



Order F24-94

## MINISTRY OF HEALTH

Allison J. Shamas  
Adjudicator

November 13, 2024

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**Summary:** An individual (applicant) asked the Ministry of Health (Ministry) for access to records related to a meeting between the Ministry and the Society for Canadians Studying Medicine Abroad (SOCASMA). The Ministry provided records but withheld some information under s. 13(1) (advice or recommendations) and other provisions of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator confirmed the Ministry's decision under s. 13(1) in part and ordered it to disclose the remaining information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165 ss. 13(1), 13(2)(a), 13(3).

### INTRODUCTION

[1] An individual (applicant) asked the Ministry of Health (Ministry) for access to records related to a meeting between the Ministry and the Society for Canadians Studying Medicine Abroad (SOCASMA).

[2] The Ministry provided records but withheld some information under ss.13 (advice or recommendations), 14 (solicitor-client privilege) and 22 (third party-personal privacy) of the *Freedom of Information and Protection of Privacy Act*<sup>1</sup> (FIPPA).

[3] The applicant 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.

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<sup>1</sup> RSBC 1996 c. 165.

## PRELIMINARY ISSUES

### ***Adequate search – s. 6(1)***

[4] The applicant submits that the Ministry failed to conduct an adequate search for records as required by s. 6(1) of FIPPA.<sup>2</sup>

[5] The Ministry states that the applicant's s. 6(1) complaint was investigated by an OIPC investigator in another file, and that the complaint was closed by the OIPC when the OIPC concluded that it was unable to substantiate that the Ministry failed to conduct an adequate search.

[6] I confirm the Ministry's submission. The applicant's s. 6(1) complaint was investigated by an OIPC investigator who found that the applicant's complaint was unsubstantiated.<sup>3</sup> As a result of the investigator's findings, the OIPC closed the complaint file.<sup>4</sup>

[7] If the applicant wished to continue to pursue the s. 6(1) issue, the appropriate course was through a request to reconsider the investigator's decision, not to reargue the issue in this inquiry.<sup>5</sup> The s. 6(1) complaint is not before me, and I will not reconsider the investigator's findings in this inquiry.

### ***Issues no longer in dispute***

[8] The Ministry states that prior to the inquiry, it withdrew its reliance on s. 14 of FIPPA and disclosed the information it previously withheld under s. 14 to the applicant.<sup>6</sup> The applicant does not dispute this statement, and the Ministry does not rely on s. 14 as a basis to withhold any information in the responsive records. I find that s. 14 is no longer in dispute.

[9] The Ministry withheld some information under s. 22. However, in her inquiry submission, the applicant states that she is not seeking access to the information the Ministry withheld under s. 22.<sup>7</sup> Therefore, I find that s. 22 is not in dispute.

[10] The Ministry also withheld the names of Ministry staff who were listed under the heading "Should Ministry Staff Attend this Meeting" in a draft briefing note under s. 13(1). In her inquiry submission the applicant states that she is not

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<sup>2</sup> Applicant's submission at paras 6 – 10.

<sup>3</sup> The applicant's s. 6(1) complaint was assigned to OIPC File F23-93173.

<sup>4</sup> The investigator's letter to the applicant closing the s. 6(1) complaint in OIPC File F23-93173 is dated November 15, 2023.

<sup>5</sup> The OIPC's policies regarding complaint files (such as s. 6(1) complaints) are set out in the OIPC's "Guide to OIPC's Processes (FIPPA) at pages 7 – 9.

<sup>6</sup> Ministry initial submission at para 6.

<sup>7</sup> Applicant submission at para 3.

seeking access to these names. Accordingly, I find that this information is not in dispute.

[11] I thank the parties for the effort to resolve these issues. I will not consider them further.

## **ISSUE**

[12] In light of the above, the sole issue I must decide in this inquiry is whether the Ministry is authorized to refuse to disclose the information that remains in dispute under s. 13(1) of FIPPA. Section 57(1) of FIPPA places the burden on the Ministry to prove that the applicant has no right of access to information withheld under s. 13(1).

## **BACKGROUND**

[13] The applicant is a representative of SOCASMA which represents students and medical graduates who study medicine outside of Canada and the United States and aim to practice medicine in Canada.<sup>8</sup>

[14] On January 10, 2018, the applicant sent an email to the Minister of Health (Minister), on behalf of SOCASMA (the Email). In the Email, the applicant set out several issues that SOCASMA wished to discuss with the Minister and requested a meeting. The requested meeting took place on February 2, 2018 (the Meeting).

[15] The applicant seeks access to records related to the Meeting.

## **RECORDS AND INFORMATION IN DISPUTE**

[16] The responsive records consist of 30 pages of emails between the applicant, Ministry officials, and a third party who is involved with SOCASMA; internal Ministry emails; and preparatory materials related to the meeting.

[17] The information that remains in dispute is found in three records which are part of the preparatory materials: a draft briefing note (Draft Briefing Note), a final version of that same briefing note (Final Briefing Note), and notes about issues raised in the Email (Notes). The redactions are found on nine pages and range from a few words to approximately 70 percent of pages.

## **SECTION 13(1) – ADVICE AND RECOMMENDATIONS**

[18] Section 13 allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. The

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<sup>8</sup> Ministry initial submission at para 14. This description was not disputed by the applicant.

purpose of s. 13 is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.<sup>9</sup>

[19] The test under s. 13 is well-established, and I will apply it below.

**Section 13(1) – would disclosure reveal advice or recommendations**

[20] The first step in the s. 13 analysis is to determine whether disclosing the information at issue would reveal advice or recommendations developed by or for a public body.

[21] “Recommendations” involve “a suggested course of action that will ultimately be accepted or rejected by the person being advised.”<sup>10</sup>

[22] The term “advice” has a broader meaning than the term “recommendations,”<sup>11</sup> and includes:

- a communication as to which courses of action are preferred or desirable,<sup>12</sup>
- 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,<sup>13</sup> and
- factual information that is integral to advice or recommendations because it was “compiled and selected by an expert, using [their] expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body, or ... the expert’s advice can be inferred from the work product”.<sup>14</sup>

[23] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences to be drawn about advice or recommendations.<sup>15</sup>

[24] The Ministry relies on an affidavit from the director of a branch within the Ministry (the Director) who provides evidence about the process that led to the

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<sup>9</sup> *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 [ICBC] at para 52.

<sup>10</sup> *John Doe v Ontario (Finance)*, 2014 SCC 36 [John Doe] at para 24.

<sup>11</sup> *John Doe* ibid at para 23.

<sup>12</sup> Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>13</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 113.

<sup>14</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 (CanLII) [PHSA] at para 94. See also PHSA para 95 and ICBC supra note 9 at para 52 cited therein.

<sup>15</sup> See for example *John Doe* supra note 10 at para 24; Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII); and Order F21-15, 2021 BCIPC 19 (CanLII).

creation of three records that contain the information in dispute. The Director explains that prior to the Meeting he received a request from the Ministry “for background information and meeting advice.”<sup>16</sup> The Director asked another individual (Employee) to complete this task.<sup>17</sup> The Employee provided the Director and others in the Ministry with the Draft Briefing Note and Notes.<sup>18</sup> The Director relied on the Notes to brief the Assistant Deputy Minister of Health (ADM).<sup>19</sup> The Draft Briefing Note was reviewed and finalized by ADM resulting in the Final Briefing Note.<sup>20</sup>

[25] While the applicant takes issue with the Ministry’s application of s. 13(1), she does not dispute the Director’s evidence about how the three records at issue were prepared or used.

[26] I accept the Director’s evidence about how the records at issue were created, and I find that all the information in dispute was developed by and for the Ministry.

[27] The Draft and Final Briefing Notes contain substantially the same content with a few differences. Both are divided into the headings “Background” and “Advice.” The Ministry withheld the information under the “Advice” heading from both briefing notes, as well as information that was moved and deleted from the Final Briefing Note.

[28] The Notes contain quotes from the Email and the Employee’s comments about each quote under the heading “Points to Consider”. The Ministry withheld the Employee’s comments from the Notes.

*Information under the heading “Advice” in the Briefing Notes*

[29] The Ministry submits that it is clear on the face of both the Draft and Final Briefing Notes that the information under the “Advice” heading is advice that was developed and prepared by public servants for the Ministry.

[30] The applicant disputes the Ministry’s position. She explains that the purpose of the Meeting was to allow SOCASMA to present information to the Minister not for the Minister to present information or reformulate policy. Therefore, according to the applicant, there was no deliberation or policy development to take place at the Meeting, and the information in briefing notes about the Meeting is not likely to be advice.

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<sup>16</sup> Ministry initial submission, affidavit of Director at paras 4 and 12.

<sup>17</sup> Ministry initial submission, affidavit of Director at para 12.

<sup>18</sup> Ministry initial submission, affidavit of Director at para 13.

<sup>19</sup> Ministry initial submission, affidavit of Director at paras 14 and 21.

<sup>20</sup> Ministry initial submission, affidavit of Director at para 15. See also para 20 of the affidavit of the Director when the Director states that other information in the Draft Briefing Note was changed upon the ADM’s review.

[31] Having reviewed the information, I find that the information under the “Advice” heading in the Draft Briefing Note sets out the Employee’s opinions about how the Minister should approach the Meeting, and what the Minister should say and do during the Meeting. On its face, the information is clearly a communication as to which courses of action are preferred or desirable.<sup>21</sup> I find that disclosing it would reveal advice within the meaning of s. 13(1).<sup>22</sup>

[32] The content of the “Advice” section of the Final Briefing Note differs from that of the Draft Briefing Note. I find it is, in addition to opinions about how the Minister should approach the Meeting and what the Minister should say during the Meeting, also related background information that provides support for the opinions about what the Minister should say during the meeting.

[33] I find that the opinions are a communication as to which courses of action are preferred or desirable,<sup>23</sup> and therefore that disclosing them would reveal advice within the meaning of s. 13(1).<sup>24</sup> The background information was clearly compiled by the author(s) of the Final Briefing Note. It relates directly to the opinions about what the Minister should say during the Meeting and is integral to understanding the reasons behind these opinions. In the circumstances, I find that the related background information is also captured by s. 13(1).<sup>25</sup>

*Information that was moved between versions of the Briefing Note*

[34] The Ministry also withheld a paragraph from the “Background” section of the Draft Briefing Note that was moved to the “Advice” Section in the Final Briefing Note. The Ministry submits that the information is captured by s. 13(1) because the decision to move the information was based on the judgement and skill of the ADM and other public servants.<sup>26</sup>

[35] The applicant submits that given the information is found under the “Background” heading, it is most likely background information about an existing system, and therefore not captured by s. 13(1).

[36] I have already found that this information is advice captured by s. 13(1) where it is found in the “Advice” section of the Final Briefing Note. I find that disclosing this information elsewhere in the records would reveal that same

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<sup>21</sup> See para 22 above and Order 01-15, 2001 CanLII 21569 at para 22.

<sup>22</sup> The information under the “Advice” heading in the Draft Briefing Note is found on page 15 of the records.

<sup>23</sup> See para 22 above and Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>24</sup> The opinions under the Advice heading in the Final Briefing Note are found on page 10 of the records.

<sup>25</sup> The related background information under the Advice heading in the Final Briefing Note is found on page 10 of the records.

<sup>26</sup> Ministry reply submission at para 18.

advice. For this reason, and those set out above, I find that s. 13(1) applies to this information.<sup>27</sup>

*Information that was deleted from the Final Briefing Note*

[37] The Ministry withheld a sentence from the Draft Briefing Note that is absent from the Final Briefing Note.<sup>28</sup> The Director's evidence about this information is that the Employee provided the Draft Briefing Note to him and another Ministry employee, and then the briefing note was finalized, reviewed and approved by the ADM.<sup>29</sup> In its submissions, the Ministry clarifies that it applied s. 13(1) to this information because the changes between the Draft and Final Briefing Note were based on the advice of public servants and the ADM whose advice was key to the deliberate choice to add or exclude certain facts,<sup>30</sup> and that the changes that were made after review by the Director, two other Ministry employees, and the ADM.<sup>31</sup>

[38] The applicant submits that given the information is found under the "Background" heading, it is most likely background information about an existing system, and therefore not captured by s. 13(1).

[39] Section 13(1) does not apply to records simply because they are drafts.<sup>32</sup> The usual principles apply, and a public body can withhold only those parts of a draft which reveal advice or recommendations about a suggested course of action that will ultimately be accepted or rejected during a deliberative process.<sup>33</sup>

[40] The information at issue is a single sentence that was included in the Draft Briefing Note but excluded from the Final Briefing Note. By comparing the two records, the reader can ascertain that a decision was made to delete the information before the Final Briefing Note was finalized. I understand the Ministry's submission to mean that the decision to delete the information was based on the advice of various other public servants. With the context provided by the Ministry's submission, I find that disclosing the deleted information would

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<sup>27</sup> This information is found on page 15 of the records.

<sup>28</sup> There is additional information that falls into this category that is found under the "Advice" heading in the Draft Briefing Note. As I have already decided that this information is captured by s. 13(1), I will not reconsider the application of s. 13(1) to it here.

<sup>29</sup> Ministry initial submission, affidavit of Director at paras 13-15.

<sup>30</sup> Ministry initial submission at para 34.

<sup>31</sup> Ministry reply submission at para 17.

<sup>32</sup> Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6, Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59; Order F14-44, 2014 BCIPC 47 (CanLII) at para. 32; Order F15-22, 2015 BCIPC 36 (CanLII) at para. 23; Order F18-38, 2018 BCIPC 41 (CanLII) at para. 17; Order F17-13, 2017 BCIPC 14 at para. 24; F20-37, 2020 BCIPC 43 at para. 33; and F24-17, 2024 BCIPC 23 (CanLII) at para 69.

<sup>33</sup> Order F18-38, 2018 BCIPC 41 at para. 17; Order F20-37, 2020 BCIPC 43 (CanLII) at para 33; Order F24-72, 2024 BCIPC 82 (CanLII) at para. 36; Order F24-12, 2024 BCIPC 16 (CanLII) at para. 70. See also Order F24-17, 2024 BCIPC 23 (CanLII) at paras 69 and 70.

allow the applicant to make accurate inferences about the recommendations made or advice provided by these public servants about how to amend the Final Briefing Note. For this reason, I find that s. 13(1) applies to this information.

*Employee's comments in the Notes*

[41] The Ministry submits that s. 13(1) applies to the Employee's comments about the Email in the Notes because disclosing this information would reveal the Employee's views as to what considerations the Minister should take into account in making decisions about issues raised in the Email.

[42] Relying on her assertion that the purpose of the Meeting was to allow SOCASMA to present information to the Minister and the fact that the information is found under the heading "points to consider," the applicant submits that the information withheld from the Notes is likely to be facts, counterpoints, and established government policy to which s. 13(1) does not apply.

[43] With four exceptions which I will address separately, I find that the information the Ministry withheld from the Notes is basic background information that describes existing government policies, actions taken by government and other entities, and facts related to those policies and actions. In general s. 13(1) is intended to protect a public body's deliberative process, not the outcome of those processes.<sup>34</sup> As such, information that communicates existing practices, policies, and facts generally does not qualify as advice or recommendations.<sup>35</sup>

[44] I am not persuaded by the Ministry's attempt to characterize these background facts as advice about what the Minister should consider in preparing for the Meeting. Providing background information is not the same as providing advice or recommending a course of action. Furthermore, on the materials before me I cannot identify, and the Ministry does not point to any connection between the background information and any actual advice or recommendations. The information is just standalone background facts about existing practices, policies, and circumstances. It provides the reader a "lay of the land" regarding existing policies, actions, and circumstances related to the raised in the Email without any suggestion as to what the reader should do with that information.

[45] I find that the background facts are not advice or recommendations within the meaning of s. 13(1).<sup>36</sup>

[46] I find that the four exceptions mentioned above are captured by s. 13(1) for the following reasons. Three of the exceptions are the Employee's opinions about how the reader should interpret some of the background information in the

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<sup>34</sup> See for example Order F23-101, 2023 BCIPC 117 (CanLII) at paras 117 and 118.

<sup>35</sup> See for example Order F24-73, 2024 BCIPC 83 (CanLII) at para. 124.

<sup>36</sup> The background facts are found on pages 19 – 24 of the records.



Notes. I find that the opinion information is advice within the meaning of s. 13(1).<sup>37</sup> I also find that the background information that relates to those opinions is integral to and intertwined with the opinions. Furthermore, from the context, it is clear that it was compiled by the Employee for the purpose of providing context to the advice. In the circumstances, I find that the related background information is also captured by s. 13(1).<sup>38</sup>

[47] The fourth exception is an editorial comment from which it is possible to deduce the author's opinion about how the reader should approach some of the background facts described in paragraph 43, above. I find that the editorial comment is advice within the meaning of s. 13(1).<sup>39</sup> However, I find that the background facts to which it refers are not integral to the comment, and that disclosing the facts will not reveal the comment. Accordingly, I find that the background information referred to in the comment is not captured by s. 13(1).

#### *Conclusions – s. 13(1)*

[48] In summary, I find that s. 13(1) applies to the opinions and related background information under the "Advice" heading in both briefing notes, the information in the Draft Briefing Note that was moved in and deleted from the Final Briefing Note, and the editorial comment, opinions, and related background information in the Notes, but not to the remaining background facts in the Notes.

#### **Section 13(2) – exceptions to disclosure**

[49] The next step is to decide whether the information that I have found is advice or recommendations under s. 13(1), falls into any of the categories in s. 13(2). If s. 13(2) applies, that information cannot be withheld under s. 13(1).

[50] The Ministry asserts that none of the exceptions in s. 13(2) apply and addresses ss. 13(2)(a) specifically. The applicant asserts that s. 13(2)(a) does apply to the information in dispute.

[51] In light of my findings under s. 13(1), the information at issue under s. 13(2) is the opinions and background information under the "Advice" heading in both briefing notes, the information in the Draft Briefing Note that was removed from the Final Briefing Note, and the editorial comment, opinions, and related background information in the Notes.

#### *Factual material – s. 13(2)(a)*

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<sup>37</sup> The opinions are found on 20 and 24 of the records.

<sup>38</sup> The related background information is found in the same bullet points as the opinions, on pages 20 and 24 of the records.

<sup>39</sup> The editorial comment is found on page 20 of the records.

[52] Section 13(2)(a) provides that a public body must not refuse to disclose “any factual material” under s. 13(1).

[53] The term “factual material” is not defined in FIPPA. However, in distinguishing it from “factual information” which may be withheld under s. 13(1), the courts have interpreted “factual material” to mean “source materials” or “background facts in isolation” that are not necessary to the advice provided.<sup>40</sup> Thus, where facts are an integral component of advice and recommendations, they are not “factual material” within the meaning of s. 13(2)(a).

[54] The opinions and editorial comment are “advice” in the traditional sense. The exclusion in s. 13(2)(a) does not apply to this kind of information.

[55] The background facts in the Final Briefing Note and the Notes to which I found s. 13(1) applies are integral to and intertwined with the opinions of the Employee and the Reviewers. As a result, I find that this information is not the kind of distinct source material or isolated background facts that courts have found to be “factual material.” Accordingly, I find that the background information at issue is not “factual material” within the meaning of s. 13(2)(a).

[56] Having examined the other categories in s. 13(2), I find that they do not apply.

### ***Section 13(3) – in existence for 10 or more years***

[57] The third step is to consider whether the “information in a record that has been in existence for 10 or more years” under s. 13(3). Information in a record that has been in existence for 10 or more years cannot be withheld under s. 13(1).

[58] The three records at issue were prepared in response to the applicant’s January 10, 2018 Email. They have not been in existence for more than 10 years. I find that s. 13(3) does not apply.

## **CONCLUSION**

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

1. Subject to item 2 below, I confirm, in part, the Ministry’s decision to refuse access to the information withheld in the records under s. 13(1).
2. I require the Ministry to give the applicant access to the information that I have found the Ministry is not authorized to withhold under s. 13(1). The information the Ministry is required to provide to the applicant is found on

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<sup>40</sup> PHSA note 14 at para 94.

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pages 19-24 and is indicated in pink in a copy of the records that will be provided to the Ministry with this order.

3. The Ministry must provide evidence of its compliance with item 2 to the OIPC Registrar of Inquiries.

Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by December 30, 2024.

November 13, 2024

**ORIGINAL SIGNED BY**

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Allison J. Shamas, Adjudicator

OIPC File No.: F23-93036