



Order F23-62

## MINISTRY OF CITIZENS' SERVICES

Carol Pakkala  
Adjudicator

August 14, 2023

CanLII Cite: 2023 BCIPC 72

Quicklaw Cite: [2023] B.C.I.P.C.D. No. 72

**Summary:** An applicant requested the Ministry of Citizens' Services (MCS) provide access to records about privacy complaints it received about birth alerts. MCS initially withheld information in the records under several provisions of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Most of the issues were resolved at the outset of the inquiry, so the adjudicator only had to decide if s. 13 (policy advice and recommendations) applied to the records. During the inquiry, the applicant also raised the issue of s. 25 (public interest disclosure) but was not permitted to add that issue into the inquiry. The adjudicator found that s. 13(1) applied to some but not all of the information in dispute. The adjudicator ordered the Ministry to disclose some information to the applicant and withhold the remainder.

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

## INTRODUCTION

[1] This inquiry concerns a request by the applicant, a digital news platform, IndigiNews, to the Ministry of Citizens' Services (MCS) for access to records about complaints it received about birth alerts. The request was for details about those complaints as well as any communications between MCS and the Ministry of Children and Family Development (MCFD) with respect to these complaints, for an 11-year period.<sup>1</sup>

[2] MCS disclosed records but withheld some information in them under ss. 3 (outside scope of the Act), 12 (Cabinet/local public body confidences), 13 (policy advice or recommendations), 14 (solicitor-client privilege), 15 (harm to law enforcement), 17 (harm to public body's financial or economic interests), and 22 (unreasonable invasion of third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). IndigiNews asked the Office of the Information and Privacy Commissioner (OIPC) to review MCS' decision.

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<sup>1</sup>IndigiNews' access request dated February 18, 2021.

[3] Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[4] MCS and IndigiNews each provided written submissions and evidence in the inquiry.

## **PRELIMINARY MATTERS**

[5] After the notice of inquiry was issued, MCS reconsidered its decision to refuse access under ss. 12 and 17 and IndigiNews withdrew its request for review of the application of ss. 3, 14, 15, and 22 to the records. Therefore, I conclude that ss. 3, 12, 24, 25, 17 and 22 are no longer at issue in this inquiry and I will not consider them any further.

[6] I note that there was some overlap in MCS' application of s. 3, 13, 14, 15, and 22 of the records. Given IndigiNews has withdrawn its request for a review of the ss. 3, 14, 15, and 22 severing, I will only consider the information that was withheld under s. 13 alone.

[7] Further, in its response submission, IndigiNews raised s. 25(1)(b) as an issue for the first time in this inquiry.<sup>2</sup> MCS objected to the late addition of s. 25. The OIPC decided that it would be unfair to allow the late addition of s. 25 into this inquiry and saw no justification for doing so.<sup>3</sup>

## **ISSUE**

[8] The issue I must decide in this inquiry is:

Is MCS authorized by s. 13(1) to refuse to disclose the information it withheld?

[9] Section 57 of FIPPA says MCS has the burden of proving that s. 13(1) applies.

## **DISCUSSION**

### **Background**

[10] A birth alert was a practice previously used by MCFD to flag expectant mothers in the health care system. This practice was a means to alert hospitals that there were concerns the woman may put their newborn at risk. The alert was activated when the woman entered the hospital to give birth. In response to a birth alert, social workers would typically attend the hospital for an assessment

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<sup>2</sup> IndigiNews' responding submissions at para 23.

<sup>3</sup> Director of Adjudication's decision letter date March 14, 2023.

of the woman's ability to care for the child once born. Birth alerts were placed without the expectant mother's consent and often without their knowledge. Birth alerts were used for decades in BC as well as other provinces and territories. They were primarily issued for marginalized women and, disproportionately, Indigenous women.<sup>4</sup>

[11] BC ended the birth alert practice on September 16, 2019. At the time, the then Minister responsible for MCFD spoke of the trauma women experience when they become aware a birth alert has been issued. She specifically acknowledged the calls to end the practice from Indigenous communities, organizations, and the report from the National Inquiry into Missing and Murdered Indigenous Women and Girls.<sup>5</sup>

[12] At least one expectant parent made a privacy complaint about a birth alert. The complaint was investigated by MCS.<sup>6</sup>

[13] IndigiNews requested access to MCS records of privacy complaints about birth alerts for the period of January 1, 2010 to February 16, 2021. The request was for records about those complaints including any communications between MCS and MCFD with respect to these complaints.<sup>7</sup>

### **Records and Information at issue**

[14] There are 217 pages of records (Records). I find there to be approximately 56 pages in these Records where information has been withheld pursuant solely to s. 13 (Disputed Information). MCS suggests IndigiNews limits its submissions on s. 13 to pages 181-185 of the records. I find that while IndigiNews expressed particular interest in pages 181 to 185, they clearly identified the application of s. 13 to the records as the issue to be decided in this inquiry.<sup>8</sup>

[15] The Disputed Information consists of email communications and various other kinds of records such as decision and information notes, a privacy assessment report, and incident reports relating to privacy complaints about the birth alert practice. Some of the records appear in both draft and final format.

### **Section 13(1) – policy advice or recommendations**

[16] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or

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<sup>4</sup> The information in this paragraph comes from the parties' submissions and supporting evidence and was not in dispute.

<sup>5</sup> This information comes from a September 16, 2019 MCFD news release that the MCS cites at para 28 of its initial submissions: <https://news.gov.bc.ca/releases/2019CFD0090-001775>.

<sup>6</sup> MCS' initial submissions at paras 29-31 and IndigiNews' responding submissions at para 16.

<sup>7</sup> IndigiNews' access request dated February 18, 2021.

<sup>8</sup> IndigiNews' responding submissions at paras 20 and 22.

a minister. However, s. 13(1) does not apply to certain types of records listed in s. 13(2) or to records in existence for more than 10 years under s. 13(3). Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1) and I adopt these principles in making my decision:

- The s. 13 exception is meant to protect a public body's internal decision making and policy making processes while considering a given issue by encouraging the free and frank flow of advice or recommendations.<sup>9</sup>
- To "reveal" advice or recommendations means that s. 13 does not apply to information that has already been disclosed.<sup>10</sup>
- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.<sup>11</sup>
- "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.<sup>12</sup>
- "Advice" is broader than "recommendations"<sup>13</sup> and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.<sup>14</sup> Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.<sup>15</sup>
- "Advice" also includes factual information "compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body."<sup>16</sup> This compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

[17] The first step in the s. 13 analysis is to determine whether the Disputed Information would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether the Disputed Information falls into any of the categories listed in s. 13(2) which a public body must not refuse to disclose under s. 13(1).

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<sup>9</sup> Order 01-15, 2001 CanLII 21569 (BC IPC) at para 22.

<sup>10</sup> See for examples: Order F23-51 2023 BCIPC 59 at para 96; Order F20-32, 2020 BCIPC 38 at para 36; Order F13-24, 2013 BCIPC 31 at para 19; Order F12-15, 2012 BCIPC 21 at para 19.

<sup>11</sup> See for example Order F19-28, 2018 BCIPC 30 at para 24.

<sup>12</sup> *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 23.

<sup>13</sup> *Ibid* at para 24.

<sup>14</sup> *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at para 113.

<sup>15</sup> *Ibid* at para 103.

<sup>16</sup> *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

[18] Finally, s. 13(3) says s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. In this case, the Records are not that old, so I find s. 13(3) does not apply.

**Would the Disputed Information reveal advice or recommendations?**

*MCS Position*

[19] MCS's position is that it properly applied s. 13(1) to the Disputed Information it withheld in relation to a decision. MCS submits that the Disputed Information would directly or indirectly disclose the content of advice or recommendations prepared by or for either MCS or MCFD.<sup>17</sup> MCS provided an itemized list of the Records redacted under s. 13 along with explanatory notes for the redactions.<sup>18</sup>

*IndigiNews Position*

[20] IndigiNews' position is that s. 13 has been either applied incorrectly or too broadly. IndigiNews submits, in the alternative, that MCS must provide it with further information as to why it is withholding information under s. 13.<sup>19</sup>

***Analysis and findings***

[21] For the reasons that follow, I find that most of the Disputed Information withheld under s. 13(1) would reveal advice or recommendations developed by or for a public body or a minister.

*Names and Contact Information*<sup>20</sup>

[22] MCS used s. 13 to redact certain contact information in the Records including names and job titles. I find s. 13 does not apply to this contact information as it is not policy advice or recommendations.

*Decision Note and Drafts*<sup>21</sup>

[23] I find that most of the redacted portions of the Decision Note and its drafts withheld under s. 13 would reveal advice or recommendations. I can see that the author and editors have used their expertise and professional judgment to comment on aspects of a pending decision (Decision). I can also see editorial suggestions that could allow someone to accurately infer advice or

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<sup>17</sup> MCS' initial submissions at para 60.

<sup>18</sup> MCS' initial submissions at para 59.

<sup>19</sup> IndigiNews' responding submissions at para 30.

<sup>20</sup> Records at pp. 161, 171, and 178.

<sup>21</sup> Records at pp. 11-15, 159-163, 168-173, 175-180, and 181-185.

recommendations. However, I find that the phrase redacted in the first sentence under the heading “Background” in the decision note drafts would not reveal, or allow for an inference of, advice or recommendations.<sup>22</sup>

*Privacy Breach Harm Assessment Report and Drafts*<sup>23</sup>

[24] I find that most of the redacted portions of the Privacy Breach Harm Assessment Report and its drafts withheld under s. 13 would reveal advice or recommendations. From the draft versions, I can see that the author and editors have used their expertise and professional judgment to comment on aspects of the Decision. I can also see editorial suggestions that could allow someone to accurately infer advice or recommendations. However, I find that the word choices redacted in the section of the report with the heading “A. Incident Details” would not reveal, or allow for an inference of, advice or recommendations.<sup>24</sup>

*Information Note*<sup>25</sup>

[25] I find that the redacted portions of the Information Note withheld under s. 13 would reveal advice or recommendations. I can see that the author outlines factors to consider and an expert opinion on the Decision.

*Draft Responses to a Media Inquiry*<sup>26</sup>

[26] I find that the redacted portions of the draft responses to a media inquiry withheld under s. 13 would reveal advice or recommendations. I can see that the suggested edits to the document represent advice and recommendations about communication matters. This finding is consistent with previous orders which have found that s. 13(1) applies to advice and recommendations about communication matters.<sup>27</sup>

*Incident Records*<sup>28</sup>

[27] I find that the information redacted from the Incident Records withheld under s. 13 would reveal advice or recommendations. I can see that these Incident Records document the free and frank discussion about options for addressing the Decision.

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<sup>22</sup> Records at pp. 159 and 168.

<sup>23</sup> Records at pp. 141-142, 144-146, 148-149, 152-153, and 155-156.

<sup>24</sup> Records at pp. 141, 144, 148, 152, and 155.

<sup>25</sup> Records at pp. 118-119.

<sup>26</sup> Records at pp. 201-204.

<sup>27</sup> For example, see Order F22-53, 2022 BCIPC 60 at para 38; Order F19-28, 2019 BCIPC 30 at para 41; Order F17-34, 2017 BCIPC 36 at para 10; Order 04-37, 2004 CanLII 49200 (BC IPC) at para 17; and Order F09-01, 2009 CanLII 3225 (BC IPC) at para 17.

<sup>28</sup> Records at pp. 215 and 216.

*Emails*<sup>29</sup>

[28] I find that the Disputed Information redacted from the emails between various MCS and MCFD employees contains analysis and opinion. I find this information to be advice within the meaning of s. 13(1). Some of the redacted information in the emails consists of suggested courses of action. I find that these suggestions are recommendations within the meaning of s. 13(1).

***Does s. 13(2) apply?***

[29] I will now decide whether the Disputed Information which I found would reveal advice or recommendations falls into any of the categories listed in s. 13(2). If it does, MCS must not refuse to disclose the information under s. 13(1). The parties address s. 13(2)(a), (l), and (m) in their submissions.<sup>30</sup>

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

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

[31] The term “factual material” in s. 13(2)(a) has a distinct meaning from “factual information.” The compilation of factual information and weighing the significance of matters of fact is an integral component of advice and informs the decision-making process. If facts are compiled and selected, using expertise, judgment, and skill for the purpose of providing explanations necessary to the deliberative process of the public body, then the facts are not “factual material” under s. 13(1).<sup>31</sup>

[32] I find that the facts within the Disputed Information are intermingled, with, and an integral part of, the advice and recommendations. For that reason, I find that s. 13(2)(a) does not apply.

*Establish new or change program or activity, s. 13(2)(l)*

[33] Section 13(2)(l) says that the head of a public body must not refuse to disclose under s. 13(1) “a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body.”

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<sup>29</sup> Records at pp. 30, 70, 105, 121-122, 143, 147, 186, 187, and 189.

<sup>30</sup> IndigiNews references (a), (l), and (m) but only makes submissions on (m) at paras 33-34 of its submissions. MCS in its initial submissions only addresses s. 13(2)(a) at paras 63-64 and submits no other sections of 13(2) apply at para 65. In its reply submissions, MCS addresses (a), (l), and (m).

<sup>31</sup> PHSA, supra note 16 at paras 91-94.

[34] MCS submits that the Decision is not a plan or proposal to establish a new program or activity or to change an existing program or activity. Rather, it is a discrete decision made in relation to an investigation under the Province of British Columbia's Information Incident Management Policy (Policy).<sup>32</sup> IndigiNews makes no submissions on s. 13(2)(l).

[35] I agree with MCS' submission. I find the Disputed Information is not a plan or proposal to establish a new program or activity or to change a program or activity. Rather the Disputed Information is about a discrete complaint and investigations under the Policy.

[36] I find the Disputed Information is not a plan or proposal to establish a new program or activity or to change a program or activity. For that reason, I find that s. 13(2)(l) does not apply.

*Information cited publicly, s. 13(2)(m)*

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

[38] In their submissions on s. 13(2)(m), both MCS and IndigiNews reference a news article published by IndigiNews. This article reported:

"Our focus since we ended the practice of birth alerts has been forward looking. We didn't want to retraumatize affected families by providing notifications of past birth alerts," wrote a spokesperson to IndigiNews.<sup>33</sup>

[39] The article does not identify which government ministry the "spokesperson" was representing. MCS says that the evidence does not indicate that the head of MCS made such a statement, rather the evidence indicates the head of MCFD may have made such a statement.

[40] I can infer from the context within the article that the spokesperson was likely speaking on behalf of MCFD. Even with such an inference however, I am not satisfied that this statement amounts to a public citing of advice and recommendations as the basis for any particular decision. The statement does not reference any decision by the head of any public body. It also does not cite or say anything about advice and recommendations having been the basis for any decision by the head of a public body. I understand the spokesperson to have

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<sup>32</sup> MCS' reply submissions at para 16.

<sup>33</sup> IndigiNews (January 12, 2021). *Exclusive: BC ministry warned birth alerts 'illegal and unconstitutional' months before banning them.* [News article]. Retrieved from <https://indiginews.com/vancouver-island/birth-alerts> as cited by IndigiNews in its responding submissions at para 34. Referenced in MCS' reply submissions at para 24.

simply been reiterating MCFD’s official acknowledgement that individuals may experience trauma when they learn that they were the subject of a birth alert.<sup>34</sup>

[41] MCS also argued about the interpretation of s. 13(2)(m) and what “the” means in the phrase “information that *the* head of the public body has cited publicly.” Given I have concluded there is insufficient evidence that the head of *any* public body publicly cited the information in dispute as the basis for making a decision or formulating a policy, it is unnecessary to make any findings about that argument and I decline to do so.

[42] For these reasons, I find that s. 13(2)(m) does not apply.

[43] In conclusion, I find some of the information withheld by MCS under s. 13(1) would reveal advice or recommendations developed by or for a public body or a minister. I also find that ss. 13(2) and 13(3) do not apply to that information. Therefore, I conclude MCS is authorized to withhold that information under s. 13(1). MCS is not authorized under s. 13(1) to withhold the information that I found would not reveal any advice or recommendations. I have highlighted the information that may not be withheld under s. 13(1) in a copy of the records that will be provided to MCS with this order.

## CONCLUSION

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

1. I confirm, in part, MCS’ decision to refuse to disclose the Disputed Information under s. 13(1) of FIPPA, subject to item 2 below.
2. I require MCS to give IndigiNews access to the information I have highlighted in the copy of pages 141, 144, 148, 152, 155, 159, 161, 168, 171, and 178 of the Records, which are provided to MCS with this order.
3. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 2 above.

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<sup>34</sup> MCS’ initial submissions at para 28 referencing: Ministry of Children and Family Development. (September 16, 2019). *Minister’s statement on ending ‘birth alerts’*. [Press release]. Retrieved from <https://news.gov.bc.ca/20591> on August 03, 2022.

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[45] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **September 26, 2023**.

August 14, 2023

**ORIGINAL SIGNED BY**

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Carol Pakkala  
Adjudicator

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