note[51]

[73] The Ministry withheld one line of a draft briefing note authored by the Manager of Investigations under s. 13(1).

[74] The Ministry says that the withheld information reveals public servants' recommendations as to what if any course of action should be taken. The Ministry also says that this information reveals an opinion involving the exercise of judgment and skill to weigh the significance of facts related to the investigation.[52]

[75] Having reviewed the withheld information, I am not persuaded by the Ministry's position that it reveals recommendations or an opinion involving the exercise of judgment and skill to weigh the significance of facts related to the investigation. Instead, I find that the author of the briefing note is providing information to the recipient of the briefing note about the circumstances surrounding the investigation. I do not see how this would reveal any advice or recommendations. The Ministry is not authorized to withhold this information.

Draft notice of enforcement action[53]

[76] The Ministry withheld a draft notice of enforcement action authored by the investigator under s. 13(1). The draft notice is directed to the pub and sets out a number of items including the reasons for enforcement action, a narrative of events, the enforcement action the General Manager proposes to take against the pub, and the pub's options going forward. The Ministry withheld the draft notice in its entirety, including tracked changes and margin comments made by another Branch employee who I will refer to as the Reviewer.

[77] The Ministry submits that the disputed information reveals "recommendations for the language to be used and the information to be included… as part of the drafting process" and "information revealing factual or background information that is a necessary and integrated part of a public servant's advice related to the investigation."[54] The Ministry also says that

[49] Information on pages 162 and 164.
[50] Order F20-32, 2020 BCIPC 38 at para 36.
[51] Information on page 63. This is the same draft briefing note as discussed in my s. 14 analysis above.
[52] Public body's initial submission at paras 72 and 74.
[53] Pages 304-311.
[54] Public body's initial submission at paras 73 and 76.

Branch employees had to "use their expertise to sort through the evidence and determine the factual information that was relevant to include" in the draft notice.[55]

[78] The applicants submit that the withheld information should be released because it would reveal the results of the investigation.[56]

[79] To begin, I find that the Reviewer's tracked changes and comments in the margins are clearly advice and recommendations to the person who would decide what the notice would ultimately say. Where information in the draft is highlighted and is the subject of a comment from the Reviewer in the margins, I find that disclosing the highlighted information would reveal through inference the Reviewer's advice in the associated comment.

[80] However, I am not persuaded that the remainder of the information would reveal advice or recommendations.

[81] Section 13(1) does not apply to draft versions of records simply because they are drafts or earlier versions.[57] Previous orders have found that s. 13 applies to draft records only where the withheld information itself reveals advice or recommendations on a proposed course of action to be accepted or rejected by a decision maker.[58]

[82] I find that the draft notice does not reveal advice or recommendations; rather it only reveals the decision that was made to issue a notice. Additionally, most of the information in the draft notice is factual information about the Branch's enforcement processes and the circumstances giving rise to the draft notice. Some of the information is headings, page numbers and header and footer information, which is not the type of information that may be withheld under s. 13(1).[59]

[83] To summarize, I find that the Reviewer's tracked changes and margin comments (and associated highlighted information) would reveal advice and recommendations under s. 13(1). However, I am not persuaded that any of the remaining information in the draft notice would reveal advice or recommendations, so the Ministry is not authorized under s. 13(1) to withhold that information.[60]

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[55] Public body's reply submission at para 21.
[56] Applicants' response submission at para 91(l).
[57] Order 00-27, 2000 CanLII 14392 (BC IPC) at page 6; Order F20-37, 2020 BCIPC 43 at para 33.
[58] Order F19-28, 2019 BCIPC 30 at paras 27-29; Order F14-17, 2014 BCIPC 20 at para 40.
[59] Information on pages 304-311.
[60] For clarity, I have not ordered the Ministry to disclose some of the information that I find would not reveal advice or recommendations because it is also withheld under s. 22(1).

Do any of the exceptions in s. 13(2) apply?

[84] Next, I will consider if s. 13(2) applies to the information that I found above would reveal advice or recommendations.

[85] The Ministry says s. 13(2) does not apply. The applicants say that if the information at issue on pages 303 and 312 relates in any way to "the reason for the [Branch] not being able to proceed with an enforcement action" the information should be released under s. 13(2)(n) or s. 13([2])(a).[61]

Factual material, s. 13(2)(a)

[86] Section 13(2)(a) says that the head of a public body must not refuse to disclose under s. 13(1) any factual material.

[87] The term "factual material" is not defined in FIPPA. However, the courts have interpreted "factual material" to mean "source materials" or "background facts in isolation" that are not necessary to the advice provided.[62] Where facts are selected and compiled by an expert as an integral component of their advice, then this information is not "factual material" under s. 13(2)(a).[63]

[88] The Ministry says it has disclosed background facts with the exception of facts which are intimately linked to the advice and recommendations.[64] The Ministry also says that the factual information in the draft notice and the investigation reports is intermingled with and an integral part of the advice and recommendations.[65]

[89] I found above that some of the information in the conclusions sections of the investigation reports is factual information that is a necessary and integrated part of the advice. It is not the kind of distinct source material or isolated background facts that the courts have found is "factual material." Additionally, in response to the applicants' concerns, the information withheld on pages 303 and 312 is not factual material because it is one employee expressing their opinion about a matter.

[90] Accordingly, I am satisfied that none of the information that I found would reveal advice or recommendations is "factual material" under s. 13(2)(a).

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[61] Applicants' response submission at para 91(k). The applicants refer to s. 13(a)(a), however I presume they intend to refer to s. 13(2)(a).
[62] *PHSA*, *supra* note 36 at para 94.
[63] Order F23-82, 2023 BCIPC 98 at para 36.
[64] Public body's initial submission at para 80.
[65] Public body's reply submission at para 21.

Decision affecting the applicant's rights, s. 13(2)(n)

[91] Section 13(2)(n) says that a public body must not refuse to disclose under s. 13(1) "a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant."

[92] The applicants submit that the Branch exercised discretion in deciding whether to proceed with an investigation and whether to proceed with an enforcement action. The applicants say that the Ministry must disclose those decisions and provide reasons for the decisions.[66]

[93] The applicants have not adequately explained how any of the disputed information is a decision that affects their rights, and I am not aware of any rights for complainants under the Liquor Act. I do not see how any of the information that I have found reveals advice or recommendations is a decision affecting the applicants' rights. Therefore, I find s. 13(2)(n) does not apply.

[94] No other subsections of s. 13(2) are relevant to the withheld information, so I find that s. 13(2) does not apply.

Does section 13(3) apply?

[95] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. In this case, the records containing information withheld under s. 13(1) date from 2017 onwards, so s. 13(3) does not apply.

Conclusion, s. 13

[96] I find that the Ministry is authorized to withhold some, but not all of the information in dispute under s. 13(1).

Exercise of discretion, s. 13

[97] 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."[67] 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."[68]

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[66] Applicants' response submission at para 97.
[67] Order 02-50, 2002 CanLII 42486 (BC IPC) at para 144.
[68] Order No 325-1999, October 12, 1999, [1999] BCIPCD No 38 at page 4.

[98] If the head of the public body has failed to exercise their discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the 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.[69]

[99] The applicants submit that the Ministry has not exercised its discretion to release as much information as possible on a timely basis. The applicants say that the Ministry's 2022 decision to release some information it was previously withholding under FIPPA shows an inconsistency in the Ministry's understanding or application of the exceptions to disclosure.[70]

[100] The Ministry says that it considered the following factors when applying s. 13:

- The general purposes of FIPPA;
- The purpose of s. 13;
- The reason or purpose the records were created;
- The nature of the records, including their significance and sensitivity;
- Whether more accurate information is available elsewhere;
- Whether similar type of records have been disclosed by the Ministry in the past;
- Whether the applicant could be satisfied by severing the record and providing them with was much information as is reasonably practicable;
- Whether disclosure will increase public confidence in the operation of the Ministry;
- Whether there is a sympathetic or compelling need to release the information; and
- The age of the records.[71]

[101] The Ministry explains that it released additional information in 2022 due to the passage of time and reduced sensitivity of the information at issue.[72]

[102] Previous orders have accepted the passage of time and reduced sensitivity of information as a legitimate basis for a public body to reconsider their severing decisions.[73] I find the Ministry's explanation on these same grounds to be reasonable. Additionally, nothing in the records or the parties' submissions

[69] Order F23-51, 2023 BCIPC 59 at para 142, citing *John Doe v Ontario (Finance*), 2014 SCC 36 at para 52 and Order 02-38, 2002 CanLII 42472 (BC IPC) at para 147.
[70] Applicants' response submission at paras 82-83.
[71] Ministry's reply submission at para 10.
[72] Ministry's reply submission at para 11.
[73] For example, Order F23-58, 2023 BCIPC 68 at para 65.

persuades me that the Ministry exercised its discretion in bad faith, for an improper purpose or based on irrelevant considerations.

[103] For these reasons, I find that the Ministry has appropriately exercised its discretion in deciding whether to release the information it withheld under s. 13(1). Therefore, I decline to order the Ministry to reconsider its decision.

Public interest disclosure, s. 25

[104] The applicants submit that the Ministry should disclose the information in dispute under ss. 25(1)(a) and (b). The relevant parts of s. 25 state:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[105] Previous orders have found that because s. 25 overrides all other provisions of FIPPA, it only applies in the clearly and most serious situations.

[106] A recent BC Court of Appeal decision found that s. 25 does not compel public bodies to disclose information which is subject to solicitor-client privilege.[74] Following that decision, I will not consider whether s. 25 applies to the information that I found above is subject to solicitor-client privilege.

Risk of significant harm, s. 25(1)(a)

[107] Section 25(1)(a) requires a public body to immediately disclose information about a risk of significant harm to the environment or to human health or safety. The types of information that should be disclosed under s. 25(1)(a) include:

- Information that discloses the existence of the risk;
- Information that describes the nature of the risk and the nature and extent of any harm; and

[74] *British Columbia (Children and Family Development) v British Columbia (Information and Privacy Commissioner)*, 2024 BCCA 190 at para 63.

- Information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.[75]

[108] The applicants submit that the withheld information reveals how the Branch and police are not enforcing overservice laws, which represents an imminent risk of significant harm to the safety of the public, and in particular, people who drive motor vehicles.[76] The applicants submit that the withheld information discloses the risks associated with impaired driving and would allow the public to understand how to reduce those risks and mitigate harm.[77]

[109] The Ministry says that the information in dispute is not about a risk of significant harm to the health or safety of the public or a group of people and does not disclose the existence of a risk not previously known or an action the public could take to mitigate the risk of harm.[78]

[110] I acknowledge the applicants' concerns about the risks associated with overservice and impaired driving as well as their concerns about the enforcement of the Liquor Act. However, the specific information at issue is not the type of information to which s. 25(1)(a) applies. The information would not meaningfully add to the public's existing knowledge of the risks of overservice and impaired driving, nor would it allow the public to take or understand actions to meet the risk or mitigate or avoid harm. For these reasons, I find that the information at issue is not about a risk of significant harm to human health or safety.

Clearly in the public interest, s. 25(1)(b)

[111] Section 25(1)(b) requires a public body to immediately disclose information that is clearly in the public interest. Disclosure will be required where a disinterested and reasonable observer, knowing the information and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.[79]

[112] The term "public interest" in the context of s. 25(1)(b) relates to matters of a broader, systemic or widespread significance, but does not encompass everything that the public might be interested in learning.[80]

[113] In considering whether disclosure is clearly in the public interest, the list of factors that should be considered include whether disclosure would:

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[75] Order 02-38, 2002 CanLII 42472 (BC IPC) at para 56.
[76] Applicants' response submission at paras 147 and 151.
[77] Applicants' response submission at para 152.
[78] Public body's initial submission at paras 55-56.
[79] Investigation Report F16-02, 2016 CanLII Docs 4591 at page 26 [Report F16-02].
[80] *Clubb v Saanich (Corporation of The District)*, 1996 CanLII 8417 (BC SC) at para 33; Order F20-47, 2020 BCIPC 56 (CanLII), at para 20.

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

[114] In any given set of circumstances there may be competing public interests, weighing for and against disclosure, and the threshold will vary according to those interests. FIPPA exceptions themselves are indicators of classes of information that, in the appropriate circumstances, may weigh against disclosure of the information.[81]

[115] As noted by former Commissioner Denham in Investigation Report F16-02, the duty to disclose under s. 25(1)(b) will not be triggered every time someone suspects that a public body is not adequately carrying out its functions. Instead, she noted "there must be an issue of objectively material, even significance, public importance, and in many cases it will have been the subject of public discussion."[82]

[116] The applicants say that disclosure is in the public interest because it could help reduce the harm of impaired driving.[83] More specifically, they say that:

- Any information that would reduce the number of fatalities caused by impaired drivers is clearly in the public interest;[84]

- Impaired driving poses a threat to the safety of the public and is debated in the media and in politics;[85]

- The withheld information would help educate the public about the non-enforcement of overservice laws in BC and enable the public to make informed political decisions;[86] and

- Disclosure will hold the Ministry accountable for systemic problems with the Branch, including delayed investigations, inadequate co-operation and information sharing with police, and problems with the Branch's investigative abilities.[87]

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[81] Report F16-02, *supra* note 79 at page 38.
[82] Report F16-02, *supra* note 79 at page 36.
[83] Applicants' response submission at para 158.
[84] Applicants' response submission at para 153.
[85] Applicants' response submission at para 155.
[86] Applicants' response submission at para 155.
[87] Applicants' response submission at paras 142, 145-146 and 155.

[117] The Ministry submits that a disinterested and reasonable observer, knowing the facts and circumstances, would not conclude that disclosure is clearly in the public interest.[88] The Ministry says that there is insufficient evidence to establish that there is a systematic pattern of delay in the Branch's overservice investigations.[89]

[118] I accept there is a public interest in how the Branch conducts its functions, including how it investigates complaints of overservice. I also accept that there is a public interest in reducing overservice and impaired driving.

[119] However, I am not persuaded that the specific information at issue meets the high threshold for disclosure under s. 25(1)(b). The information at issue is about one investigation conducted by the Branch. Having carefully reviewed all of the information at issue, I can say that none of it would contribute to the public's understanding about Branch investigations, impaired driving and overservice. Information that may substantively contribute in this way has already been disclosed.

[120] For these reasons, I do not find that a disinterested and reasonable observer, knowing the facts and circumstances, would conclude that disclosure of the information in dispute is clearly in the public interest.

Conclusion, s. 25

[121] I find that the Ministry is not required to disclose the information in dispute pursuant to s. 25(1(a) or (b).

CONCLUSION

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

1. I confirm, subject to item 4 below, the Ministry's decision to refuse the applicant access to the information withheld under s. 13(1).

2. I confirm, subject to item 4 below, the Ministry's decision to refuse the applicant access to the information withheld under s. 14.

3. I confirm the Ministry's decision that it is not required to disclose the information in dispute under s. 25(1).

[88] Public body's initial submission at para 64.
[89] Public body's initial submission at para 63.

4. The Ministry is required to give the applicant access to the information that I have determined it is not authorized to withhold under ss. 13(1) and 14. I have highlighted this information in blue on the copy of pages 2, 63-64, 162, 164, 304-311 and 353 that will be provided to the Ministry with this order.

5. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 4 above.

[123] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this Order by November 15, 2024.

October 2, 2024

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

OIPC File No.: F21-85233