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VICTORIA POLICE DEPARTMENT

Order F15-61

Elizabeth Barker
Senior Adjudicator

November 10, 2015

CanLII Cite: 2015 BCIPC 67
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 67

Summary: A journalist requested records related to the BC Association of Chiefs of Police and the BC Association of Municipal Chiefs of Police. The Victoria Police Department disclosed some records but refused to disclose other records and information under ss. 3(1)(c), 13, 14, 15, 16 and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and s. 182 of the *Police Act*. The adjudicator found that some records could be withheld because they are outside the scope of FIPPA due to s. 3(1)(c) of FIPPA and others because s. 182 of the *Police Act* applied. The adjudicator also found that some information could be withheld under s. 13 (advice or recommendations), s. 14 (solicitor client privilege), s. 15 (1)(c) and (l) (harm to law enforcement) and s. 22 (harm to personal privacy). However, VicPD was not authorized to refuse to disclose any of the information it withheld under s. 16 (harm to intergovernmental relations or negotiations).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), 13, 14, 15(1)(a), (c), (j) and (l), 16(1)(b) and 22. *Police Act*, s.182.

Authorities Considered: B.C.: Order 170-1997, 1997 CanLII 1485 (BCIPC); Order 331-1999, 1999 CanLII 4253 (BCIPC);Order 00-07 2000 CanLII 7711 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 01-43, 2001 CanLII 21597 (BCIPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-19, 2002 CanLII 42444 (BCIPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order 03-06, 2003 CanLII 49170 (BC IPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Decision F06-06, 2006 CanLII 32975; Order F06-16, 2006 CanLII 25576 (BCIPC); Order 07-05, 2007 CanLII 9596 (BC IPC); Order F07-15, 2007 CanLII 35476 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F11-17,

2011 BCIPC 23 (CanLII); Order F13-10, 2013 BCIPC 11 (CanLII); Order F13-23, 2013 BCIPC 30 (CanLII); Order F14-12, 2014 BCIPC 15 (CanLII); Order F15-05, 2015 BCIPC 5 (CanLII); Order F15-16, 2015 BCIPC 17 (CanLII); Order F15-30, 2015 BCIPC 33(CanLII); Order F15-49, 2015 BCIPC 52(CanLII). **Ont.:** Order PO-3167, 2013 CanLII 10462 (ON IPC).

Cases Considered: *John Doe v. Ontario (Finance*), 2014 SCC 36; *Canada v. Solosky*, 1979 CanLII 9 (SCC); *College of Physicians of B.C. v. British Columbia, 2002 BCCA 665; R. v. B., 1995 Can LII 2007* (BCSC); *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.;* Sable Offshore Energy Inc. v. Ameron International, 2013 NSSC 131 (CanLII); *General Accident Insurance Company et al. v. Chrusz* (1999), 1999 CanLII 7320 (ONCA); *Pitney Bowes of Canada v. Canada*, 2003 FCT 214; *Archean Energy Ltd. v. Canada (Minister of National Revenue), 1997 CanLII 14953 (ABQB); Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455 (CanLII); *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31; *Maranda v. Richer*, 2003 SCC 67; *Buttes Gas and Oil v. Hammer (No. 3)* [1980] 3 All ER 475; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII);*Van Der Wolf v. Allen*, 2008 BCSC 1054 (CanLII); *Boudreau v. Loba*, 2015 ONSC 1648 (CanLII); *Manthorne v Canadian Breast Cancer Network*, 2015 ONSC 3799 (CanLII); *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner), 2012 BCSC 875.*

Publication Considered: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 1993.

INTRODUCTION

[1] A journalist ("applicant") requested that Victoria Police Department ("VicPD") provide him with copies of records about the BC Association of Chiefs of Police ("BCACP") and the BC Association of Municipal Chiefs of Police ("BCAMCP"). VicPD disclosed some records but refused to disclose other records and information under ss. 3(1)(c) (outside of scope), 13 (policy advice or recommendations), 14 (solicitor client privilege), 15 (harm to law enforcement), 16 (harm to intergovernmental relations or negotiations), 17 (harm to financial or economic interests of a public body) and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). VicPD also refused to disclose some records under s. 182 of the *Police Act*.

[2] The applicant was dissatisfied with the response and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). The applicant also complained about the adequacy of the public body's search for records under s. 6 of FIPPA, but that matter was addressed in file F13-55714 and does not form part of this inquiry.

[3] Mediation did not resolve the issues regarding VicPD's application of ss. 3, 13, 14, 15, 16, 17 and 22 of FIPPA and s. 182 of the *Police Act* to the records, and the applicant requested that the matter proceed to inquiry.

[4] BCACP, BCAMCP, Pivot Legal Society and the Freedom of Information and Privacy Association ("intervenors") were invited to participate in the inquiry as intervenors. VicPD provided submissions, which BCACP and BCAMCP each said that they agreed with and supported. The applicant also provided submissions. The intervenors provided a joint submission.

[5] In its initial submissions, VicPD said that it had reconsidered some of the severing and had decided to disclose three more records in full.[1] It also said that it is no longer withholding any information under s. 17. For that reason, those three records and s. 17 are no longer at issue in this inquiry.

ISSUES

[6] The issues in this inquiry are as follows:

1. Are some of the records outside the scope of FIPPA due to s. 182 of the *Police Act*?

2. Do some of the records fall outside the scope of FIPPA pursuant to s. 3(1)(c) of FIPPA?

3. Is VicPD authorized to withhold information under ss. 13, 14, 15(1)(a), (c), (j) and (l) and/or 16(1)(b) of FIPPA?

4. Is VicPD required to withhold information under s. 22 of FIPPA?

[7] Section 57(1) of FIPPA places the onus on VicPD to prove that the applicant has no right of access to the information withheld under ss. 13, 14, 15 and 16. However, the burden is on the applicant to establish that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy under s. 22 of FIPPA. Although s. 57 is silent regarding the burden of proof in cases involving s. 3(1) of FIPPA and the *Police Act*, I agree with previous orders that have said that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA.[2]

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[1] Records 3, 4 and 6.

[2] For example: Order 03-06, 2003 CanLII 49170 (BC IPC) at para. 6. Order 170-1997, 1997 CanLII 1485 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F13-23, 2013 BCIPC 30 (CanLII); F15-49, 2015 BCIPC 52.

DISCUSSION

[8] **Background –** The applicant's request for access to records regarding BCACP and BCAMCP was made to the VicPD because neither BCACP or BCAMCP are public bodies under FIPPA. He also made similar access requests to the Central Saanich, Saanich and West Vancouver police departments. With the applicant's consent, VicPD coordinated all of the responses by collecting the responsive records from other police departments and treating them as if they were all in VicPD's custody and control.

[9] BCAMCP is an unincorporated association and BCACP is a society incorporated under the *Society Act*. BCACP consists of senior executive managers from various BC police agencies and senior managers from non-police agencies that have a role related to law enforcement. BCAMCP consists of senior executive managers from independent municipal police agencies, municipal detachments of the Royal Canadian Mounted Policed ("RCMP") and senior government officials who have a direct role in the administration of policing in the province.[3]

[10] The objectives of BCAMCP and BCACP are similar and include:

- Encouraging and developing co-operation among its members in the pursuit of and attainment of their goals;
- Promoting a high standard of ethics, integrity, honour and conduct;
- Fostering uniformity of police practices;
- Encouraging the development and implementation of efficient and effective practices in the prevention and detection of crime; and
- Effectively communicating problems and concerns to appropriate levels of authority. [4]

[11] Pivot Legal Society is a small non-profit organization operating out of Vancouver's downtown eastside, and it describes its mandate as advocating for increased police accountability. It says that it works with individuals who require assistance with police complaint processes and accessing information held by police. The Freedom of Information and Privacy Association describes itself as a non-partisan, non-profit society that promotes freedom of information and privacy rights. It says that its goal is to empower citizens by increasing their access to information and control over their own personal information.[5]

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[3] VicPD Deputy Chief Constable's affidavit, paras. 5-6
[4] Affidavit of VicPD's Manager of Information Services, exhibits B and C.
[5] Intervenors' submission, para. 2-3.

[12] **Information in Dispute –** VicPD explains that in total it disclosed approximately 1850 pages of records in response to the applicant's request. The information in dispute is contained in 17 records (44 pages) comprised of:

- BCACP and BCAMCP meeting minutes;
- A summary of a meeting of the "Crown/Police Liaison Committee";
- An Abbotsford Police Department incident summary from an agenda;
- Correspondence from the Office of the Registrar of Lobbyists of British Columbia;
- A draft document prepared by the Ministry of Justice; and
- A report on the Provincial Intelligence Centre and Real Time Crime Centres.

[13] **Preliminary matters -** The focus of the applicant's submissions is his contention that the individual members of BCACP and BCAMCP are acting in their personal or private capacity at meetings, and that disclosing information in such a group setting amounts to public disclosure. Given this, he believes that the information is in the public realm and there is no justification for denying him access.[6] The intervenors agree with the applicant on this point.

[14] The issue of the applicant's concerns regarding the capacity in which individuals are acting when engaged in BCACP and BCAMCP activities was addressed by the Registrar of Lobbyists of B.C. in Investigation Report 13-02.[7] The applicant had complained that BCACP and BCAMCP should be required to register as lobbyist under the *Lobbyist Registration Act*. The Acting Deputy Registrar found that registering was not required because the associations' police members are acting in their official capacity as employees of local government authorities and the government of Canada when engaged in the associations' activities.

[15] Based on the submissions and evidence provided by VicPD in this inquiry, I also find that BCACP and BCAMCP members are acting in their professional capacity as employees of their respective organizations. In my view, there is nothing to suggest that they are acting in their private or personal capacity when participating in BCACP and BCAMCP activities.

[16] In addition, the applicant and the intervenors submit that the sharing and discussing of third party personal information among BCACP and BCAMCP members is a violation of personal privacy. The applicant alleges that such disclosure may be a breach of FIPPA, the *Personal Information Protection Act*

[6] Applicant's submissions, paras. 32, 45, 49.
[7] Investigation Report 13-02 at http://www.lobbyistsregistrar.bc.ca.

and/or the *Police Act*.[8] This issue was not included in the Notice of Inquiry. The applicant does not explain why he did not raise this issue prior to the exchange of submissions or why he should be permitted to add it at this late stage. Therefore, I have decided that this issue is not properly before me in this inquiry and I will not consider it.

[17] However, I will consider the applicant and the intervenors' arguments regarding public disclosure and confidentiality below, to the extent that they are relevant.

Section 182 of the Police Act

[18] VicPD is withholding portions of the minutes of a BCAMCP meeting as being outside of the scope of FIPPA due to s. 182 of the *Police Act*.[9] Neither the applicant nor the intervenors make any submissions regarding this issue. Section 182 states:

> 182 Except as provided by this Act and by section 3(3) of the *Freedom of Information and Protection of Privacy Act*, that Act does not apply to
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> (a) any record of a complaint concerning the conduct of a member that is made, submitted, registered or processed under this Part,
>
> (b) any record related to a record described in paragraph (a), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,
>
> (c) any information or report in respect of which an investigation is initiated under this Part, or
>
> (d) any record related to information or a report described in paragraph (c), including, without limitation, any record related to a public hearing or review on the record in respect of the matter,
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> whether that record, information or report is created on or after a complaint is made, submitted or registered or the investigation is initiated, as the case may be.

[19] In applying s. 182 of the *Police Act*, it is necessary to first determine whether s. 3(3) of FIPPA applies and if there are other provisions of the *Police Act* that override s. 182. Section 3(3) makes various sections of FIPPA applicable to officers of the Legislature "as if the officers and their offices were public bodies". The applicable sections under s. 3(3) all relate to the Commissioner's function in protecting personal privacy. In this case, it is clear

[8] Applicant's submissions, paras. 73-74, and intervenors' submissions, para. 39.
[9] Record 12 (pp. 422-23). This information is also being withheld under s. 22.

that s. 3(3) does not apply. Further, it is also evident that there are no other provisions of the *Police Act* that override s. 182 in this case.

[20] Two previous orders have considered s. 182 of the *Police Act*, and in both, the following two part test, which I will also follow, was used:[10]

1. The record, information or report must fall within one of the categories denoted in s. 182(a), (b), (c) or (d).
2. The record, information or report must be created on or after a complaint is made, submitted or registered, or the investigation is initiated, as the case may be.

[21] Some of the information in the meeting minutes has been disclosed: the title of the document, the date and time of the meeting, the names of the attendees and the topics discussed. The minutes state that the meeting was closed to the public. The individuals listed as having attended were the Assistant Deputy Minister for the Ministry of Public Safety and Solicitor General, as well as superior rank officers of several municipal police departments, the Combined Forces Special Enforcement Unit of British Columbia and the South Coast British Columbia Transportation Authority Police Service. VicPD withheld all the information from the minutes under the heading "New Business, Police Act Investigations". VicPD submits that the withheld information relates to investigations and decisions of the Office of the Police Complaints Commissioner under the *Police Act* and that it identifies complainants, witnesses and police officers, and contains opinions or judgments about those matters.

[22] I agree with VicPD's characterization of what the withheld information reveals. Section 177(1) of the *Police Act* states that the police complaint commissioner is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings under Part 11, and ensuring that the purposes of Part 11 are achieved. Part 11 deals with misconduct, complaints, investigations, discipline and proceedings involving constables, deputy chief constables or chief constables of a municipal police department. It is evident from the withheld information, which is in the nature of a group discussion of what occurred, that there had been investigations and public hearings under the *Police Act* regarding Part 11 matters, and that the Office of the Police Complaints Commissioner was involved. Therefore, I find that the withheld information in Record 12 relates to a record of a complaint submitted, registered or processed under Part 11 of the *Police Act*, so s. 182(b) applies. In conclusion, VicPD has established that FIPPA does not apply to Record 12.

[10] Order F15-05, 2015 BCIPC 5 (CanLII) and Order F15-30, 2015 BCIPC 33 (CanLII), (addressing the previous version of s. 182). Order F15-05 is under judicial review on grounds other than the two part test for interpreting s. 182.

Scope of FIPPA - s. 3(1)(c)

[23] VicPD is withholding one letter[11] under s. 3(1)(c). That provision states:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> ...
> (c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[24] The following three criteria must be met in order for s. 3(1)(c) to apply: [12]

1. An "officer of the Legislature" is involved;
2. The record must have been created *by* or *for* an officer of the Legislature, or be in the *custody* or *control* of an officer of the Legislature; and
3. In all cases, the record must relate to the exercise of the officer's functions under an Act.

[25] The letter VicPD is withholding under s. 3(1)(c) is from the Office of the Registrar of Lobbyists for British Columbia.[13] Section 7 of the *Lobbyists Registration Act* states:

> 7(1) The person holding the office of, or acting as, Information and Privacy Commissioner under the *Freedom of Information and Protection of Privacy Act* is designated as registrar for the purposes of this Act.

[26] The definition of "officer of the Legislature" in Schedule 1 of FIPPA includes the Information and Privacy Commissioner. Therefore, I find that the Registrar of Lobbyists is an "officer of the legislature" for the purposes of s. 3(1)(c) of FIPPA. Further, the letter was authored by the Registrar of Lobbyist's staff and it plainly relates to the exercise of the Registrar's functions under the *Lobbyists Registration Act*. Therefore, VicPD has established that s. 3(1)(c) applies to Record 8, and it falls outside the scope of FIPPA.

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[11] Record 8. Neither the applicant nor the intervenors made a submission regarding the application of s. 3(1)(c).

[12] See Order 01-43, 2001 CanLII 21597 (BCIPC); Decision F06-06, 2006 CanLII 32975; Order F14-12, 2014 BCIPC 15.

[13] The Office of the Registrar of Lobbyists for British Columbia is an independent office of the legislature, and its mandate is to oversee, monitor and enforce the *Lobbyists Registration Act* (LRA).

Policy Advice or Recommendations - s. 13

[27] VicPD is relying on s. 13 to withhold excerpts from some of the records. Section 13(1) states that 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.

[28] Section 13(1) has been the subject of many orders that have consistently held that the purpose of s. 13(1) is to allow for 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 decisions and policy-making were subject to excessive scrutiny.[14] In *John Doe v. Ontario (Finance*) ("John Doe"),[15] the Supreme Court of Canada addressed Ontario's equivalent of s. 13 and said:

> Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

[29] BC orders have also found that s. 13(1) applies not only when disclosure of the information would directly reveal advice and recommendations but also when it would allow accurate inferences about the advice or recommendations.[16]

[30] In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner* ("*College*")[17] the British Columbia Court of Appeal said that "advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinions on matters of fact on which a public body must make a decision for future action. Further, in *John Doe,* the Supreme Court of Canada determined that the word "advice" in s. 13(1) of the Ontario FIPPA includes policy options, whether or not the advice is communicated to anyone.

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[14] For example, Order 01-15, 2001 CanLII 21569 (BC IPC) and Order F11-17, 2011 BCIPC 23 (CanLII).
[15] 2014 SCC 36, at para. 45.
[16] Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC).
[17] 2002 BCCA 665, at para. 113.

[31] The process for determining whether s. 13(1) applies to information involves two stages. The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). The effect of s. 13(2) is that, even in cases where information would reveal advice or recommendations developed by or for a public body, the public body may not withhold the information if it falls within any of the categories of information and records listed in s. 13(2).

Parties' Submissions

[32] VicPD submits that all of the information it is withholding under s.13 reveals advice and recommendations developed by or for a public body and that none of the exceptions in s. 13(2) apply.

[33] The applicant makes no submissions about s. 13 specifically.

[34] The intervenors submit that the information withheld under s. 13 is not advice and recommendations. They also submit that information cannot be withheld under s. 13 if it has been shared with individuals who are not part of the public body that developed the advice and recommendations or for whom the advice and recommendations were developed.[18] They cite no case law in support of this assertion. They also submit that the information withheld under s. 13 is already in the public realm because it has been disclosed to individuals who do not work for any public body.[19] As noted above in the preliminary issues section, the applicant makes the same argument as the intervenors in this regard.

[35] VicPD submits that the sharing of information between BCACP and BCAMCP is done on an express understanding that the information will be kept confidential and there is no basis for concluding that the sharing of information is a public disclosure.[20] VicPD's Deputy Chief Constable deposes that BCACP and BCAMCP are comprised of senior managers from BC police agencies, the RCMP and non-police agencies that have a role related to law enforcement, as well as senior government officials who have a direct role in the administration of policing in BC. While they often share information, including advice developed by or for their agencies, he says that the records from the associations' meetings, such as agendas and minutes, are kept within each member's respective agency as part of the member's overall policing duties and are treated as confidential.[21]

[18] Intervenors' submissions, paras. 17-19.
[19] Intervenors' submissions, para. 19.
[20] VicPD submissions, paras. 3-4.
[21] Affidavit of VicPD's Deputy Chief Constable, paras. 8, 11

Analysis s. 13

[36] In my view, the fact that advice or recommendations developed by or for a public body are shared outside of that public body does not mean that the information is no longer advice or recommendations, as the applicant and intervenors submit. It is not a requirement of s. 13 that there be no sharing of the advice and recommendations, that the advice and recommendations only be shared with other public bodies, or that the advice and recommendations remain confidential among a specific group. This is not an interpretation that is supported by the context and plain and ordinary meaning of the language in s. 13. Nor have the applicant and the interveners identified any case law that supports this interpretation. Withholding advice and recommendations that have previously been disclosed is a matter that pertains to whether the public body properly exercised its discretion when deciding to refuse subsequent access to the advice and recommendations under s. 13.

[37] Furthermore, in any event, I am not persuaded by the argument that disclosure to BCACP and BCAMCP amounts to disclosure to the public such that there can be no justification in refusing to disclose the same information to the applicant. The evidence establishes that the BCACP and BCAMCP meetings are attended by representatives of various policing agencies and other organizations who share a common interest in policing matters. The fact that not all of those members are representatives of public bodies under FIPPA does not establish that disclosure to them is the same as disclosure to the public or that the information should be considered to be in the public realm. Also, despite their assertions, neither the applicant nor the intervenors provided evidence to establish that the information withheld under s. 13 has been publicly disclosed or shared beyond the confines of the BCACP and BCAMCP membership.

[38] Therefore, I will now consider whether the information withheld under s. 13 is advice and recommendations, regardless of who has previously been given access to it.

[39] *Record 1* – This record is the minutes of a BCACP meeting. VicPD withheld an excerpt about whether BCACP members should develop a policy to address a particular policing issue. VicPD says that the excerpt reveals advice and recommendation of VicPD's Deputy Chief Constable, who was participating in the meeting in his official capacity. VicPD acknowledges that the BCACP is not a public body. However, it says that VicPD is a public body and the advice and recommendations of VicPD's Deputy Chief Constable was the advice and recommendations developed by VicPD.

[40] I find that this information reveals the advice and a recommendation of VicPD's Deputy Chief Constable. The withheld information clearly demonstrates that he was acting in his official capacity on behalf of VicPD when he

communicated his advice and recommendation. Therefore, the advice and recommendation is that *of* a public body, and s. 13(1) applies.

[41] *Record 5* – VicPD relied on s. 13 to withhold an excerpt from these minutes of a BCACP closed meeting. VicPD says the excerpt summarizes a presentation given by the Vancouver Police Department's Senior Director of Public Affairs and Marketing ("Senior Director") about "crisis management and lessons learned from the 2011 Vancouver Stanley Cup Riot", and it contains the Senior Director's advice and recommendations.[22] VicPD submits that although some of the withheld information is a factual summary, this does not preclude it from qualifying as "advice" for the purposes of s. 13(1) because the Senior Director exercised his judgment as to what facts were relevant for consideration. Further, VicPD submits that, although the withheld information is a narrative of events, it is not "factual material" under s. 13(2)(a) because "the selection of facts deemed significant, out of an event that is well known and documented in the public media, cannot be viewed as merely factual material."[23]

[42] The Senior Director deposes that he has reviewed Record 5 and it "contains much of the information"[24] he shared with the BCACP when he was asked to tell them about the advice he provided to the Vancouver Police during the riot, as well as the lessons learned with respect to proper crisis and media relations management. He says:

> The information I shared with BCACP included my advice and in some cases my recommended course of action that I had provided to the VPD Executive with respect to the VPD Riot related to managing the message prior to and during the event, the related law enforcement investigation, and how to best approach issues around the prosecution of Riot related offenders. Interwoven within my advice and recommended course of action was an account of the Riot and how the VPD responded to it from a public relations and media perspective.
> …
> I also shared with the BCACP my advice to the VPD Executive Team as to how to best approach future circumstances based on a similar fact pattern and circumstance. My talk to the BCACP included information related to policy options or alternative courses of actions considered by the VPD, as I presented to the VPD Executive.
> …
> In response to the questions raised, it was necessary to share and discuss the advice ad recommendations provided to the VPD in the context of if anything would be done differently today and my response to the questions posed by the BCACP members reveals advice and options I discussed with the VPD Executive…[25]

[22] VicPD initial submissions, para. 41.
[23] VicPD initial submission, para. 49.
[24] Senior Director's affidavit, para. 10.
[25] Senior Director's affidavit, paras. 6, 8, 9.

[43] I find that the information withheld from Record 5 is advice and recommendations. The background or history of events, which is laid out in the summary, is integral to and would easily allow one to accurately infer the advice the Senior Director gave to the Vancouver Police about crisis communications during the riot and managing media relations. The withheld information also includes some opinions on various matters related to how the BCACP members can manage media relations in a similar situation in the future, so those opinions are the Senior Director's "advice" in the sense articulated in *College* as being an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. Therefore, I find that disclosure of the information in Record 5 would reveal advice or recommendations developed by a public body and s. 13(1) applies.

[44] *Record 15* – This record is the minutes of a BCAMCP meeting. VicPD relied on s. 13 to withhold one sentence, which it says is a "suggestion" made by a municipal police department representative participating in the meeting. VicPD submits that the suggestion proposes a course of action or conduct and clearly falls within the meaning of advice or recommendations. I agree that the information is a recommendation made by an individual who is acting in his official capacity as a representative of a municipal police department. Therefore, I find that it is a recommendation developed by a public body and s. 13(1) applies.

[45] *Record 17* – VicPD withheld all of this record, which it says is a draft document prepared by the Ministry of Justice that proposes new procedures and standards related to criminal prosecutions. The record was provided to BCAMCP members. I agree with VicPD's characterization of the record and find that the information withheld from it is advice or recommendations developed by a public body (i.e., the Ministry of Justice) and s. 13(1) applies.

[46] *Record 19* – VicPD relied on s. 13 to withhold several excerpts from this record, which it says is a report on the need and viability of enhancing the Provincial Intelligence Centre and a Real Time Crime Centre. The information withheld under s. 13 consists of the recommendations of a steering committee. Although VicPD does not identify who is on the steering committee and developed the recommendations, it is obvious that the recommendations were developed *for* B.C. police departments, which are public bodies within the meaning of FIPPA. I find that all of this information is recommendations developed for public bodies and s. 13(1) applies.

[47] *Section 13(2)* - I have determined that none of the categories in s. 13(2), including "factual material" under s. 13(2)(a), apply to the information that I find above is advice and recommendations.

[48] In conclusion, VicPD is authorized to withhold all the information it withheld under s. 13(1).

Solicitor client privilege - s. 14

[49] Section 14 states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. VicPD withheld some information from Records 2, 9 and 20 under s. 14 of FIPPA. All three records are single pages from the minutes of BCACP and BCAMCP meetings.[26]

[50] The law is well established that s.14 encompasses both types of solicitor client privilege found at common law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[27] VicPD does not specify whether it believes legal advice privilege or litigation privilege applies. However, it is apparent from their submissions that they are claiming legal advice privilege.[28]

[51] For legal advice privilege to apply the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[52] Not every communication between client and solicitor is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.[29] The above criteria have consistently been applied in BC Orders, and I will take the same approach here.[30]

[53] The applicant does not dispute that the information at issue records legal advice. Instead, he asserts that the fact that the information was presented at

[26] Record 2 consists of p. 6 of the minutes of a BCACP meeting, Record 9 consists of p. 7 of the minutes of a BCAMCP meeting, and Record 20 is p. 3 of a BCAMCP meeting minutes. The balance of the meeting minutes were not part of the inquiry materials.
[27] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), para. 26.
[28] There was no submission or evidence that litigation is underway.
[29] For a statement of these principles see also *R. v. B., 1995 Can LII 2007* (BCSC), para. 22 and *Canada v. Solosky*, 1979 CanLII 9 (SCC), p. 13.
[30] See: Order 01-53, 2001 CanLII 21607 (BC IPC) and Order F13-10, 2013 BCIPC 11 (CanLII).

BCACP and BCAMCP meetings constitutes public disclosure and a waiver of privilege.[31]

[54] The intervenors submit that the fact that the information withheld under s. 14 is contained in meeting minutes, without any indication that it was privileged, suggests that it was legal information, not legal advice. Further, they add that if it were legal advice, privilege was waived when the advice was shared. It disputes VicPD's assertion that there was a shared common interest among the members of the meetings.

Analysis s. 14

[55] *Record 2* – This record is the minutes of a BCACP meeting. VicPD provides affidavit evidence from a lawyer with the federal Department of Justice who provided the legal advice at issue in Record 2. The lawyer is the RCMP's legal advisor. He says that the information withheld from Record 2 is a restatement of legal advice he gave the RCMP at an earlier date. He does not explain who was responsible for sharing the advice with the meeting participants or if he attended the meeting. He expresses the opinion that "the police agencies and other participants of the meeting"[32] all had a common interest in the subject matter of the legal advice. There was no evidence provided by the lawyer or VicPD about the identity of the "other participants" of the meeting.

[56] The information withheld from Record 2 clearly reveals legal advice that was provided to the RCMP by its legal counsel. There is nothing to suggest that at the time the advice was provided to the RCMP it was not communicated in confidence. Therefore, I find that this excerpt meets the criteria for legal advice privilege. The issue, however, is whether by sharing that legal advice at the BCACP meeting, the RCMP waived privilege over it.

Waiver

[57] Legal advice privilege exists to protect confidential communications between a client and solicitor. Therefore, any voluntary disclosure by the holder of the privilege is inconsistent with the confidential relationship and waives the privilege. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.[33]

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[31] Applicant's submissions, para. 57.
[32] RCMP lawyer's affidavit, para. 5.
[33] Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 1993, p. 187-191; *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.;* Order 00-07 2000 CanLII 7711 (BC IPC); Order 07-05, 2007 CanLII 9596 (BC IPC).

[58] The legal advice withheld from Record 2 is contained in meeting minutes and clearly demonstrates that the RCMP told the meeting participants what legal advice it had received on a matter pertaining to its own legal affairs. VicPD submits that although the privileged information was shared among the various police agencies represented at the meeting, this was not a waiver of privilege. Instead, it submits, common interest privilege applies to the information.

Common interest exception to waiver

[59] Common interest privilege is an exception to circumstances that might otherwise amount to a waiver of privilege. In other words, common interest privilege protects against waiver of privilege when a privileged document - whether protected by legal advice privilege or litigation privilege - is disclosed to someone who otherwise would have no right to it, but with whom the party has a common interest.[34] Lord Denning described common interest privilege in *Buttes Gas and Oil v. Hammer (No. 3)* as follows:

> There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation - because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should - for the purposes of discovery - treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.[35]

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34 *Sable Offshore Energy Inc. v. Ameron International*, 2013 NSSC 131 (CanLII), para 118.
35 [1980] 3 All ER 475, at 484.

[60] More recently, in *Sable Offshore Energy Project v. Ameron International Corporation* the Nova Scotia Court of Appeal said that the law requires the party claiming common interest privilege establish that the document was shared for the clear intent of pursuing a common adversary:

> The correct approach is to direct that only where it is clearly established that the documents were exchanged in furtherance of a joint interest against a third party, and the documents were also otherwise privileged, does a common interest privilege arise.[36]

[61] In *General Accident Insurance Company et al. v. Chrusz* (1999),[37] the Ontario Court of Appeal explained that the rationale for common interest privilege is the promotion of the adversarial system. The Court stated that a document in the hand of an outsider will only be protected by a privilege if there is a common interest in litigation or its prospect. While the Court said that in that case, litigation or anticipated litigation against a common adversary needed to be established, it also recognized that the subject of common interest privilege has arisen in other contexts in Canadian cases.

[62] Specifically, common interest privilege has been expanded in the courts to cover circumstances where the common interest is not in a dispute or litigation, but is instead a common interest in the successful completion of a commercial transaction or negotiation.[38] For instance, in *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, Lowry, J. said:

> To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.[39]

[63] It has also been expanded to cover those situations in which a fiduciary or similar duty has been found to exist between the parties to create a common interest (i.e., trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations).[40]

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[36] 2015 NSCA 8 (CanLII), at para. 69.
[37] 1999 CanLII 7320 (ONCA), at para. 37.
[38] *Pitney Bowes of Canada v. Canada*, 2003 FCT 214 - successful completion of leasing transaction; *Archean Energy Ltd. v. Canada (Minister of National Revenue*), 1997 CanLII 14953 (ABQB) - successful completion of share purchase transaction; *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, 1998 ABQB 455 (CanLII) - successful merger negotiation.
[39] 2002 BCSC 1344, at para. 14.
[40] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 (CanLII), at para. 24.

[64] VicPD also refers me to Ontario Order PO-3167[41] where the adjudicator took the approach that the common interest between parties need not be litigation, a common adversary, or the goal of successfully completing a commercial transaction. In that case, the record at issue was a memorandum containing a legal opinion provided by Ontario's Assistant Deputy Attorney General to crown attorneys, which was subsequently shared with all Ontario chiefs of police. The adjudicator said the common interest privilege exception to waiver applied because the Ministry of the Attorney General and the chiefs of police share a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration.

[65] VicPD submits that in the present case, the RCMP's legal advice related to an issue that all members of BCACP shared a common interest in, the incorporation of the BCACP under the *Society Act*.[42] The advice was shared as part of BCACP discussions regarding incorporation for the purpose of providing other members with the benefit of the RCMP's legal advice.

[66] I have considered the content and context of the excerpt and find that the RCMP and the other members of the BCACP shared a common interest in the successful incorporation of BCACP. The legal advice pertained to the requirements of incorporation, and it was evidently of concern and interest to all of them. In that way there are parallels to the cases where the successful completion of a commercial transaction was the common interest. In this case, it is not a commercial transaction, rather a shared common interest in the successful completion of incorporation under the *Society's Act*. In these circumstances, I find that the RCMP did not waive privilege over the legal advice contained in Record 2, when it shared it with its fellow BCACP meeting participants. VicPD may continue to withhold the information in Record 2 under s. 14.

[67] *Record 9* – This record is one page of the minutes of a BCAMCP meeting from which two dollar figures have been withheld. VicPD's Manager of Information Services/Legal Services deposes that the withheld information is the amount of legal costs incurred by BCAMCP on behalf of some of its members in dealing with an access request under FIPPA.[43]

Rebuttable presumption

[68] Although the information in the excerpt is not a communication between a client and its legal advisor, it reflects the solicitor client relationship and what

[41] Order PO-3167, 2013 CanLII 10462 (ON IPC).
[42] VicPD's submission, para. 39.
[43] VicPD Manager's affidavit, para. 13.

transpired within it, and the Supreme Court of Canada in *Maranda v. Richer* says that such information is presumed to be privileged:

> The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements… Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.[44]

[69] In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*[45], ("*Central Coast*"), the BC Supreme Court recognized the need for guidance in how to assess if the presumption is rebutted: "there are occasions when claims of privilege will not stand up to scrutiny and, therefore, there has to be some way for the adjudicator of the privilege issue to assess the validity of the assertion of privilege."[46] The Court said that the correct approach to determining whether the presumption has been rebutted is to consider the following two questions:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and

2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? [47]

[70] VicPD provides no submissions regarding the presumption and whether it has been rebutted. It submits that the information is privileged because it is a confidential communication related to the seeking and obtaining of legal advice. It submits that BCAMCP is the client, so there was no waiver of privilege when BCAMCP members discussed the dollar amounts at the meeting. In the alternative, it submits that common interest exception to waiver applies.

[71] In so far as the dollar amounts reflect the solicitor client relationship and what transpired within it, I find that the dollar amounts are presumed to be privileged.

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[44] *Maranda v. Richer*, 2003 SCC 67 (CanLII), para. 32-33.
[45] Central Coast, 2012 BCSC 427.
[46] Central Coast, para 103.
[47] Central Coast, paras.104-106.

[72] The applicant provided no evidence or argument to rebut the presumption. However, it is still incumbent upon me to consider the nature of the information and the circumstances and context of the case to determine whether the presumption is rebutted.[48] With that end in mind, I have considered the fact that the two total dollar amounts do not reveal the identity of the lawyer, whether the matter to which they relate is ongoing or concluded, or any specific descriptions, date ranges or price breakdowns for the legal services. Nor is there any information that there is ongoing litigation such that the size of the dollar amounts might disclose litigation strategy.

[73] I note that VicPD has disclosed the balance of Record 9 to the applicant, so it has already revealed the subject matter of the legal services and roughly when they were provided. Despite this context having already been disclosed, I am not satisfied that there is any reasonable potential that disclosure of the total dollar amounts will directly or indirectly reveal communications protected by solicitor-client privilege. While this kind of dollar amount information could potentially reveal privileged information in some situations, I find that it does not do so in the circumstances of this case. Similar findings have been made in previous orders and court cases regarding the total amount of legal fees.[49] In summary, I find that VicPD may not withhold the total dollar amounts in Record 9, under s. 14.

[74] *Record 20* - The information withheld from the meeting minutes in Record 20, is also legal advice provided by the RCMP's lawyer. The lawyer says that the BCAMCP asked him to attend part of the meeting to provide legal advice concerning the accessibility of BCACP and BCAMCP meeting minutes under FIPPA. He says that he provided the advice to the RCMP and to representatives of the other police agencies who were in the room. He says that those other police agencies participate with his clients in the activities of the BCACP and BCAMCP and they share a common interest in the subject matter of the advice. The lawyer says that to the best of his knowledge the legal advice he provided has not been shared with anyone other than the policing organizations present at the meeting.

[75] Similar to Record 2, the information withheld from Record 20 is legal advice provided by the RCMP's legal advisor. However, unlike Record 2, the legal advice in Record 20 was not provided to the RCMP and then subsequently shared by the RCMP with others. The evidence establishes that the lawyer was asked by BCAMCP to attend the meeting and provide legal advice to all of the

[48] Central Coast, para. 114.

[49] For example, see: Order F15-16, 2015 BCIPC 17 (CanLII); *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII).

participants at the same time, only one of which was the RCMP. It is also evident from the content of the withheld information that the legal advice was about matters affecting the BCAMCP and the BCACP and applied to all of the members of those associations. The lawyer says that to the best of his knowledge the legal advice he provided has not been shared with anyone other than the policing organizations present at the meeting, and there was no evidence suggesting that it had.

[76] I am satisfied that the excerpt in Record 20 reflects a communication of legal advice between a lawyer and client, made in confidence, and that it thus meets the criteria for legal advice privilege. Further, I find that common interest privilege applies and that what took place was not a waiver of privilege. Parties who have a common interest in the solicitor-client communications includes those jointly retaining counsel, but it can also be extended to those who might have a reasonable belief that the solicitor was also offering advice to them notwithstanding the actual retainer was between the solicitor and the other party.[50] One condition necessary to invoking joint or common interest privilege is that the common interest exists at the time of the communication.[51] VicPD has established that the communication in Record 20 was a confidential communication between BCAMCP and BCACP and the lawyer they asked to provide them with legal advice on a matter of common interest. I find that VicPD is authorized to refuse to disclose this information in Record 20 under s. 14.

[77] In conclusion, VicPD is authorized to refuse to disclose the information in Records 2 and 20 under s. 14, but not the information in Record 9.

Disclosure harmful to law enforcement - s. 15

[78] VicPD relies on ss. 15(1)(a), (c), (j) and (l) to withhold information from Records 16 and 19. The relevant parts of s. 15 read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,
>
> …
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> …
>
> (j) facilitate the escape from custody of a person who is under lawful detention,

[50] *Van Der Wolf v. Allen*, 2008 BCSC 1054 (CanLII), at para. 8; Manes & Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths Canada Ltd, 1993), p. 64; *Boudreau v. Loba*, 2015 ONSC 1648 (CanLII).

[51] *Manthorne v Canadian Breast Cancer Network*, 2015 ONSC 3799 (CanLII), paras 21-22.

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

[79] The following definition in Schedule 1 of FIPPA defines "law enforcement" is also relevant here:

> "law enforcement" means
> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[80] In order to prove that ss. 15(1)(a), (c), (j) and/or (l) apply, VicPD must establish that there is a clear and direct connection between the disclosure of the information in question and the harm that is alleged. Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[52] In Order F07-15,[53] former Commissioner Loukidelis outlined the evidentiary requirements to establish a reasonable expectation of harm:

> …there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm… Referring to language used by the Supreme Court of Canada in an access to information case, I have said 'there must be a clear and direct connection between disclosure of specific information and the harm that is alleged'.

[81] Further, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[54] Bracken, J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

Analysis s. 15

[82] *Record 16* - VicPD says disclosure would harm the security of the BC Hydro system and its property by providing tips to would-be thieves about tools and means for stealing electricity, and reveal techniques and procedures used to combat the theft. VicPD provides no evidence regarding how disclosure might reasonably be expected to result in the alleged harms. Instead, it submits that the harm that would be caused by disclosure of the information withheld from

[52] Order 00-10, 2000 CanLII 11042 (BC IPC), at p. 10.
[53] Order F07-15, 2007 CanLII 35476 (BC IPC) at para. 17.
[54] 2012 BCSC 875, at para. 43.

Record 16 is self-evident on the face of the record. The applicant made no submissions regarding s. 15. The intervenors submit only that VicPD has the burden of proving that s. 15 applies.

[83] I find that the withheld information in Record 16 relates to a law enforcement matter under s. 15 because it is about theft and the investigation and prevention of that crime. However, with only two exceptions, it is not self-evident on the face of the record, as VicPD submits, that disclosure will result in all of the s. 15 harms it alleges. In particular, I cannot see how disclosure of any of this information could result in the harms in s. 15(1)(j), and VicPD did not explain how harm could occur. Further, VicPD is withholding some information under s. 15 that has already been disclosed elsewhere in the same record,[55] and VicPD has not explained how further disclosure could reasonably be expected to result in the alleged harms. None of this information may be withheld under ss. 15 (1)(a), (c), (j) or (l).

[84] There are only two excerpts that contain any level of specificity or detail that might conceivably assist someone trying to steal electricity.[56] I find that these two excerpts may be withheld under ss. 15(1)(c) and (l) because disclosure could reasonably be expected to harm the security of BC Hydro's property or system.

[85] *Record 19* – VicPD explains that this record is a report on the need and viability of enhancing the Provincial Intelligence Centre with a Real Time Crime Centre. Only one sentence in a footnote has been withheld under s. 15(1)(c). VicPD says that if this information is revealed it would disclose the effectiveness of that particular investigative technique, "potentially undermining its utility in the future."[57] How this would occur is not at all clear, and VicPD did not explain. Therefore, I find that the information in Record 19 may not be withheld under s. 15(1)(c) because VicPD has not established that disclosure could reasonably be expected to harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement.

[86] In conclusion, VicPD is only authorized under s. 15 to refuse to disclose the two excerpts that I have highlighted in a copy of Record 16 that will be sent to VicPD along with this Order.

Disclosure Harmful to Intergovernmental Relations or Negotiations – s. 16

[87] VicPD is withholding a very small amount of information from the BCAMCP meeting minutes in Records 10 and 11 under s. 16(1)(b). Section 16 of FIPPA authorizes public bodies to refuse access to information if disclosure

[55] The first excerpt in para. 6 has already been disclosed in para. 7.
[56] Information in paras. 5 and 10 on first page of Record 16.
[57] VicPD submissions, para. 99.

would be harmful to intergovernmental relations or negotiations. The relevant part of s. 16(1) states:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> (i) the government of Canada or a province of Canada;
>
> …
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies …

[88] Former Commissioner Loukidelis established a two-part test for the application of s. 16(1)(b).[58] The first part is to determine whether the information was supplied by one of the bodies listed in s. 16(1)(a) or any of their agencies. I find that the province of B.C. is a government listed in paragraph 16(1)(a).

[89] The second part of the test is to determine whether the information was received in confidence. There must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. In Order 331-1999, former Commissioner Loukidelis said:

> In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors - which are not necessarily exhaustive - will be relevant in s. 16(1)(b) cases:
>
> 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
> 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
> 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)

[58] Order 02-19, 2002 CanLII 42444 (BCIPC), at para. 18.

4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?
7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers? [59]

[90] VicPD submits that information is about the results of an audit of the Police Academy, that it is sensitive, and it was received in confidence from agents of the B.C. Provincial Government. VicPD's Deputy Chief Constable deposes that B.C. Provincial Government representatives commonly attend BCACP and BCAMCP meetings and provide updates on various projects and initiatives, with information being shared on the "express" understanding that it will be kept confidential.[60]

[91] The applicant disputes VicPD's assertion that the information was received in confidence. He says that based on the records he has already received, the BCACP and BCAMCP membership is varied and information is passed back and forth among these members as if the information was already public.[61] He also alleges that the records he has thus far received demonstrate that the BCACP and BCAMCP members are confused about when something is confidential, when meetings should be *in camera* and who should be allowed to attend.

[92] Although VicPD's Deputy Chief Constable deposes that the information at these meetings is shared on an "express" understanding that it will be kept confidential, there was nothing marked on the face of Records 10 and 11 identifying the information they contain as being confidential. Further, there is no evidence from the VicPD's Deputy Chief Constable or anyone else saying that they actually participated in those two meetings and can attest to the participants' understanding regarding confidentiality at that time (in 2010). The contents of the records also do not suggest that the provider of the information expressed

[59] Order 331-1999, 1999 CanLII 4253 (BCIPC) at para. 31.
[60] VicPD's Deputy Chief Constable's affidavit, para. 9.
[61] Applicant's submissions, para. 54.

a concern for, or expectation that the information remain confidential.[62] VicPD did not point to anything in BCAMCP's and BCACP's constitutions and bylaws (which they provided) that speak about confidentiality. Finally, it is not self-evident that the withheld information is confidential or any more sensitive than the balance of the information on the same page, which has already been disclosed to the applicant.

[93] In conclusion, I find that VicPD has not established that the information in Records 10 and 11 was "received in confidence", so it may not be withheld under s. 16(1)(b).

Disclosure harmful to personal privacy - s. 22

[94] VicPD is withholding some information on the basis that the disclosure would be an unreasonable invasion of third party personal privacy under s. 22.[63] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[64]

Personal information

[95] The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined as **"**recorded information about an identifiable individual other than contact information". Contact information is defined 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".[65]

[96] *Record 7* – This record is a one page excerpt from a meeting agenda that provides details of an Abbotsford Police Drug Enforcement Unit investigation. Most of the record has been disclosed, and it is about the execution of search warrants, illegal activities, medical marihuana and child protection matters. VicPD has anonymized the information in this record by withholding the address of the house and the dates the search warrants were executed. In combination with the information that has already been disclosed or is publicly available (i.e., through Land Titles Office or the phone book), it would be a simple matter to use the withheld information to identify and learn personal information about the individuals who owned and/or resided in the home at the time of the search warrants. Therefore, I find that the withheld information is personal information.

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[62] VicPD only provided me with the two pages of those records that contain the withheld information, so I did not see the first page of those minutes. For that reason, it is not clear who was present at the two meetings reflected in the minutes.

[63] I will only deal with information that I have not already determined above may be withheld. The information I will consider under s. 22 is in Records 7, 13, 14, 18 and 19.

[64] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.

[65] See Schedule 1 of FIPPA for these definitions**.**

[97] *Record 13* –VicPD withheld from meeting minutes the names of individuals who were denied associate membership in BCAMCP. I find that the withheld information is personal information.

[98] *Record 14* – The withheld information is contained in meeting minutes and is the medical reason an individual was absent from the meeting. I find that this is his personal information.

[99] *Record 18* – VicPD withheld from meeting minutes the name and other identifying information of an individual who is an alleged associate of the Hells Angels. I find that this is personal information.

[100] *Record 19* – The personal information withheld is in three presentation slides from a report on the need and viability of enhancing the Provincial Intelligence Centre. The slides summarize several examples of how the Provincial Intelligence Centre has assisted with crime investigation. VicPD says that disclosing this information would allow an astute and determined person to identify specific incidents and the individuals involved. I find that the withheld information is personal information in the form of names or other details about a crime that would allow one to determine the identity of the individuals involved.

Section 22(4)

[101] The next step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, then disclosure would not be an unreasonable invasion of personal privacy. Neither of the parties suggests that s. 22(4) applies in this case. Based on my review of the information, I find that none of the circumstances in s. 22(4) apply.

Presumptions – s. 22(3)

[102] Subsection 22(3) provides circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. It states in part:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the

> extent that disclosure is necessary to prosecute the violation or to continue the investigation,…

[103] For Record 14, I agree with Vic PD that s. 22(3)(a) applies to the personal information because it is medical information. I also agree with VicPD that s. 22(3)(b) applies to the personal information in Records 7, 18 and 19 because it is clear that it was collected as part of a law enforcement investigation. I find that no presumptions apply to the personal information in Record 13.

Relevant circumstances – s. 22(2)

[104] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered in determining whether a disclosure of third party personal information is unreasonable. Section 22(2) states in part:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, …

[105] *Record 7* – This record provides anonymized details of a police drug investigation. The applicant already has most of the record as VicPD has given him access to the substance of what it says about investigating grow ops when there is a licence allowing for the production of medical marihuana. I fail to see how disclosing the exact address of the home or the date of the search warrant is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Nor does the applicant submit how it would be desirable for that end. In summary, I can see no factors that rebut the presumption under s. 22(3)(b), so I find that disclosure of the information withheld in Record 7 would be an unreasonable invasion of third party personal privacy under s. 22(1).

[106] *Record 13* - Vic PD submits that disclosure of the names of individuals who were denied associate membership in BCAMCP would unfairly damage their reputations. It submits that most of the record has been disclosed and nothing more would be gained in terms of public scrutiny of BCAMCP activity by disclosing the names of unsuccessful applicants. The intervenors submit that any damage to reputation is highly debatable in this case or it would not be of the level that previous orders have found is unfair and warrants protection under s. 22. The applicant submits:

> … since these Associations seem to be playing central roles in the governance of public policing in BC, it is of extreme public interest that it be more clear to the public how these Associations decide to include or not include members and who those people or agencies are who have shown interest in participating and been denied.[66]

[107] The names withheld from this record are of two Ministry of Justice employees. The information VicPD already disclosed to the applicant reveals that when these individuals' memberships were discussed, there was nothing that pertained in any way to their personal attributes or performance. The disclosed information is exclusively about their professional role and functions. In my view, considering the context in which they appear, I am satisfied that disclosing their names would not unfairly damage their reputations. Nor can I see any other factors that might weigh against disclosure. Therefore, I find that disclosure would not be an unreasonable invasion of their personal privacy under s. 22(1).

[108] *Record 14* – I can see no factors that would rebut the s. 22(3)(a) presumption that the medical reason an individual was absent from a meeting would be an unreasonable invasion of his personal privacy under s. 22(1).

[109] *Record 18* – In the same way as it did with Record 7, VicPD anonymized the information in this meeting minute of a discussion about an alleged Hells Angels associate. The applicant has already been given access to the substance of what was discussed. For the same reasons as apply to Record 7, I can see no factors that rebut the the presumption under s. 22(3)(b). Therefore, I find that disclosure of the information withheld in Record 18 would be an unreasonable invasion of third party personal privacy under s. 22(1).

[110] *Record 19* – VicPD has anonymized the information in these three slide presentations and disclosed the largest part to the applicant. The information withheld identifies the alleged perpetrators of crime and victims. I fail to see how disclosing these personal details would be desirable for the purpose of public scrutiny of police activity and I can see no other factors that rebut the s. 22(3)(b) presumption. I find that disclosure would be an unreasonable invasion of third party personal privacy under s. 22(1).

[111] *Conclusion s. 22* – I find that VicPD is required to withhold the information it withheld under s. 22 from Records 7, 14, 18 and 19. However, it is not required to refuse to disclose the personal information withheld from Record 13.

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[66] Applicant's submissions, paras. 74.

CONCLUSION

[112] For the reasons given above, I find that s. 3(1)(c) of FIPPA applies to Record 8 and s. 182 of the *Police Act* applies to Record 12, so those records fall outside the scope of FIPPA. Further, under s. 58 of FIPPA, I order that:

1. Subject to paragraph 2 below, VicPD is authorized or required to refuse to disclose the information it withheld under ss. 13, 14 and 15(1)(c), 15(1)(l) and 22 of FIPPA.

2. VicPD must disclose to the applicant the information highlighted in yellow in Records 9, 10, 11, 13 and 16, which accompany VicPD's copy of this Order.

3. VicPD is not authorized to refuse to disclose information under s. 16(1)(b) of FIPPA.

4. I require VicPD to give the applicant access to this information by December 23, 2015. VicPD must concurrently copy the Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

November 10, 2015

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F13-55713