OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F11-04
(Additional to Order F10-18)

THE BOARD OF EDUCATION OF SCHOOL DISTRICT No. 39 (Vancouver)

Elizabeth Denham, Information and Privacy Commissioner

February 3, 2011

Quicklaw Cite: [2011] B.C.I.P.C.D. No. 4
CanLII Cite: 2011 BCIPC 4
Document URL: http://www.oipc.bc.ca/orders/2011/OrderF11-04.pdf

Summary: After a former teacher was convicted of a number of offences, the School District commissioned Don Avison to conduct a review of its current policies and practices in the area of child protection. In response to the applicant's request, the School District released a severed version of Avison's report on his review, withholding information under several sections of FIPPA. An earlier decision, Order F10-18, of June 7, 2010, determined that solicitor client privilege did not apply to the severed information because Avison was not retained to act as a legal advisor to the School District.

In this decision, the Commissioner concluded that disclosure of the Report would not reveal the substance of deliberations of a meeting of the board of education under s. 12(3)(b) and could not be reasonably expected to cause the School District to suffer financial harm under s. 17(1). The Commissioner also found that, as the Report was a final report on the performance and efficiency of School District policies under s. 13(2)(g), s. 13(1) (protection of advice or recommendations) did not apply. Finally, the Commissioner found that s. 22(1) applied to the employment history of identifiable individuals, but that other personal information about employees could be disclosed because it was factual or routine information.

The Commissioner ordered the School Board to disclose all severed information except for the employment history information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 13(1), 13(2)(a), (g) and (k), 17(1), 22(1), 22(2)(a), (e) and (h), and 22(3)(d).

Authorities Considered: B.C.: Order F10-08, [2010] B.C.I.P.C.D. No. 29; Order 01-53, [2001 B.C.I.P.C.D. No. 56; Order F08-04, [2008] B.C.I.P.C.D. No. 7; Order F10-21, [2010] B.C.I.P.C.D. No. 21; Order F08-03, [2008] B.C.I.P.C.D. No. 6; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order No. 114-1996, [1996] B.C.I.P.C.D. No. 41; Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 01-01, [2001] B.C.I.P.C.D. No. 1.

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

1.0 INTRODUCTION

[1] This matter follows Order F10-18[1] that Acting Information and Privacy Commissioner Paul D.K. Fraser, QC issued on June 7, 2010. Order F10-18 dealt with the application of s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA")[2] to a report by Don Avison ("Report"). The Acting Commissioner found that FIPPA did not authorize the Board of Education of School District No. 39 (Vancouver) ("School District") to withhold certain portions of the Report under s. 14. He ordered the School District to produce an unsevered copy of the record to this Office for the purpose of adjudicating the School District's application of ss. 12(3)(b), 13(1), 17(1) and 22(1) of FIPPA to portions of the Report. The School District complied with the Acting Commissioner's Order, and I deal here with these other exceptions.

[2] After I had reviewed the submissions on these other exceptions, I noted that none of the parties had addressed the applicability of s. 13(2)(g), which stipulates that s. 13(1) does not apply to a final report on the performance or efficiency of a public body or any of its programs and policies. As I considered that s. 13(2)(g) might be relevant to this case, I invited the parties to provide further submissions on this issue, which they did.

2.0 ISSUES

[3] The issues before me are these:

1. Whether the School District is required by s. 22(1) to refuse access to the severed portions of the Report.

2. Whether the School District is authorized by ss. 12(3)(b), 13(1) and 17(1) to refuse access to the severed portions of the Report.

---

[1] [2010] B.C.I.P.C.D. No. 29.

[2] Section 14 authorizes public bodies to deny access to information that is protected by solicitor client privilege. Order F10-18 sets out the test for applying this exception.

[4] Under s. 57(1), the School District has the burden of proof regarding ss. 12(3)(b), 13(1) and 17(1), while under s. 57(2) the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[5] **3.1 Background**—Following the trial and conviction of a teacher for indecent assault and gross indecency, the School District commissioned Don Avison to conduct a review in three parts. The first was to review the record and circumstances associated with the operation of a particular education program as context. The second part was to review the School District's current policies and practices. The third part was to make recommendations for changes. Mr. Avison conducted his review and delivered his 17-page report to the School District on September 14, 2007. The Report has four parts: Purpose and Scope of Review; Background and Context; The Vancouver School Board Policy Context-Further Improvements Remain Necessary; and A New VSB Code of Conduct. The School District withheld approximately 11 of the 17 pages.

[6] Order F10-18 reproduces the Terms of Reference under which Don Avison conducted his review. I will therefore not repeat that material here, but will cite a portion of it below in my analysis of s. 13.

[7] **3.2 School District's Application of Exceptions**—The School District applied all of the exceptions in issue here (ss. 12(3)(b), 13(1), 14, 17(1) and 22) in blanket fashion to all of the passages that it severed. In its submissions, it did not explain how the individual exceptions apply to any particular passage. Rather, it implied that all of the exceptions apply equally to every sentence that it severed.

[8] Public bodies should review records line by line and apply each exception with care and deliberation. They should also exercise discretion in applying discretionary exceptions and, in an inquiry such as this, demonstrate how they have exercised that discretion. The wholesale application of exceptions to information, as the School District has done here, undermines its position.

[9] **3.3 Third-Party Privacy**—The relevant parts of s. 22 are these:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (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,
>
> (e) the third party will be exposed unfairly to financial or other harm, …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …
>
> (d) the personal information relates to employment, occupational or educational history, …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, …
>
> **"personal information"** means recorded information about an identifiable individual other than contact information;

[10] Numerous orders have considered the application of s. 22, for example, Order 01-53, in which Commissioner Loukidelis held the following:[3]

> [22] **3.3 How Section 22 is Applied** – When a public body is considering the application of s. 22, it must first determine whether the information in question is personal information within the Act's definition of "personal information". …
>
> [23] The next step in the s. 22 analysis is to determine whether disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy. The public body must consider whether disclosure of the disputed information is considered, under s. 22(4) of the Act, *not* to result in an unreasonable invasion of third-party privacy. …
>
> [24] Next, the public body must decide whether disclosure of the disputed information is, under s. 22(3), *presumed* to cause an unreasonable invasion of privacy. According to s. 22(2), the public body then must consider all relevant circumstances in determining whether disclosure would unreasonably invade personal privacy, including the circumstances set out in s. 22(2). The relevant circumstances may or may not rebut any presumed unreasonable invasion of privacy under s. 22(3) or lead to the conclusion that disclosure would not otherwise cause an unreasonable invasion of personal privacy. [italics in original]

[11] I take the same approach here.

---

[3] [2001] B.C.I.P.C.D. No. 56.

Parties' submissions

[12] The applicant argued that any information on the operation and supervision of the particular educational program is not personal information.[4] He suggested that the School District likely relies on s. 22(3)(d) to withhold any severed information that is personal information. However, he argued, the purpose of the Report was "not to investigate any specific workplace incident nor was its purpose to examine the behaviour of individual employees and assess their culpability with respect to workplace actions." The applicant argued that s. 22(4)(e) applies instead, as the Report contains "objective, factual statements about what a third party did or said in the normal course of discharging his or her job duties", not "qualitative assessments or evaluations of a third party's action." Alternatively, the applicant argued that, in line with Order F08-04,[5] the School District should disclose information about the employees' actions without identifying the individual employees.[6]

[13] The School District argued that the severed information is third-party personal information and that none of it falls into s. 22(4)(e). Section 22(3)(d) applies to this information, in its view, and no relevant circumstances rebut the presumption that disclosure would unreasonably invade third-party privacy.[7] The School District agrees with the applicant that the Report was not intended to assess responsibility of employees for their workplace actions.[8]

Analysis

[14] I am unable to describe in any detail my analysis of the application of s. 22 because the bulk of the School District's submission and evidence on s. 22 was received appropriately *in camera*.[9] I have however carefully considered all of this *in camera* material. I have also considered the nature of the severed information in arriving at my conclusions.

[15] Without revealing the nature and substance of the information in dispute, I can say that much of the information to which the School District applied s. 22(1) in the Report is not personal information. It consists rather of factual descriptions of the review, background on the educational program, factual comments, observations or statements and factual accounts of events. These passages are easy to distinguish from the rest because they do not contain any information about identifiable individuals. Section 22(1) does not apply to these passages.

---

[4] The applicant referred to Order F05-02, [2005] B.C.I.P.C.D. No. 2, in this regard.
[5] [2008] B.C.I.P.C.D. No. 7.
[6] Applicant's initial submission, paras. 60-75.
[7] School District's initial submission, paras. 47-56. Much of the School District's argument on s. 22(3)(d) and the relevant circumstances was received *in camera*.
[8] School District's reply submission, para. 61.
[9] School district's initial submission Paras. 48-56; Kelly affidavit, paras. 44, 58 and 59; school district's reply submission.

[16] However, some of the severed information is "personal information" in that it relates to identifiable individuals, whom I cannot identify further, other than to indicate that they were employees. The applicant is incorrect in his speculations on the application of s. 22(4)(e). This personal information is not "about" the position, functions or remuneration of public body employees. Rather it forms part of a historical account of the role they played in the events that are the subject of a review of a program that was in place in the 1970s and 1980s. Numerous orders have held that personal information about employees collected as part of a workplace investigation constitute their employment history in accordance with s. 22(3)(d).[10] Although the review in this case does not constitute a workplace investigation in every respect, the information is analogous to information past orders have found to be "employment history" information. The Report does not assess individual responsibility, but Mr. Avison did formally interview employees to find out what happened in terms of the actions taken by employees individually and the members of the School District collectively.

[17] Thus, I agree with the School District that s. 22(3)(d) of FIPPA applies to this personal information. Disclosure of this information is therefore presumed to be an unreasonable invasion of third-party personal privacy.

Relevant circumstances

[18] I will first consider whether disclosure of this information is desirable for subjecting the School District to public scrutiny, in accordance with s. 22(2)(a). This is a relevant circumstance because the very purpose of the Report was to conduct a review of current policies and practices with a view to identifying improvements. It is desirable, generally, that public bodies be accountable for their policies and practices. The question in this case is the extent to which disclosure of the severed personal information would promote that kind of accountability. This is important in determining how much weight to give this consideration.

[19] I note that the applicant said that the purpose of the Report was not to assess personal responsibility for events. The School District replied to this assertion that it "agrees that Mr. Avison did not have a mandate to do so".[11] In addition, there are other reasons that the School District has supplied *in camera* or which appear on the face of the record, to suggest the Report is not

[10] See for example, Order F10-21, [2010] B.C.I.P.C.D. No. 32; Order F08-04, [2008] B.C.I.P.C.D. No. 7; Order F08-03, [2008] B.C.I.P.C.D. No. 6; Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[11] School District's reply submission, para. 61.

reliable for the purpose of subjecting the School District to public scrutiny.[12] For these reasons, while I consider promoting public scrutiny to be a consideration weighing in favour of disclosure, I give it little weight in the circumstances of this case.

[20] I find that other relevant circumstances also apply to some of the personal information. In some cases, disclosure could subject the individuals to unfair harm, as contemplated by s. 22(2)(e). This circumstance weighs in favour of withholding such information. Once again, the fact that the School District has provided its arguments *in camera* limits my ability to explain my reasons or the nature of that harm.

[21] The Report contains some personal information about the convicted teacher that is in the public domain, as a result of his public trial and the accompanying publicity. This circumstance weighs in favour of the disclosure of such information.

[22] The Report also contains some personal information that is strictly routine and factual in nature, and there is no apparent reason to expect that its disclosure would subject a third party to any harm. This includes the fact that particular school district officials held certain posts at particular times and some of the actions that they took in those capacities. This information forms part of the background of the Report and is largely about former employees whom Mr. Avison interviewed for the purpose of obtaining background information. This circumstance weighs in favour of the disclosure of such information.

Conclusion on s. 22(1)

[23] I found above that some information is not personal information. Section 22 therefore does not apply to it.

[24] Other information is the employment history of certain individuals to which the presumption in s. 22(3)(d) applies. Some of this s. 22(3)(d) information is routine and factual in nature. I found above that this is a relevant circumstance that favours its disclosure. This factor rebuts the presumption that disclosure of this employment history would constitute an unreasonable invasion of the former employees' personal privacy. Section 22 therefore does not apply to it.

[25] The remaining s. 22(3)(d) information is not routine or factual. I found that the relevant circumstances in s. 22(2)(e) apply and favour withholding this information, and I give considerable weight to this consideration. I also found that, although in some circumstances disclosure might be desirable for subjecting the School District to public scrutiny, the facts of this case do not support disclosure on this basis. In summary, with respect to this information, the

[12] School District initial submission, Affidavit of the Superintendent, para. 43; the Report, p. 2.

relevant circumstances do not rebut the presumption that disclosure would be an unreasonable invasion of the former employees' personal privacy. Section 22(1) therefore applies to this information.

[26] **3.4 Local Public Body Confidences**—The School District relies on s. 12(3)(b) to withhold the severed information. This section reads as follows:

> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or
>
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.
>
> (4) Subsection (3) does not apply if
>
> (a) the draft of the resolution, bylaw, other legal instrument or private Bill or the subject matter of the deliberations has been considered in a meeting open to the public, or
>
> (b) the information referred to in that subsection is in a record that has been in existence for 15 or more years.

[27] Commissioner Loukidelis held in Order 00-14[13] that, in order to deny access to a record under s. 12(3)(b), a public body must satisfy three conditions:

> (a) it must show that there is statutory authority to meet in the absence of the public;
>
> (b) it must show that a meeting was held in the absence of the public; and
>
> (c) it must show that the requested information would, if disclosed, reveal the substance of the deliberations of the meeting.

[28] Previous orders have said that source documents considered at such meetings may be disclosed without revealing the substance of deliberations about them.[14]

[29] The essence of s. 12(3) is to protect a full and frank exploration of all of the issues, despite how controversial they might be but, in the words of

[13] [2000] B.C.I.P.C.D. No. 17.
[14] See Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39.

Commissioner Flaherty in Order No. 114-1996,[15] "not the material which stimulated the discussion or the outcomes of deliberations in the form of written decisions".[16] I take the same approach as set out in previous orders on this topic.

Parties' submissions

[30] The School District said that it commissioned the Report with the intention of presenting it to the School District's Board of Trustees for the purpose of implementing its recommendations. It said the Report was delivered to its Board in September 2007 and that the Board considered the Report at its *in camera* meeting of September 20, 2007. The School District said that s. 69(2) of the *School Act* authorizes meetings in the absence of the public where the public interest requires. The School District submitted that the subject of the Report was appropriate for a meeting in the absence of the public. The School District noted that documents considered at *in camera* meetings may be withheld, if disclosure would permit an accurate inference to be drawn regarding the substance of deliberations during the meeting. In the School District's view, disclosure of the withheld portions of the Report would have this result. It also said it considered all of the relevant factors in deciding to apply s. 12(3)(b) and, therefore, properly exercised its discretion in accordance with the direction set out in previous orders.[17]

[31] The applicant argued that s. 12(3)(b) does not apply because:

- the 15-year time limit of s. 12(4)(b) applies to portions of the Report dealing with the operation and supervision of a particular program, because the program was launched in 1973 and terminated in 1987;[18]
- portions of the Report dealing with information about the teacher's trial already have been made public through the court process;
- portions of the Report dealing with policy revisions already finalized and implemented would not have been the subject of deliberation.[19]

[15] [1996] B.C.I.P.C.D. No. 41.
[16] At p. 4.
[17] School District's initial submission, paras. 40-46; School District's reply submission, paras. 32-34; Kelly affidavit, para. 37. Portions of the School District's argument on these points were received *in camera*. The School District drew my attention to a number of Orders it considered relevant in its initial and reply submissions.
[18] The School District disputed this argument in its reply, saying s. 12(4)(b) applies to records that are older than 15 years, not information; School District's reply submission, paras. 27-30.
[19] Applicant's initial submission, paras. 11-29.

Analysis

[32] Section 69(2) of the *School Act* reads as follows:

> ***Attendance of public and secretary treasurer at meeting***
>
> 69(1) Subject to subsection (2), the meetings of the board are open to the public.
>
> (2) If, in the opinion of the board, the public interest so requires, persons other than trustees may be excluded from a meeting.

[33] I agree with the School District that its Board has the authority to meet *in camera*. I also accept from the Kelly affidavit evidence that the Board met *in camera* In September 2007 and that it "reviewed" the Report.

[34] The School District has failed, however, to establish that disclosure of the severed portions of the Report would reveal the substance of deliberations of its Board. It has provided no evidence, such as minutes of the meeting or affidavit testimony, as to what the substance of deliberations was or how passages in the Report would reveal what Board members said about it.

[35] Past Orders have stated that s. 12(3)(b) does not apply to the "subject" of deliberations—what stimulated the discussion—but rather to the "substance" of deliberations—that is, what was said at a meeting.[20] Commissioner Loukidelis had this to say about the meaning of "substance of deliberations":

> ***Meaning of "Substance of Deliberations"***
>
> The first question is what is meant by the words "substance" and "deliberations" in s. 12(3)(b). In my view, "substance" is not the same as the subject, or basis, of deliberations. As *Black's Law Dictionary*, 8th ed., puts it, 'substance' is the essential or material part of something, in this case, of the deliberations themselves. See, also, Order No. 48-1995 and Order No. 113-1996.
>
> Without necessarily being exhaustive of the meaning of the word 'deliberations', I consider that term to cover discussions conducted with a view to making a decision or following a course of action. Assistant Commissioner Irwin Glasberg took an approach similar to this in Order M-184 (September 10, 1993), a decision regarding s. 6(1)(b) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act*. That provision is very similar to s. 12(3)(b). This approach has recently been affirmed in Ontario. See Order M-1269 (January 21, 2000).[21]

[20] Order No. 114-1996, [1996] B.C.I.P.C.D. No. 41.
[21] Order 00-11, [2000] B.C.I.P.C.D. No. 12.

[36] The severed information consists principally of background information on the educational program, which was at the centre of the context portion of the Report, and background with respect to the policies and practices, as well as factual accounts of certain events and the actions certain individuals took. While, as noted, I accept that the Board "reviewed" the Report, disclosure of the severed portions would reveal nothing about what the Board discussed or decided about it. Nor would their disclosure reveal any opinions the Board may have had about the Report or about the underlying subject-matter of the Report.

[37] Commissioner Loukidelis came to the same conclusions in Order No. 326-1999[22] with respect to a case involving a report on firefighting services that the City of Cranbrook considered at a meeting *in camera*. He concluded:

> disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report - which was prepared by outside consultants - what the deliberations of council were.

[38] The applicant provided copies of School District memoranda entitled "Implementing of the Avison Report Recommendations". They post-date the Report and state what the Report's recommendations were and that the Board had accepted and developed a plan to implement them.[23] From this, perhaps the only thing I can infer is that the School District ultimately agreed with the recommendations. However, the factual information that the School District severed would not reveal the reasons why it agreed nor what course the debate took. Therefore, I find that s. 12(3)(b) does not apply to the withheld information.

[39] **3.5 Advice or Recommendations**—The relevant parts of s. 13 read as follows:

> **Policy advice, recommendations or draft regulations**
>
> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material, …

[22] [1999] B.C.I.P.C.D. No. 39.
[23] Applicant's initial submission, Attachment #3.

> (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[40] This exception has been the subject of many Orders, for example, Order 01-15,[24] where Commissioner Loukidelis said this:

> [22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. …

[41] I take the same approach here.[25]

Does the Report contain advice or recommendations?

[42] The School District argued that s. 13(1) applies to the severed portions of the Report. It had this to say about s. 13(1):

> 36. … The purpose of Section 13 is to allow full and frank discussion of advice or recommendations provided to a public body, preventing the harm that would occur if the deliberative process of public decision and policy making was subject to excessive scrutiny: *Inquiry re A Decision by the Ministry of Attorney General to Withhold Records from Tri-Way Seniors Mobile Home Park*, OIPC Order No. 212-1998.
>
> 37. The proper approach to the interpretation of section 13(1) is also set out in the *College of Physicians of BC* decision at para. 105-6:
>
> > In my view, s. 13 of the *Act* recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries. …
> >
> > By defining "advice" so that it effectively has the same meaning as "recommendations", the Commissioner and the chambers judge failed to recognize that *the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action.* [emphasis is school district's]

[24] [2001] B.C.I.P.C.D. No. 16.
[25] See also Order 02-38, [2002] B.C.I.P.C.D. No. 38, at paras. 101-127.

> 38. The Court has held that "advice" under section 13(1) includes information the purpose of which is to present background explanations or analysis for consideration in making a decision:
>
> > I am similarly of the view that the word "advice" in s. 13 of the *Act* should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.[26]

[43] I agree with the School District that the Report contains passages that constitute advice or recommendations, but I disagree with the School District that every sentence that it withheld contains such information. There are sentences and paragraphs that do not constitute either advice or recommendations as past Orders and case law have interpreted these terms.[27]

[44] I now move to the application of 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" as contemplated by s.13 (1), if the information falls within the ambit of any part of s. 13(2), the School District may not withhold the information. In other words, the Legislature has expressly excluded information that falls within the ambit of s. 13(2) from the effect of s. 13(1).

Parties' arguments on s. 13(2)(g)

[45] As I noted above, I invited the parties to make further submissions on the applicability of s. 13(2)(g).

[46] In his supplementary submission, the applicant submitted that the Report falls within s. 13(2)(g). He argued that the terms of reference for Don Avison's review involved the policies and practices regarding student safety and security.[28] He cited a press release from the School District that indicated that it "called for this review with the objective of acquiring an independent evaluation of its current policies and procedures".[29] He also submits that the Report is final: the terms of reference indicated that the Report was to be submitted to the School District by February 28, 2007, unless the School District approved an extension, which it did not do.

---

[26] The school district emphasized its arguments on s. 13(1) in its reply at paras. 35-41, some of which was received *in camera*.

[27] See for example, Order 02-38, [2002] B.C.I.P.C.D. No. 38, paras. 101-141; Order 01-15, [2001] B.C.I.P.C.D. No. 16, paras. 20-29; Order F04-37, [2004] B.C.I.P.C.D. No. 38, paras. 12-20; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

[28] Applicant's further submission, para. 3.

[29] Applicant's further submission, para. 6.

[47] The School District disagreed. It submitted that the limitations provided by s. 13(2) "must be interpreted in a manner that respects and reflects the broad approach to the section 13(1) exemption and that does nothing to impair the deliberative process."[30] It submitted further than the Report does not fall within "the clear language" of s. 13(2)(g).[31] It argued that the Report is neither an audit nor a report and that it is also "not a report on the 'performance' or 'efficiency' of anything." Mr. Avison was merely asked to conduct a review of best practices, the School District argued, and to make recommendations for changes to current policies.[32] The School District also submitted that the Report was not final but an "interim" report: "He was asked to make recommendations which expressly would contemplate further action by the Public Body."[33]

Interpretation of s. 13(2)g)

[48] The School District tried to argue that the application of s. 13(2) does not necessarily negate the application of s. 13(1). It submitted that s. 13(2) must be read in conjunction with s. 13(1) such that it would permit the application of s. 13(1) to parts of records listed in s. 13(2). I dismiss this argument out of hand. It is clear from the wording of s. 13(2) that public bodies "must not refuse to disclose under subsection (1)" any of the categories of records listed. Thus, as noted above, if s. 13(2)(g) applies to information, s. 13(1) does not.

[49] In interpreting the meaning of s. 13(2)(g), there is no guidance available in previous Orders. However, the *Policy and Procedures Manual* ("Manual") that the government maintains to provide guidance to public bodies on interpreting FIPPA defines "performance or efficiency" as:

> the management, administration, operations, conduct, functioning or effectiveness of the public body, its programs or its policies. This phrase relates to the management of finances, assets, and personnel, and the delivery of services of the public body. It also pertains to the effectiveness of the public body's programs and policies in completing those tasks.

[50] The Manual also provides the following helpful guidance: "Information or records within the scope of section 13(2) cannot be withheld under section 13(1)."

[51] Although, as Commissioner Flaherty said in Order No. 1-1994, "the Manual is not binding on the Commissioner in the interpretation and application of [FIPPA]",[34] I find the above quotes to be useful guidance in interpreting particular provisions of the legislation in this case.

---

[30] School District's further submission, para. 8.
[31] School District's further submission, para. 13.
[32] School District's further submission, para. 14.
[33] School District's further submission, para. 15.
[34] [1994] B.C.I.P.C.D. No. 1.

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

[52] The School District indicates that the purpose of commissioning the Report was for:

> the School District to have a review of its current policies and practices conducted so that our organization and the public could be assured that the safety of their children is safeguarded while in the care of the school system.[35]

[53] The Terms of Reference of the review include these provisions, all of which concern the review and evaluation of the School District's policies regarding the educational program:

> **The Review of Current Policies and Procedures**
>
> 3. Review and evaluate current policies and procedures governing the operation and supervision of outdoor education programs and field studies;
>
> 4. Review and evaluate current policies and procedures governing:
>
> a. standards of conduct for employees;
>
> b. practices for communicating and disseminating standards of conduct to all district employees; and
>
> c. allegations of employee misconduct.
>
> **Recommendations**
>
> 5. Review best practices and, where appropriate, make recommendations for change to current policies and practices in the School District.

[54] These all support the conclusion that the review was intended to result in a "report" on the "performance or efficiency" of the programs or policies of a public body. Moreover the Report reviewed the policies, identified weaknesses and recommended improvements. Thus, from the face of the record itself, the Report is clearly concerned with an evaluation of the efficiency and effectiveness of the School District's policies relating to child safety.

[55] The School District denies that the record constitutes a "final report" or even a "report". However, it provided the record in response to a request for "the Report prepared by Don Avison". As to whether it was "final", the Manual defines a "final report" as "the conclusive or decisive report" and I agree. The School District received the Report in 2007. There is no evidence to suggest that Mr. Avison or anyone else prepared another draft of the Report after that. The record in dispute is a "final report" for the purposes of s. 13(2)(g).

---

[35] School District's initial submission, Affidavit of the Superintendant, para. 13.

[56] Therefore, for the reasons stated above, I find that the entire Report meets the requirements of a final report on the performance or efficiency of the School District's policies on child protection in accordance with s. 13(2)(g). It follows that s. 13(1) does not apply to any portion of the Report.

[57] The applicant made additional arguments about the application of s. 13(2)(a) and (k) and 13(3), but as I have found that s. 13(2)(g) applies, I do not need to consider them.

[58] **3.6 Financial or Economic Harm—**Section 17(1) reads as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[59] This section has been the subject of numerous Orders and I take the same approach here. Commissioner Loukidelis has said that the application of s. 17(1):

> requires a confident and objective evidentiary basis for concluding that disclosure 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 that "there must be a clear and direct connection between the disclosure of specific information and the harm." The focus is on what a reasonable person would expect, based on evidence. The probability of harm occurring is relevant to the assessment,

> but mathematical likelihood will not be decisive when other contextual factors are at work. ... [36]

[60] With respect to the standard of evidence for determining whether disclosure of information at issue would cause a particular harm, as Commissioner Loukidelis observed in Order 00-10:

> Evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work.[37]

[61] I have applied the same approaches here.

Parties' submissions

[62] The applicant noted that the School District had not cited a specific part of s. 17(1) but said it appears likely the School District is relying on s. 17(1)(c). He argued that there is no reasonable expectation of harm to the School District's economic or financial interests on disclosure of the severed portions. Secondly, he said, the Report does not constitute a "plan" for the purposes of s. 17(1)(c).[38]

[63] The School District acknowledged the test for applying s. 17(1) set out in past Orders. It said it accepts that the assessment of harm is a contextual exercise and that the nature and magnitude of outcome are factors to be considered.[39]

Analysis

[64] I am unable to describe in any detail my analysis of the application of s. 17 because the bulk of the School District's submission and evidence on s. 17(1) was received, appropriately, *in camera*. This was because disclosure of the arguments in the School District's submission might cause the same harm that the School District submits would result from the disclosure of the information in the record.[40] This impinges on my ability to communicate effectively the reasons for my decision.

---

[36] Order F08-22, [2008] B.C.I.P.C.D. No. 40, para. 35.
[37] Order 00-10, [2000] B.C.I.P.C.D. No. 11.
[38] Applicant's initial submission, para. 59; Applicant's reply submission, paras. 14-17.
[39] School District's initial submission, paras. 11-14.
[40] See School District's initial submission, paras. 16-23; Kelly affidavit; School District's reply submission, paras. 53-54.

[65] Commissioner Loukidelis encountered this problem in Order 01-01.[41] In outlining the importance of reasons for decision, he cited the observations of L'Heureux-Dubé J. in para. 39 of *Baker v. Canada (Minister of Citizenship and Immigration)*:[42]

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review. ... Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given.[43]

[66] Commissioner Loukidelis commented further:

> 13. These are all valuable observations, to which I respectfully subscribe, but there are competing factors under the Act. Section 47(3) of the Act requires me not to disclose, in conducting an inquiry, any information that a public body would be required or authorized to refuse to disclose under the Act. My reasons for decision must conform to this stricture. Where a public body's *in camera* material contains information to which the s. 47(3) rule may apply, I cannot give as fulsome reasons as I would like. (Another example of this dilemma is Order No. 324-1999, where I could not even describe the nature of a controversy without risking disclosing the very information the public body sought to withhold.)
>
> 14. So, although I have tried to be as detailed as possible in setting out the reasoning underpinning my decision, the nature of this case requires me to express findings without necessarily being able to explain the basis for them as fully as I would wish. This means that some portions of this order have a conclusionary air about them. I have, however, carefully weighed all of the evidence before me and have analyzed the parties' submissions with deliberation.

[67] The same principles apply in this case, in which I can say even less about the School District's submission than Commissioner Loukidelis was able to say about the public body's submission in Order 01-01. What I am able to say is that the School District raised the spectre of two separate but related scenarios flowing from disclosure that it submitted could reasonably be expected to threaten it with financial harm. One of the scenarios is hypothetical and speculative.[44] The passage of time further reinforces the speculative nature of this scenario. The second scenario is predicated on the first scenario, which is speculative. In any event, the School District did not explain how disclosure

---

[41] [2001] B.C.I.P.C.D. No. 1.
[42] [1999] 2 S.C.R. 817.
[43] Order 01-01, para. 12.
[44] The School District described the first scenario in its initial submission, paras. 17-20, and 22 and in the Affidavit of the Superintendent, paras. 16, 35, 49, 55.

under FIPPA could give rise to the second scenario, and accordingly the required causal connection has not been established.[45]

[68] Although unable to describe the School District's argument beyond what appears above, I have considered all of the School District's submissions and evidence carefully, including its *in camera* material. I find that s. 17 does not apply to any of the severed information.

4.0 CONCLUSION

[69] For the reasons given above, I make the following orders:

1. I require the School District to refuse to disclose, in accordance with s. 22(1) the yellow highlighted information in the requested record on the following pages: 4, 5, 6, 7, 8, 10, 11, 12 and 14.

2. I confirm that the School District is not authorized to withhold any information under ss. 12(3)(b), 13(1) or 17(1).

3. I require the School District disclose all of the information in the record it withheld, except the information that I have highlighted in yellow.

4. I require the School District to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before March 17, 2011 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

February 3, 2011

ORIGINAL SIGNED BY

Elizabeth Denham
Information & Privacy Commissioner
for British Columbia

OIPC File No. F08-35550

[45] The School District described the second scenario in its initial submission, paras. 16, and 21-23 and in the Affidavit of the Superintendent, paras. 48, 50, 53, and Exhibit L. However, there are two references in Exhibit H of the Affidavit that further undermine the School District's case with respect to the second scenario.