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Order F15-39

## MINISTRY OF JUSTICE

Ross Alexander  
Adjudicator

August 21, 2015

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**Summary:** An applicant requested records regarding the construction and operation of the Okanagan Correctional Centre. The Ministry of Justice disclosed some records to the applicant, but withheld others in their entirety on the basis that they were exempt from disclosure under FIPPA. The adjudicator determined that the Ministry was required or authorized to withhold most of this information under s. 12 (cabinet confidences), s. 13 (policy advice or recommendations), s. 15 (disclosure harmful to law enforcement), s. 17 (disclosure harmful to the financial or economic interests of the public body), or s. 22 (disclosure harmful to personal privacy) of FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 12, 13, 15, 17, 22 and 25.

**Authorities Considered: B.C.:** Order 02-38, 2002 CanLII 42472 (BC IPC); Investigation Report F13-05, 2013 CanLII 95961 (BC IPC); Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21; Order F14-20, 2014 BCIPC No. 23 (CanLII); Order F08-17, 2008 CanLII 57360 (BC IPC); Order F14-51, 2014 BCIPC 55 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F10-34, 2010 BCIPC 50 (CanLII); Order F15-37, 2015 BCIPC 40 (CanLII); Order F14-37, 2014 BCIPC 40.

**Cases Considered:** *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6444, [1998] B.C.J. No. 1927 (C.A.); *British Columbia (Premier) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112; *Alberta Wilderness Assn. v. Canada (Attorney General)*, 2013 FCA 190 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy*

*Commissioner*), 2014 SCC 31; *John Doe v. Ontario (Finance)*, 2014 SCC 36; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII);

## INTRODUCTION

[1] This inquiry relates to an applicant's request for records about the estimated economic and social impacts for the construction and operation of the Okanagan Correctional Centre (“OCC”).

[2] The Ministry of Justice (“Ministry”) provided some records to the applicant, but it withheld others on the basis that they are exempt from disclosure under s. 12 (cabinet confidences) or s. 15 (disclosure harmful to law enforcement) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision. Mediation did not resolve the matter, and the applicant requested that it proceed to inquiry.

[4] Prior to the start of inquiry, the Ministry advised the applicant that it is also withholding some of the information because it would reveal advice or recommendations developed for a public body or minister under s. 13 of FIPPA, or because it would reveal information which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia under s. 17 of FIPPA. Further, in its initial submissions, the Ministry took the position that s. 22 of FIPPA applies to three pages of information on the basis that disclosure would be an unreasonable invasion of the personal privacy of a third party. In summary, the Ministry is withholding information under ss. 12, 13, 15, 17 and 22 of FIPPA.

## ISSUES

[5] The issues listed in the Notice of Inquiry are as follows:

- a) Is the Ministry required to refuse access to information because disclosure would reveal the substance of deliberations of the Executive Council or any of its committees under s. 12 of FIPPA?
- b) Is the Ministry authorized to refuse access to information because disclosure could reasonably be expected to harm law enforcement under s. 15 of FIPPA?
- c) Is the Ministry authorized to refuse access to information because disclosure would reveal advice or recommendations under s. 13 of FIPPA?

- d) Is the Ministry authorized to refuse access to information because disclosure could reasonably be expected to harm the financial or economic interests of the public body or the government of British Columbia, or the ability of the government to manage the economy, under s. 17 of FIPPA?

[6] While s. 22 of FIPPA is not listed in the Notice of Inquiry, it is a mandatory provision requiring the Ministry to withhold information if s. 22 applies. Given this, I will also consider whether disclosing the withheld information would be an unreasonable invasion of a third party's personal privacy under s. 22 of FIPPA.

[7] The applicant submits in her reply submissions that s. 25(1)(b) of FIPPA applies to the withheld information. This provision states that whether or not a request for access is made, the head of a public body must, without delay, disclose information that is "clearly in the public interest". The Ministry objected to this issue being considered in the inquiry because it was raised at such a late stage. I have addressed this issue as a preliminary matter.

## DISCUSSION

[8] **Records in dispute** – There are three records in dispute. They are:

- a) a report dated July 9, 2012, entitled "Okanagan Correctional Centre Business Case Confidential Draft" (the "Business Case Report");
- b) an addendum to the Business Case Report (the "Addendum"); and
- c) a document outlining the staffing model for the OCC (the "Staffing Model").

[9] **Background** – Provincial correctional facilities in British Columbia are operated by the Corrections Branch of the Ministry ("Corrections").

[10] In February 2012, the Province announced its preferred location for a new OCC, which was a site proposed by the Osoyoos Indian Band.<sup>1</sup>

[11] Subsequent to this announcement, the Ministry, Partnerships BC, and Shared Services BC prepared the Business Case Report and Addendum. The focus of these records is the facility portion of the OCC. They summarize the service delivery and procurement options for this project, and include detailed financial assessments.<sup>2</sup> These records analyze and compare procurement methods for constructing the OCC, and recommend a procurement approach

<sup>1</sup> Applicant's initial submissions at para. 5 at Exhibit 13.

<sup>2</sup> Affidavit of Corrections' Finance Manager of its Capital Division at para. 20.

and implementation strategy.<sup>3</sup> They also contain information related to funding for the project.<sup>4</sup> The Staffing Model provides advice on the total number of full time equivalent employees (and related funding) that would be required to operate the OCC.<sup>5</sup>

[12] In advance of the decision to construct and operate the OCC, the Ministry prepared Treasury Board Submissions for Treasury Board. It then enclosed the Business Case Report and Addendum as appendices to these submissions, which was provided to Treasury Board staff.

[13] Treasury Board staff also prepared a briefing note for Treasury Board with respect to its decision about the OCC. Portions of the information in the briefing note are from the Business Case Report.<sup>6</sup>

[14] When the Treasury Board staff provided a package of materials to Treasury Board to make its decision regarding the OCC, the package included the Treasury Board Submissions and the Treasury Board staff's briefing note. The Business Case Report and Addendum were made available to the Treasury Board upon request.

[15] The Treasury Board made its decision, which was recorded in a "Treasury Board Minute".

[16] On December 5, 2012, Cabinet ratified the Treasury Board decision to construct and operate the OCC on Osoyoos Indian Band land.

[17] After this decision was ratified, there was a procurement process. The preferred proponent was selected in January 2014.

[18] A contract resulted from this process, and construction of the OCC commenced in March 2014.

### *Preliminary matters*

#### *Jurisdiction and Scope of this Inquiry*

[19] The vast majority of the applicant's submissions relate to the consultation process (or lack of a consultation process), and the lack of information that was made public, before the site for the OCC was decided. In general, the applicant's view is that the information that was made public was misleading and inadequate, and she is concerned how the chosen location will impact the

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<sup>3</sup> Affidavit of Corrections' Finance Manager of its Capital Division at para. 20.

<sup>4</sup> Affidavit of Corrections' Finance Manager of its Capital Division at para. 20.

<sup>5</sup> Affidavit of Corrections' Finance Manager of its Capital Division at para. 23.

<sup>6</sup> Affidavit of the Director of Treasury Board Staff at paras. 6 and 10, and Exhibit "C".

community. Further, the applicant wants to know what risk and impact assessments occurred prior to announcing the location. She points out that the Business Case Report and Addendum occurred after the proposed location for the OCC was announced to the public, and says there should be a risk and impact assessment document from before the announcement of the location, which she wants to be disclosed to her.

[20] Nearly all of the issues and concerns raised by the applicant cannot be decided in this inquiry. I have no jurisdiction with respect to the decision of where to locate the OCC, what information about the siting process was made public prior to the decision, or other concerns she has with this project. Further, based on the applicant's materials, it is apparent that she is primarily concerned with the decision of where to locate the OCC. However, the records before me are not about the decision of where to locate this facility. As pointed out by the applicant, the records at issue in this inquiry post-date the public announcement of the site selection. They relate to the decision of how precisely to proceed with the OCC at this previously determined location, with particular regard to financial details of the project such as procurement and construction. The withheld information before me is not about the decision about where to locate the OCC.

[21] It is not within the scope of this inquiry for me to consider whether the Ministry has records regarding site selection for the OCC in its custody or control. Even assuming such records would be within the scope of the applicant's request for records,<sup>7</sup> this is not a case where one of the issues before me is whether the public body responded openly, accurately and completely to the applicant pursuant to s. 6(1) of FIPPA. Therefore, I will only consider the three records that are before me in this inquiry.

### *Section 25*

[22] In her reply submissions, the applicant raised the issue of whether s. 25(1)(b) of FIPPA applies to the withheld information. This provision states that whether or not a request for access is made, the head of a public body must, without delay, disclose information which is "clearly in the public interest".

[23] The applicant is concerned about a lack of available information on the impacts and risks of the new OCC, and she submits that the Ministry should not shroud its prison project in secrecy because it impacts the long-term economic, financial and social interests of the affected communities. In her view, this absence of information casts doubts about the quality of the analysis that was (or was not) completed before the project was announced. As such, she submits that it is imperative for the public to be allowed to review and evaluate the

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<sup>7</sup> The applicant's request that gives rise to this inquiry is for records "...supporting and detailing the estimated economic and social impacts of the announced Okanagan Correctional Facility for both the construction and subsequent operating phases...".

Province's due diligence in selecting the site for this facility. She is particularly troubled that the Ministry's description of the records at issue in its initial inquiry materials does not refer to information about risk and impact assessments for the region's communities. This suggests to her that the analysis supporting the location of the OCC was inadequate.

[24] The Ministry objected to the applicant's request to include s. 25 in this inquiry, and asked that this issue be excluded from the inquiry. In the alternative, the Ministry submits that procedural fairness requires that it be given the opportunity to reply on the s. 25 issue and provide related evidence before s. 25 is considered.

[25] Notwithstanding that the applicant only raised s. 25 in reply, I will briefly address it because I accept that the first time she fully appreciated that the records do not contain the information she seeks (which is a key factor in why she says s. 25 applies) was when she reviewed the Ministry's initial submissions, and because s. 25 applies whether or not an access request is made. However, given my finding about whether s. 25 applies based on the materials before me, it is unnecessary for the Ministry to provide submissions on this point.

[26] Previous orders have stated that s. 25(1) requires a clear gravity that compels the need for disclosure without delay.<sup>8</sup> As Commissioner Denham stated in Investigation Report F13-05, disclosure must further the education of or debate among the public on a topical issue for s. 25(1)(b) to apply. It is not intended to be used by the public to scrutinize public bodies.<sup>9</sup> In these types of circumstances, the public may still use its general right to access records under FIPPA.

[27] In this inquiry, I am considering the information in the records that are before me. This information relates to the construction and procurement of the facility portion of the project. In my view, this information does not have the gravity of being clearly in the public interest for it to fall under s. 25. Further, in my view, disclosing that these records do not contain risk and impact assessments for the community regarding the OCC does not confirm that no such assessments took place. For the above reasons, I find that s. 25(1)(b) does not apply because disclosure of the information at issue is not clearly in the public interest.

## *Section 12*

[28] Section 12 of FIPPA requires public bodies to withhold information that would reveal the substance of deliberations of the Executive Council (also known as Cabinet) and any of its committees, subject to certain exceptions.

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<sup>8</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 53.

<sup>9</sup> Investigation Report F13-05, 2013 CanLII 95961 (BC IPC) at p. 10.

The Treasury Board is a designated committee of Cabinet for the purpose of s. 12 of FIPPA.<sup>10</sup> Section 12 states in part:

- 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
- (2) Subsection (1) does not apply to
- ...
- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
- (i) the decision has been made public,
  - (ii) the decision has been implemented, or
- ...

[29] In *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)* [*Aquasource*]<sup>11</sup>, which upheld Order No. 48-1995, the British Columbia Court of Appeal considered how to interpret ss. 12(1) and (2) of FIPPA. *Aquasource* confirmed the central importance of the phrase “substance of deliberations” for interpreting s. 12(1), which was explained in Order No. 48-1995 as:

...recorded information that reveals the oral arguments, pro and con, for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision.<sup>12</sup>

[30] *Aquasource* stated that s. 12(1) “must be read as widely protecting the confidence of Cabinet communications”,<sup>13</sup> including the body of information that Cabinet considered.<sup>14</sup> It does not, however, relate to the topics discussed, unless disclosure of the mere subject matter could be combined with other publicly available information to reveal the substance of deliberations.<sup>15</sup>

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<sup>10</sup> Section 1 of the *Committees of the Executive Council Regulation under FIPPA*.

<sup>11</sup> *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6444, [1998] B.C.J. No. 1927 (C.A.).

<sup>12</sup> Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21 at p. 9; For example, also see Order F14-20, 2014 BCIPC No. 23 (CanLII) at para. 9.

<sup>13</sup> *Aquasource* at para. 41.

<sup>14</sup> *Aquasource* at para. 39.

<sup>15</sup> Order F08-17, 2008 CanLII 57360 (BC IPC) at paras. 17 to 24; upheld on judicial review in *British Columbia (Premier) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 97.

[31] Moreover, previous orders have stated that s. 12(1) is broad enough to encompass a document that was not submitted to Cabinet, but would nonetheless reveal the substance of its deliberations. The issue is whether disclosure of the withheld information – alone or in connection with other available information – would directly reveal, or allow an applicant to draw accurate inferences about, the substance of the deliberations.<sup>16</sup>

[32] Pursuant to s. 12(2) of FIPPA, s. 12(1) does not apply to information in a record the purpose of which is to present background explanations or analysis to Cabinet or its committees under the circumstances outlined in s. 12(2).<sup>17</sup> In *Aquasource*, the court determined that former Commissioner Flaherty correctly interpreted s. 12(2) in relation to s. 12(1), in which the former Commissioner stated in part:

"Background explanations" include, at least, everything factual that Cabinet used to make a decision. "Analysis" includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it.<sup>18</sup>

[33] I adopt and apply the interpretation that was accepted in *Aquasource* in this case.

#### *Positions of the Parties*

[34] The Ministry submits that it is required to refuse to disclose all of the records at issue under s. 12. It submits that the information falls under s. 12(1), but not s. 12(2). It submits that the Business Case Report and Addendum were directly submitted to Treasury Board, so they reveal the substance of deliberations. The Ministry further submits that even if it is determined that the information was not submitted to Treasury Board, disclosure would still reveal the substance of deliberations because it would allow the drawing of accurate inferences about the information Treasury Board considered in making a decision. The Ministry also submits that access to the Staffing Model (which the Ministry does not say was submitted to Treasury Board) would enable accurate inferences about Treasury Board's deliberations. It submits that none of the records can be considered "background information" such that s. 12(2)(c) would apply.

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<sup>16</sup> Order F14-51, 2014 BCIPC 55 (CanLII) at para. 16.

<sup>17</sup> *Aquasource* at para. 51.

<sup>18</sup> *Aquasource* at para. 11.

[35] The applicant submits that s. 12(1) does not apply to the withheld information because the decision about the OCC has been made public, so it is “analysis” that falls under s. 12(2)(c).

*Section 12(1)*

[36] The records at issue under s. 12 are the Business Case Report, the Addendum and the Staffing Model. The Business Case Report and Addendum were provided to Treasury Board Staff, appended as part of its Treasury Board submissions. They were made available to Treasury Board upon request,<sup>19</sup> but there is no evidence that Treasury Board requested, reviewed or discussed the Business Case Report or Addendum. Further, there is no evidence that the Staffing Model was put to Treasury Board.

[37] The records submitted to Treasury Board were the Treasury Board Submissions and briefing note. Given this and other *in camera* materials, I am satisfied that disclosure of most of the information in the Treasury Board Submissions and briefing note either reveals the substance of the deliberations of Treasury Board within the meaning of s. 12(1) or would enable accurate inferences to be drawn as to the contents of these deliberations.

[38] The Ministry adduced evidence from a Ministry employee who worked on the Treasury Board Submissions and also a Treasury Board staff member who worked on the briefing note. In both cases, these employees deposed that they extensively used the Business Case Report and Addendum in drafting these records, and they provided details about where and how they used the information in the Treasury Board Submissions and briefing note.

[39] Based on my review of the materials before me – including the Treasury Board Submissions, briefing note, Business Case Report, Addendum, Staffing Model and Treasury Board Minute – I find that disclosure of portions of the Business Case Report, Addendum and Staffing Model would directly reveal the substance of deliberations of Treasury Board. I also find that accurate inferences can be drawn about the substance of Treasury Board deliberations for a significant amount of information. For example, there is information in these records that is either a subset of, or more detailed information about, matters that are in the Treasury Board Submissions or the briefing note. I find that disclosure of this information would enable accurate inferences about the substance of Treasury Board’s deliberations. Further, I find that accurate inferences about deliberations could be drawn based on the differences between the Business Case Report and the Addendum. Additionally, accurate inferences could also be drawn about the substance of deliberations for some information because it discloses options that were not put forward to Treasury Board in circumstances where disclosing the rejected options may enable an accurate inference about

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<sup>19</sup> Affidavit of the Director of Treasury Board Staff at para. 7.

what option was recommended and discussed.<sup>20</sup> I find that disclosure of all of this information would reveal the substance of deliberations of Treasury Board within the meaning of s. 12(1).

[40] However, there is also other information that I find does not reveal the substance of deliberations because there is no evidence that it was deliberated on by Treasury Board, or that its disclosure would enable accurate inferences about deliberations that did occur.<sup>21</sup> In most instances, this information is on specific topics that are not mentioned in the Treasury Board submissions, the briefing note, or the Treasury Board Minute. However, in some instances it is detailed information on topics that may have been deliberated on by Treasury Board in a high level way, but for which disclosure would not reveal or enable accurate inferences about the deliberations of Treasury Board, even if combined with other available information. I find that s. 12(1) does not apply to this information.

[41] In summary, I find that disclosure of portions of the Business Case Report, the Addendum and the Staffing Model would reveal the substance of Treasury Board's deliberations. I will now consider whether s. 12(2) applies to the information that I find reveals the substance of Treasury Board's deliberations.

#### *Section 12(2)*

[42] Section 12(2)(c)(i) provides that s. 12(1) does not apply to information in a record the purpose of which is to present background explanations or analysis to Treasury Board for its consideration in making a decision, if that decision has been made public. In this case, the decision has clearly been made public. Therefore, the issue is whether the purpose of the information I have determined would reveal the substance of deliberations is to present background explanations or analysis to Treasury Board.

[43] The Ministry submits that none of the withheld information falls under s. 12(2) because it is not background information. The applicant, on the other hand, submits that s. 12(2)(c)(i) applies to all of the information because it is "analysis". In support of her position, the applicant refers to a Federal Court of Appeal case in which the Federal Government claimed cabinet confidence immunity under the *Canada Evidence Act*.<sup>22</sup>

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<sup>20</sup> For example, pp. 6 to 9 of Appendix E of the Business Case Report provides projected construction costs in granular detail. While there is no evidence that Treasury Board reviewed this detailed information, disclosure may enable an accurate inference about the substance of Treasury Board's deliberations.

<sup>21</sup> Order F14-20, 2014 BCIPC No. 23 (CanLII) at para. 12.

<sup>22</sup> *Alberta Wilderness Assn. v. Canada (Attorney General)*, 2013 FCA 190 (CanLII).

[44] In my view, neither the case cited by the applicant nor the *Canada Evidence Act* assist in interpreting s. 12(2) or determining whether s. 12(2) applies in this case. Further, in light of *Aquasource*, I do not accept the applicant's view that the term "analysis" contained in s. 12(2) of FIPPA should be interpreted so broadly as to include all of the information contained in the records. As stated above, *Aquasource* states that "analysis" includes discussion about the background explanations, but not analysis of policy options presented to Cabinet, or advice, recommendations or policy considerations.<sup>23</sup>

[45] Based on my review of the materials before me, I find that some of the withheld information falls under s. 12(2). There are portions of the Business Case Report and Addendum that are factual information or analysis of that factual information. These excerpts do not include advice, recommendations, or policy considerations regarding the matter that Treasury Board was deliberating. For example, there are background explanations about the project in general, and of previous decisions that had already been made and publicized at the time of these Treasury Board deliberations. I find that s. 12(2) applies to this type of information, so it cannot be withheld under s. 12(1). However, I find that s. 12(2) does not apply to the other information that falls under s. 12(1).

[46] In summary, I find that disclosure of most of the information in the Business Case Report, Addendum and Staffing Model would reveal the substance of Treasury Board's deliberations. However, not all of this information must be withheld under s. 12(1) because I find that s. 12(2) applies to some of it.

[47] Some of the information that I determined does not fall under s. 12 of FIPPA is also being withheld on the basis that other exceptions to disclosure apply. I will now consider these provisions for the information that does not fall under s. 12.

## Section 15

[48] Section 15 relates to disclosure harmful to law enforcement. The Ministry is relying on ss. 15(1)(f) and (l) to withhold information about: correctional centre cell occupancies, staffing levels and models (including the Staffing Model); schematics and layouts of the OCC site and the proposed building; and information the Ministry describes as "the benefits and recommended options with respect to the Okanagan Correctional Centre".<sup>24</sup> Sections 15(1)(f) and (l) state:

**15(1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

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<sup>23</sup> *Aquasource* at para. 11.

<sup>24</sup> Ministry's initial submissions at para. 4.63.

(f) endanger the life or physical safety of a law enforcement officer or any other person,

...

(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[49] The standard of proof under s. 15 is whether disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as requiring a reasonable expectation of probable harm from disclosure of the information.<sup>25</sup> It is a middle ground between what is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach this standard. The determination of whether the standard of proof has been met is contextual, and the quantity and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".

[50] The Ministry submits that s. 15(1)(f) applies because corrections officers often deal with violent individuals, and disclosure of the information it is withholding under s. 15 could reasonably be expected to detract from the level of order and control that Corrections has over correctional centres. It submits that disclosure of the information may also result in harm to correctional centres other than the OCC because corrections centres in BC have common design elements. It states that this in turn could reasonably be expected to increase the risk of inmates rioting, smuggling contraband, and attacking guards or other individuals. It submits that this would heighten the already prevalent risk to the physical safety of Corrections staff and other individuals working in a correctional centre as well as, in some cases, the public at large. The Ministry raises these same argument with respect to s. 15(1)(l). Moreover, it also submits that s. 15(1)(l) applies because disclosure would increase the risk of prisoners eluding staff, planning an escape or stealing materials located in correctional centres.

[51] The applicant's submissions under s. 15 primarily relate to her concern that there are public safety risks that will be caused due to the OCC that were not publicly disclosed during the OCC site selection process.

[52] The Ministry's Deputy Provincial Director of Corrections deposed an affidavit in support of the Ministry's submissions.<sup>26</sup> He says that a correctional centre can be unsafe by its very nature, and that Corrections must maintain order

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<sup>25</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54 citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 [*Merck Frosst*] with respect to this entire paragraph.

<sup>26</sup> Portions of this affidavit was *in camera*.

and control. In the Deputy Provincial Director's opinion, disclosure of some of the information withheld under s. 15 would increase the risk of inmates rioting or attacking Corrections staff, and disclosure of other information may increase the likelihood that prisoners will attempt to escape, enhance their ability to escape, increase the risk of contraband being smuggled into the correctional facility, and increase the risk that tools, equipment, materials and supplies will be stolen from the correctional centre. The Deputy Provincial Director connects these occurrences to how they could endanger the life or physical safety of a law enforcement officer or others. He also provides specific examples of previous occurrences of inmates getting caught trying to escape or using contraband to endanger the safety of others.

[53] I accept the Deputy Provincial Director's evidence that the very nature of a correctional centre means that it can be unsafe, and that Corrections must maintain a level of order and control. Further, I find the Deputy Provincial Director's opinions to be persuasive, particularly given the context and considering the background information and evidence he provided to support his opinions. He provided evidence about past incidents that provide a basis for his opinions about potential future harm, and explained that corrections centres in BC have common elements, which supports his opinion that disclosure of the information about the OCC would also harm the security of other operating corrections centres. I therefore find that the disclosure of information about the cell occupancy, schematics and layouts, staffing levels and the Staffing Model<sup>27</sup> could reasonably be expected to endanger the life or physical safety of a law enforcement officer or another person under s. 15(1)(f), with three exceptions.

[54] The three exceptions are an aerial photograph of the proposed site,<sup>28</sup> a sketch of the physical profile of the proposed OCC,<sup>29</sup> and most of the OCC site planning and design principles ("planning principles").<sup>30</sup> The aerial photograph is the type of photograph that a person could find on Google Maps or another publicly available geographic information system. The sketch contains very little detail, arguably less than could be gathered from driving past the OCC once it is constructed. Further, in my view, most of the planning principles for the OCC are so general that they would not disclose information about the site or facility that could reasonably be expected to result in any of the harms described by the Deputy Provincial Director.

[55] In summary, I find there is no reasonable expectation of probable harm arising from disclosing these three excerpts. This is because the information is not detailed enough to give rise to the risk that its disclosure could reasonably be

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<sup>27</sup> This includes some of the guiding principles at Appendix A, pp. 2 and 3 (left side of page).

<sup>28</sup> Appendix A pp. 5 and 6. The photograph is on both pages. It has a legend on it, which relates to photographs of the proposed site that the Ministry withholding under s. 15.

<sup>29</sup> Appendix A p. 10.

<sup>30</sup> Appendix A at pp. 2 and 3.

expected to endanger the life or physical safety of a law enforcement officer or any other person. For the same reason, I find that there is no reasonable expectation of harm to the security of any property or system, including a building, a vehicle, a computer system or a communications system, under s. 15(1)(l).

[56] The remaining information withheld under s. 15 is the information the Ministry describes as “the benefits and recommended options with respect to the Okanagan Correctional Centre”. While the Ministry does not specify what information it is referring to, in my view there are two remaining excerpts that are properly characterized in this way. The first is a short excerpt that is similar to some of the information I have already determined that the Ministry is authorized to withhold under s. 15(1)(f).<sup>31</sup> For the reasons discussed above, I find that it too may be withheld under s. 15(1)(f).

[57] The second type of information is portions of a “risk report” about construction and financial-related risks. It is not about social risks or risks to the community. Further, the Ministry does not specifically address this information. It does not connect the disclosure of this information to harm within the meaning of s. 15, and no such connection is apparent to me. Based on the materials before me, I am not satisfied that there is a reasonable expectation of probable harm under ss. 15(1)(f) or (l) that would arise from disclosure of this information.

[58] In summary, I find that the Ministry is authorized to refuse to disclose most of the information it is withholding under s. 15. The exceptions are the risk report information and the three other excerpts that are described above.

### **Section 13**

[59] For most of the information the Ministry is withholding under s. 13, I have already determined that the Ministry is required or authorized to withhold it under ss. 12 or 15. I will only consider the information that I have not already determined can be withheld. This remaining information, which I will consider under s. 13, consists of excerpts from the Business Case Report and Addendum. In general, this information relates to options and details about proposed design elements of the OCC.

[60] Section 13 of FIPPA authorizes public bodies to refuse to disclose policy advice or recommendations, subject to specified exceptions in s. 13(2). Section 13(1) states:

- (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

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<sup>31</sup> Business Case Report at p. 14.

[61] The Supreme Court of Canada stated in *John Doe v. Ontario (Finance)* that the purpose of exempting advice or recommendations from disclosure “is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.”<sup>32</sup> The British Columbia Court of Appeal similarly stated in the *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 of FIPPA “recognizes that some degree of deliberative secrecy fosters the decision-making process.”<sup>33</sup>

[62] In determining whether s. 13 applies, it is first necessary to establish whether disclosing the information “would reveal advice or recommendations developed by or for a public body or a minister”. If so, it is then necessary to consider whether that information is excluded from s. 13(1) because it falls within any of the categories of information listed in s. 13(2) of FIPPA.

[63] The Ministry submits that the information it is withholding under s.13 falls under s. 13(1), and that none of it falls under s. 13(2). It says the Business Case Report and Addendum were each developed by the Ministry, Partnerships BC and Shared Services BC for the Ministry, and, ultimately, the Treasury Board. The function of these records was to provide advice and make recommendations with respect to the preferred delivery option and procurement approach for the OCC. This includes the giving of advice about a range of options, the implications of those options, and guidance as to the best option. The Ministry submits that not only do these records explicitly contain advice and recommendations that are apparent in the face of the records, but they also would permit an individual to draw accurate inferences about advice or recommendations with respect to the OCC.

[64] The applicant submits that s. 13(2) clearly indicates that the public has a right to obtain and review materials underlying the announced site selection decision for the OCC. She does not specify what provisions of s. 13(2) she believes apply to the withheld information.

[65] I will first address whether the information withheld under s. 13 falls within the meaning of s. 13(1), and then consider whether any of the exceptions in s. 13(2) apply in this case.

#### *Section 13(1)*

[66] Section 13(1) applies to information that would directly reveal advice or recommendations if disclosed, as well as information that would enable an

<sup>32</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

<sup>33</sup> *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 105.

individual to draw accurate inferences about advice or recommendations. For s. 13(1) to apply, the information must also have been developed by or for a public body or minister.

[67] Based on my review of the records, I agree with the Ministry's characterization of the Business Case Report and Addendum information withheld from the under s. 13. Most of it relates to options and opinions, and it is clearly advice or recommendations developed both by and for a public body. I therefore find that it falls within the meaning of s. 13(1) of FIPPA.

[68] There is a small amount of information about the planning principles for the design and siting of the OCC that I determined the Ministry may not withhold under s. 15. This information is less clearly advice or recommendations, as it is written as factual statements that are not by themselves advice or recommendations.<sup>34</sup> Nonetheless, these planning principles were subject to change by the decision-maker(s), and, in context, this information provides an explanation or rationale for why certain recommendations were made for the OCC. I therefore find that this information reveals advice or recommendations within the meaning of s. 13(1).

### *Section 13(2)*

[69] Section 13(2) of FIPPA specifies a number of different types of information public bodies must not refuse to disclose under s. 13(1) of FIPPA. For example, s. 13(2)(a) provides that a public body must not refuse to disclose "any factual material" under s. 13(2)(a).

[70] Based on my review of the information to which I found s. 13(1) of FIPPA applies, I find that none of it falls under any of the provisions in s. 13(2). In particular, I find that the planning principles are not "factual material" within the meaning of s. 13(2)(a).

[71] In conclusion, I therefore find that the Ministry is authorized to refuse to disclose the information withheld under s. 13.

## **Section 17**

[72] The Ministry is also withholding information under s. 17. I will only consider the information for which I have not already determined that the Ministry is required or authorized to withhold under a different provision of FIPPA. This information is:

- portions of a "risk report" (the "Risk Report")

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<sup>34</sup> Business Case Report, Appendix A at p. 2 and 3.

- financial assumptions (such as interest rates, inflation rates, historical costs, etc.), benchmark costs and cost estimate information (collectively “Financial Assumptions”)

[73] Section 17 relates to disclosure harmful to the financial or economic interest of a public body. It states in part:

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
- (e) information about negotiations carried on by or for a public body or the government of British Columbia;
- (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[74] The issue under s. 17 is whether disclosure “could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy”. Sections 17(1)(a) to (f) are examples of this harm, but disclosing information that does not fit into these enumerated examples may still constitute harm under s. 17(1). As for how to interpret ss. 17(1)(a) to (f), former Commissioner Loukidelis stated in Order F08-22 that:

The intent and meaning of the listed examples are interpreted in relation to the opening words of s. 17(1), which, together with the listed examples, are interpreted in light of the purposes in s. 2(1) and the context of the statute as a whole.<sup>35</sup>

[75] With respect to the requirement for the Ministry to prove harm under s. 17, the standard of proof under s. 17 is the same as for s. 15. In short, the Ministry must establish that there is a reasonable expectation of probable harm within the meaning of s. 17.<sup>36</sup>

[76] The applicant submits that the Ministry must prove that there is “harm” for s. 17 to apply. She further submits that the Ministry must also prove that s. 17 does not override the rights of citizens to receive evidence about the analysis

<sup>35</sup> Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 43.

<sup>36</sup> See para. 49 of this order.

that led to the decision to locate the OCC on Osoyoos Indian Band land. In her view, this is necessary to ensure that this decision reflects a socially and economically sound decision for the South Okanagan region.<sup>37</sup>

[77] The applicant did not provide a legal basis to support her submission that the Ministry must prove that s. 17 does not override the rights of citizens to receive information. FIPPA provides a right of access to records, subject to specified limited exceptions to the rights of access. Section 17 is one of those exceptions to disclosure. As such, assuming that s. 17 applies, I do not accept that the Ministry must also prove that s. 17 does not override the rights of citizens to receive information.<sup>38</sup>

[78] The Ministry submits that in light of the realities of complex and competitive procurement processes, disclosure of the information withheld under s. 17 could reasonably be expected to harm the negotiating position of the Ministry and harm its competitive bidding processes, thus resulting in financial harm to the Province and undue financial gain to a third party, both with respect to the OCC and for future procurements in the public sector.

[79] It submits that disclosure of the withheld information would have given proponents an unfair advantage before the bidding process for the OCC was complete, as it would have disclosed the basis for the Province's project estimates. It further submits that disclosure of the information would reveal the basis for the Province's estimates for other projects of this type and scope. The Ministry submits that – as was the case in Order F10-34<sup>39</sup> – disclosure would reveal critical information that would harm the Ministry in this project, and harm the Ministry in future projects because proponents would receive valuable insight into the Ministry's financial analyses, schematic designs and development of costs estimates for a project of this nature.

[80] The Ministry submits that ss. 17(1)(d), (e) and (f) are relevant, but it does not provide anything further in its submissions about these the specific provisions, opting instead to address the more general question of whether disclosure of the withheld information could reasonably be expected to harm its financial or economic interests. Given this, I will also address the issue of harm under s. 17 more generally, keeping in mind ss. 17(1)(d), (e) and (f).

[81] The Ministry may have been authorized to withhold much of the information about the OCC under s. 17 at the time the Ministry provided its

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<sup>37</sup> Applicant's initial submissions at para. 8.

<sup>38</sup> I note that if s. 25 were to apply to the information, s. 25 would override s. 17. Further, s. 17 authorizes but does not require public bodies to refuse access to information, so public bodies are required to exercise their discretion about whether to withhold information.

<sup>39</sup> Order F10-34, 2010 BCIPC 50 (CanLII).

decision to the applicant. However, as stated in Order F15-37,<sup>40</sup> the time for assessing harm is the date of the inquiry.

[82] In this case, as of the date of its response to the applicant's access request, the Ministry had not yet awarded a contract to construct the OCC. However, it awarded a contract only a few days later and construction has commenced on the facility. The circumstances changed, and there is no specific evidence or submissions regarding harm that could arise from disclosure with respect to the OCC project at the time of inquiry. I therefore find that there is no reasonable expectation of probable harm to the Ministry's financial or economic interests from disclosure of the withheld information for this reason.

[83] The Ministry also submits that disclosure of the information would harm its financial or economic interests under s. 17 because it would reveal the breakdown of the Ministry's cost analyses and estimates. This information would allow proponents to determine and extrapolate the exact factors the Ministry considers when putting together cost estimates and use this information to tailor their bids for future projects. The Ministry submits that disclosure of this information would put the Ministry at a significant disadvantage and could result in increased project costs as future proponents could orient their bids to the detriment of the Ministry's financial interests.

[84] As for the Ministry's submission about disclosure causing harm to future projects, there are similarities between the Risk Report information and the information that was at issue in Order F10-34.<sup>41</sup> Order F10-34 dealt with financial spreadsheets for a hospital construction project. The information involved background information that public bodies had developed to use in negotiations for the project. It also included information about how they assessed the risks relating to specific portions of the project and the extent to which the risks had been transferred to or shared with a private sector partner. In that order, Commissioner Denham determined that s. 17 applied because disclosure of the financial risk information might result in the public bodies' private sector partners to "refuse to assume risks that they otherwise would have accepted" or "require greater levels of compensation than they would otherwise have been willing to accept as the price of assuming the risk."<sup>42</sup>

[85] In this case, the Risk Report is a comprehensive and detailed assessment of construction risks. It includes the Ministry's views as to the extent to which risks are transferred to or shared with the successful bidder, and how the Ministry quantifies the value or costs of such risks. In my view the information is similar to the information in dispute in Order F10-34 because disclosure may result in proponents refusing to accept risks that they would have otherwise accepted, or

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<sup>40</sup> Order F15-37, 2015 BCIPC 40 (CanLII) at para. 50.

<sup>41</sup> Order F10-34, 2010 BCIPC 50.

<sup>42</sup> Order F10-34, 2010 BCIPC 50 at para. 24.

increasing their bid prices to assume such risks. Further, the size and scope of the OCC, and the financial requirements required of the successful proponent, limit the number of potential qualified proponents compared to other smaller projects. Given these factors, I am satisfied that disclosure of the withheld Risk Report information could reasonably be expected to result in future proponents orienting their bids to the detriment of the Ministry's financial interests, and thus the financial or economic interests of the Province. I therefore find that s. 17(1) authorizes the Ministry to withhold the Risk Report information.

[86] The Ministry's evidence and submissions do not delineate between the Risk Report and the Financial Assumptions. My understanding of the Ministry's primary submission for this information is that disclosure would reveal the basis for the Province's cost estimates for other projects of this type and scope, which would result in a disadvantage to the Province for future negotiations and procurement processes. However, the Ministry does not explain how disclosure of the specific information that is withheld would enable proponents to harm the Ministry's negotiating position, and it is not apparent from the materials before me that disclosure of the Financial Assumptions information is the type of information that would assist proponents in future procurement processes or negotiations with the Province. Further, as stated in Order F14-37, procurement processes are inherently competitive, and cost estimate information does not preclude bidders from submitting a bid that gives them the best chance of being the successful proponent.<sup>43</sup> Moreover, this information is from 2012, and it is the type of information that changes over time. Absent specific evidence on this point, I find that it is likely outdated. For the above reasons, I am not satisfied that there would be a reasonable expectation of probable harm arising from disclosure for any of the Financial Assumptions information under s. 17(1). I therefore find that s. 17(1) does not apply, and that the Ministry must disclose it to the applicant.

[87] In summary, I find that the Ministry is authorized to withhold the Risk Report information under s. 17(1) of FIPPA because disclosure could reasonably be expected to harm the financial or economic interests of the Ministry. However, the Financial Assumptions may not be withheld under s. 17 and they must be disclosed to the applicant.

## **Section 22**

[88] The Business Case Report provides brief resume-type synopses for the risk quantification team members that worked on portions of the report. The Ministry is not applying s. 22 to the identities of the team members (or their current employer and job title), but it is withholding information about their past employment and educational experience under s. 22.

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<sup>43</sup> Order F14-37, 2014 BCIPC 40 at para. 31.

[89] Numerous orders have considered the approach to s. 22 of FIPPA, which states that a “public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.” This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[90] FIPPA defines “personal information” as “recorded information about an identifiable individual other than contact information”. In this case, the withheld information is about identifiable individuals and it is not contact information,<sup>44</sup> so I find that it is personal information.

[91] Subsection 22(4) specifies circumstances where disclosure of personal information is not an unreasonable invasion of a third party's personal privacy, while disclosure is presumed to be an unreasonable invasion of a third party's personal privacy if s. 22(3) applies. Based on my review of the withheld information, I find that none of the provisions in s. 22(4) apply. However, I find that s. 22(3)(d) applies because the withheld resume-type information “relates to employment, occupational or educational history” information of third parties. Therefore, there is a presumption that disclosure of the withheld information would be an unreasonable invasion of a third party's personal privacy.

[92] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered in determining whether disclosure would be an unreasonable invasion of the personal privacy of third parties under s. 22(1). In my view, none of the factors listed in s. 22(2) apply here, and I find that there are no other relevant factors in this case that are sufficient to rebut the presumption that disclosure would be an unreasonable invasion of the personal privacy of third parties. I therefore find that the Ministry is required to refuse to disclose the information it is withholding under s. 22 of FIPPA.

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<sup>44</sup> Schedule 1 of FIPPA defines “contact information” as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual”.

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## CONCLUSION

[93] For the reasons given above, under s. 58 of FIPPA, I order that the Ministry is:

- a) required to refuse to disclose information under ss. 12 and 22 of FIPPA, subject to paragraph (c) below;
- b) authorized to refuse to disclose information under ss. 13, 15 and 17 of FIPPA, subject to paragraph (c) below; and
- c) required to give the applicant access to the information I have highlighted in a copy of the record that will be sent to the Ministry along with this decision, by **October 5, 2015**, pursuant to s. 59 of FIPPA. The Ministry must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

August 21, 2015

## ORIGINAL SIGNED BY

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Ross Alexander, Adjudicator

OIPC File No.: F13-52724