



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

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Order F18-41

**MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS  
AND RURAL DEVELOPMENT**

**AND**

**MINISTRY OF ENVIRONMENT AND CLIMATE CHANGE STRATEGY**

Chelsea Lott  
Adjudicator

October 3, 2018

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**Summary:** An environmental organization requested access to records regarding British Columbia's approach to managing species at risk. Two ministries responded and disclosed records but refused to disclose some information under ss. 12(1) (cabinet confidences), 13 (advice and recommendations) and 15(1)(l) (security of property or system). The adjudicator found that s. 13 applied to most of the information, but ss. 12(1) and 15(1)(l) did not apply.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13, 15(1)(l).

## **INTRODUCTION**

[1] The applicant, the Wilderness Committee, asked the Ministry of Forests, Lands and Natural Resource Operations (Ministry of Forests) for “[a]ny and all records relating to a ‘Made in BC’ approach to species at risk management” for the period from June 1, 2014 to November 20, 2015.<sup>1</sup> The Ministry of Forests transferred part of the request to the Ministry of Environment and Climate Change Strategy (Ministry of Environment). The ministries gave access to some of the requested records, but withheld information under ss. 13, 14, 16, 17 and 22 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The

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<sup>1</sup> Investigator's fact report at para. 1.

applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the ministries' decision to withhold information. Mediation did not resolve the matters in dispute and the applicant requested an inquiry.

[2] After the registrar issued the notice of inquiry, the ministries reconsidered their severing, released additional information, and ceased reliance on ss. 14, 16 and 17. The ministries also sought, and were granted, the registrar's consent to add ss. 12 and 15 to the exceptions in issue.<sup>2</sup> In its inquiry submissions, the applicant states that it has no objection to the ministries' severing under s. 22. As a result, s. 22 is no longer in issue. Thus, the exceptions which remain in issue for this inquiry are ss. 12(1) (cabinet confidences), 13 (advice and recommendations) and 15(1)(l) (security of property or system).

[3] The information at issue is contained in 115 pages of records processed by the Ministry of Forests and 135 pages of records processed by the Ministry of Environment.<sup>3</sup> The ministries made a joint submission for the inquiry. For convenience, I have referred to all severing decisions and evidence as resulting jointly from the ministries.

## ISSUES

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

1. Are the ministries authorized to refuse access to the requested information under ss. 13 and/or 15(1)(l)?
2. Are the ministries required to withhold information under s. 12(1)?

Pursuant to s. 57(1), the burden rests with the ministries to prove that ss. 12(1), 13 or 15(1)(l) apply to the information they have withheld under those exceptions.

## DISCUSSION

### *Background*

[5] Federal legislation, the *Species at Risk Act (SARA)*, regulates protection and management of endangered or threatened wildlife and plants.<sup>4</sup> *SARA* contains a number of provisions which require the federal government to consult with the provinces on management of at risk species. *SARA* also permits the federal government to accept existing provincial measures in satisfaction of some requirements under the Act.

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<sup>2</sup> Email from the registrar to the parties dated March 27, 2018.

<sup>3</sup> Investigator's fact report at para. 7.

<sup>4</sup> SC 2002, c 29.

[6] The Ministry of Forests and the Ministry of Environment are responsible for the Province’s management of species at risk.<sup>5</sup> According to a director with the Ministry of Forests, the Province’s plan to manage species at risk has required “a considerable amount of discussion regarding policy options and outcomes involving representatives for both [m]inistries working closely together, at times with other stakeholders both within government and outside government.”<sup>6</sup> The records reflect these communications and touch on a variety of matters related to the Province’s approach to SARA.

### **Section 13 – Advice and recommendations**

[7] I will first consider whether s. 13 applies to any information in dispute because the ministries withheld most of the information under this exception.

[8] Section 13(1) authorizes a public body to withhold information which reveals advice or recommendations, subject to exceptions contained in s. 13(2). Section 13(1) states:

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.

[9] The purpose of exempting advice and recommendations from disclosure “is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice.”<sup>7</sup> Section 13(1) protects not only information which directly reveals advice or recommendations, but also information which would allow accurate inferences about the advice or recommendations.<sup>8</sup>

[10] “Advice” and “recommendations” have distinct meanings in the context of s. 13(1). A “recommendation” is information that “relates to a suggested course of action that will ultimately be accepted or rejected” by the decision maker.<sup>9</sup> “Advice” has a distinct and broader meaning than “recommendations”.<sup>10</sup> “Advice” includes opinions which require exercising skill and judgment to weigh facts on which a public body must make a decision.<sup>11</sup> Advice also includes opinions as to a range of policy options.<sup>12</sup> Lastly, “advice or recommendations”

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<sup>5</sup> Affidavit of AD at para. 5.

<sup>6</sup> Affidavit of CR at para. 6.

<sup>7</sup> *John Doe v Ontario (Finance)*, 2014 SCC 36 at para. 43 [*John Doe*].

<sup>8</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135; Order F18-19, 2018 BCIPC 22 at para. 12.

<sup>9</sup> *John Doe*, *supra* note 7 at para. 23

<sup>10</sup> *Ibid* at para. 24.

<sup>11</sup> *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113 [*College of Physicians*].

<sup>12</sup> *John Doe*, *supra* note 7 at para. 46.

includes information which presents background explanation or analysis for consideration in making a decision.<sup>13</sup>

### *Analysis*

[11] The information withheld under s. 13(1) is contained in emails and attachments to those emails such as letters, briefing notes, and speaking notes. Many of the attachments are drafts which have been circulated for feedback and revision. The emails were exchanged between the ministries, as well as with some third parties. The emails relate to various issues pertaining to the effects of SARA on the Province's wildlife and forestry management.

[12] The ministries submit that the withheld information was developed by, or for the ministries, and that it directly reveals advice or recommendations, or in the alternative that disclosure would enable the applicant to draw accurate inferences about advice or recommendations.<sup>14</sup> The ministries have provided two detailed affidavits from ministry directors who were involved in most of the communications.<sup>15</sup>

[13] The applicant argues that the ministries' application of s. 13 is overbroad. The applicant submits that much of the withheld information is analysis and not advice or recommendations.

#### *(i) Emails*

[14] Much of the withheld information is contained in emails between ministry<sup>16</sup> staff in which participants provide opinions on policy and strategy pertaining to SARA issues. It is evident from my review of the emails that the authors have exercised professional expertise and skill in providing these opinions, because the information contained in the emails reflects specialized knowledge on resource management. As discussed above, such opinions are "advice" within s. 13(1).<sup>17</sup> In other instances, the emails reflect the participants' deliberations on how to formulate advice or recommendations for the ultimate decision makers. This deliberative process preceding the more formal advice to superiors, also constitutes advice or recommendations. There is no requirement in s. 13 that advice be given in a formal manner. In my view, all of the foregoing is the type of information which s. 13 is aimed at protecting, specifically ongoing discussions and deliberations which are necessary for the decision making process. I am

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<sup>13</sup> *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 at para. 29 [*Insurance Corporation of British Columbia*].

<sup>14</sup> Ministries' initial submission at para. 48.

<sup>15</sup> The affidavits are from the Caribou Recovery Program Director, Resource Stewardship Division of the Ministry of Forests (affidavit of CR) and the Executive Director, Environmental Sustainability and Strategic Policy Division of the Ministry of Environment (affidavit of AD).

<sup>16</sup> "ministry" refers to both ministries.

<sup>17</sup> *College of Physicians*, *supra* note 11 at para. 113.

satisfied that the majority of the information withheld in the emails is advice or recommendations within the meaning of s. 13(1).

[15] However, some of the information in the staff emails cannot be characterized as advice or recommendations. The ministries have withheld one sentence in a staff email which they describe as advice and recommendations from staff to executives for their draft presentation to Cabinet on SARA.<sup>18</sup> However, the sentence describes the general topics and content in a draft slide presentation. In addition, the ministries have withheld the topics for an upcoming external stakeholder meeting.<sup>19</sup> I am not satisfied that any inferences about advice or recommendations could be drawn from these general descriptions of the presentation or meeting topics.

[16] The ministries have also withheld instructions to ministry staff<sup>20</sup> and a request for advice.<sup>21</sup> Having reviewed the information, I am satisfied that it does not allow inferences about advice or recommendations, and thus does not come within s. 13(1). My finding is consistent with past OIPC orders.<sup>22</sup>

(ii) *Advice from external parties*

[17] A small portion of the emails are between external third parties and staff of the ministries. Section 13(1) can apply to advice or recommendations provided by a private citizen or organization to a public body, as long as it is developed for the public body.<sup>23</sup>

[18] I have grouped the external third parties into three categories. The first category is forestry industry stakeholders. The ministries have withheld follow-up emails which were sent after meetings between staff of the ministries and industry stakeholders. The withheld information consists of feedback on the Province's proposed approach to SARA<sup>24</sup> as well as feedback on information packages about the Northern Goshawk and Marbled Murrelet.<sup>25</sup> The applicant argues that the "meetings covered by the records were requested by the third

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<sup>18</sup> Affidavit of AD at para. 6. Pages 12, 73, 75, and 78 of Ministry of Environment (MoE) records; pp. 84 and 85 of Ministry of Forests (MoF) records. The ministries have also applied s. 12(1) to this sentence.

<sup>19</sup> Page 65 of MoF records (topics, not discussion on approach to topics).

<sup>20</sup> Page 89 and portions of pp. 116 and 134 of MoE records.

<sup>21</sup> Pages 45 and 48 of MoF records.

<sup>22</sup> Order F15-33, 2015 BCIPC 36 at para. 25 (instructions); Order F17-23, 2017 BCIPC 24 at para. 19 (intention to seek advice).

<sup>23</sup> *BC Freedom of Information and Privacy Association v British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at para. 66 [*Freedom of Information and Privacy Association*].

<sup>24</sup> Page 5 of MoE records.

<sup>25</sup> Pages 49-51 of MoF records.

parties, not by government” and therefore involved lobbying and not the provision of advice or recommendations.<sup>26</sup>

[19] There is no direct evidence as to why the stakeholders were providing input to the ministries and in particular whether their feedback was sought by the ministries. However, based on the contents of the record, I find it more likely that the ministries were consulting with industry on SARA related matters rather than receiving unsolicited feedback. Past decisions have held that stakeholder feedback solicited by a public body is advice or recommendations developed for a public body within the meaning of s. 13(1).<sup>27</sup> Therefore, consistent with past orders, I am satisfied that the feedback is advice or recommendations.

[20] The second category of external party is a consultant whom ministry staff reached out to for advice on issues raised by the industry stakeholders.<sup>28</sup> The ministry employee specifically stated in an initial email to the consultant that he was looking for the consultant’s advice.<sup>29</sup> The ministries have withheld portions of their email exchange. The applicant argues this withheld information is analysis and therefore should be released.<sup>30</sup> There are two sentences in the email thread which merely ask for the consultant’s advice, and I have already found that s. 13(1) does not apply to that information.<sup>31</sup> However, I find that the balance of the information withheld in the email exchange is advice or recommendations.

[21] Lastly, the records also include an email from a federal employee to two ministry staff.<sup>32</sup> The ministries describe the withheld information as advice and recommendations regarding “updates to mapping for southern mountain caribou.”<sup>33</sup> The ministries have withheld the body of the email in which the federal employee provided an update on progress related to a mapping project and also discusses collaboration on other matters related to species at risk. This information cannot be characterized as advice or recommendations developed for the ministries. Rather, the information provides the ministries with an update on SARA related matters from the federal government’s perspective. Providing an update on a program, unrelated to any decision a public body must make, does not fall within s. 13(1) of FIPPA.<sup>34</sup>

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<sup>26</sup> Applicant submissions at para. 26.

<sup>27</sup> *Freedom of Information and Privacy Association, supra* note 23; Order F14-17, 2014 BCIPC 20 at paras. 45–46.

<sup>28</sup> Pages 46-47 of MoF records.

<sup>29</sup> Page 45 of MoF records.

<sup>30</sup> Applicant submissions at para. 19.

<sup>31</sup> Pages 45 and 48 of MoF records.

<sup>32</sup> Page 99 of MoE records.

<sup>33</sup> Affidavit of AD at para. 9 on p. 6.

<sup>34</sup> Order F15-52, 2015 BCIPC 55 at para. 28.

(iii) *Krindle Report*

[22] The applicant argues that the ministry has inappropriately withheld information about the “Krindle Report”. The “Krindle report” was a report commissioned by the federal government to provide recommendations on whether the laws of British Columbia adequately satisfy the requirements of SARA.<sup>35</sup> The actual Krindle Report is not contained in the records, however there are references to it in two records.<sup>36</sup> In one record, the ministries have withheld a brief statement about the report in a decision note.<sup>37</sup> The information is the decision note author’s assessment of the salient points from the report. I would characterize it as background analysis which informs the advice contained in the balance of the decision note about engaging with Environment Canada to assess critical habitat. Thus, I find it is advice or recommendations.

[23] The second reference to the Krindle Report is contained in an email from a federal employee to representatives of the ministries. The disputed information is the federal employee’s summary of her meeting with ministry representatives.<sup>38</sup> The summary includes feedback obtained at the meeting on the Krindle Report. The ministries describe this feedback as advice from the federal government employee to representatives of the ministries, “regarding her view of comments on the Krindle report and recommendations as to the appropriate steps for the Province to take next.”<sup>39</sup> However, based on my review of the email, it appears that the feedback was provided by ministry staff and was to be communicated to a specific federal agency. The federal employee is merely summarizing what was said at the meeting. As the feedback was coming from ministry staff, it is more properly characterized as advice to the federal government and not to the ministries.

[24] Section 13(1), is intended to “protect a public body’s internal decision-making and policy-making processes...”<sup>40</sup> The federal government clearly does not meet the definition of “public body” in FIPPA.<sup>41</sup> The ministries do not explain how s. 13(1) would apply to feedback they provided to the federal government on a federal government document. While the feedback was provided by the ministries, they do not suggest that it was relevant to any of their own internal policy or decision making, or that it would allow accurate inferences about their internal advice or recommendations.

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<sup>35</sup> Affidavit of CR at para. 6 on p. 4.

<sup>36</sup> The applicant refers to portions of the report being withheld. However, after the close of submissions the ministries confirmed that the Krindle Report was not a responsive record (August 20, 2018 email to registrar of inquiries).

<sup>37</sup> Page 86 of MoE records; p. 24 of MoF records.

<sup>38</sup> Page 37 of MoE records; p. 91 of MoF records.

<sup>39</sup> Affidavit of AD at para. 9 on p 5.

<sup>40</sup> Order F09-02, 2009 CanLII 3226 (BC IPC) at para. 10 quoted with approval on judicial review in *Freedom of Information and Privacy Association*, *supra* note 23 at para. 64.

<sup>41</sup> See Schedule 1 of FIPPA for definitions and Schedule 2 for a list of public bodies.

[25] I have considered *Insurance Corporation of British Columbia v Automotive Retailers Association*, in which the court concluded that communications between ICBC and a federal agency, the Competition Bureau, were subject to s. 13. However, in that case, the records were “integral to ICBC’s deliberative policy-making process regarding matters raised by ICBC with the Competition Bureau.”<sup>42</sup> In other words, ICBC sought and obtained advice from the Competition Bureau to aid in its internal deliberations. Therefore, s. 13 applied to ICBC’s communications with the federal agency. In contrast, here the ministries do not suggest that their feedback relates to advice or recommendations developed by or for the ministries. Therefore, s. 13(1) does not apply to feedback which the ministries developed for the federal government.

(iv) *Briefing documents*

[26] I turn now to the briefing notes contained in the records. I will start by noting that in a few instances, the ministries have withheld information, but disclosed it elsewhere in a duplicate record.<sup>43</sup> As a result, I will not consider whether s. 13 applies to such information, as the applicant has already received it pursuant to FIPPA.

[27] Having reviewed the information withheld under s. 13 in the briefing documents, with a few exceptions, I find that this information is advice or recommendations within the meaning of s. 13(1).

[28] The ministries have withheld information in briefing notes which describe options, weigh those options and provide recommendations on how to proceed on various SARA related matters. In other instances, the disputed information is staff opinions which contain implicit advice or the information is background explanations which are integral to the advice or recommendation provided in the document. I am satisfied that this information would reveal advice or recommendations.

[29] Some of the briefing documents are drafts. Previous OIPC orders have established that s. 13(1) does not apply to records simply because they are drafts. However, s. 13(1) may apply where disclosing information in a draft would allow accurate inferences to be made about advice or recommendations developed by or for a public body.<sup>44</sup> The ministries have withheld substantive advice and editing suggestions ministry staff have added to drafts using the “Track Changes” Word function. In addition, some withheld information in drafts

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<sup>42</sup> *Insurance Corporation of British Columbia*, supra note 13 at para. 64.

<sup>43</sup> The withheld information is at pp. 68, 71, and 123 of MoE records.

<sup>44</sup> Order F17-32, 2017 BCIPC 34 at para. 17.

can be compared to other versions to discern editing and substantive advice.<sup>45</sup> The foregoing is advice or recommendations under s. 13(1).

[30] The ministries have withheld two draft letters to a forestry company regarding the company's proposal.<sup>46</sup> Proposed wording for the letters was properly withheld in earlier emails circulated amongst ministry staff because it differs from what appears in the letters.<sup>47</sup> The letters were attached to an email in which the author states that he has revised the letters and invites comments on the tone or content of the letter.<sup>48</sup> The ministries provide no information about these specific records other than to describe them as a draft letter to the Private Forest Landowners Association and Timber West.<sup>49</sup> The draft letters do not contain any annotations or comments. There are no other versions of the letters in the records to compare to the drafts which could permit inferences about editorial advice or recommendations. The substantive content of the letters does not contain advice or recommendations. Given the lack of evidence regarding these letters, I am unable to conclude that disclosing them would reveal any advice or recommendations developed by or for the ministries.

[31] A small amount of information is withheld in a spreadsheet titled "Mandate Letter Expectations" which tracks progress on certain objectives for the ministries.<sup>50</sup> The ministries describe it as advice to executives regarding "mandate letter expectations".<sup>51</sup> Some of the information would permit inferences about advice on fulfilling those mandates. However, the remainder is objective information about ministry activities and is not background explanation or analysis, nor would it permit inferences about advice or recommendations. Thus, I find s. 13(1) does not apply to it.

#### *Section 13(2)*

[32] I turn now to consider whether any of the information which I have found is advice or recommendations developed by or for the ministries falls within any of the categories listed s. 13(2). If it does, the ministries must not refuse to disclose the information under s. 13(1).

[33] The applicant submits that ss. 13(2)(a) and possibly 13(2)(k) apply. Those provisions state:

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<sup>45</sup> Information note at pp. 7-8, 10-11, 59-60, 62-63, 68-69, 71-72 of MoE records and pp. 1-2, 65-66, 98-99 of MoF records. Information note at pp. 15-16, 96-97 of MoE records and pp. 3-4 of MoF records.

<sup>46</sup> Pages 19-22 and 102-104 of MoE records; pp. 112-113 of MoF records – this letter is identical save for a date at the top left.

<sup>47</sup> Pages 91-94 of MoE records.

<sup>48</sup> Page 17 of MoE records.

<sup>49</sup> Affidavit of AD at para. 9 on p. 5

<sup>50</sup> Page 27 of MoF records.

<sup>51</sup> Affidavit of CR at para. 6 on p 3.

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

...

(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,

[34] Pursuant to s. 13(2)(a), public bodies are not permitted to withhold “factual material” under s. 13(1). Factual material is distinct from factual information. Factual material has an independent prior existence. In contrast, if factual information is compiled from source materials by experts, which then becomes integral to the analysis or views expressed in the record, it is not factual material within s. 13(2)(a).<sup>52</sup>

[35] The ministries argue that any factual information they have withheld is “inextricably interwoven with and integral to” the advice and cannot reasonably be severed from the information properly subject to s. 13(1).<sup>53</sup>

[36] Most of the information withheld under s. 13(1) is not “factual material” under s. 13(2)(a). To the extent the information contains facts, they are not a body of distinct facts separate and independent from the opinions and advice. Instead, they are background facts that are intermingled with - and clearly an integral part of ministry staff’s analysis, opinion and recommendations necessary for the ministries’ deliberative process surrounding SARA.

[37] There are a few exceptions. The ministries have withheld some information about past or ongoing programs and activities of the ministries.<sup>54</sup> It is objective information and it contains no element of analysis. For example, the ministries have withheld an attachment to a joint information note which describes BC’s conservation activities for Whitebark Pine.<sup>55</sup> Such information is broadly part of the relevant background to the briefing note, but it not integral to or interwoven with any advice or recommendations. Another example is information on lobbying in notes prepared by staff for a “Minister roundtable”.<sup>56</sup> The ministries describe it as advice from staff to executive regarding species at risk recovery.<sup>57</sup> However, it is just a description of past requests from industry

<sup>52</sup> *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 93-94 and *Insurance Corporation of British Columbia*, *supra* note 13 at para. 52.

<sup>53</sup> Ministries’ initial submission at para. 51.

<sup>54</sup> Page 132 of MoE records; pp. 24 of MoF and 86 of MoE records (first three sentences of second paragraph); p. 52 of MoE records and p. 106 of MoF records.

<sup>55</sup> Page 132 of MoE records.

<sup>56</sup> Page 52 of MoE records; p. 106 of MoF records.

<sup>57</sup> Affidavit of CR at para. 6 on pp. 4–5.

groups to government. I am satisfied that the foregoing objective information is factual material within the meaning of s. 13(2)(a).

[38] I have also considered whether s. 13(2)(k) applies. However, none of the records are a report of a task force, committee, council or similar body. The records were created by ministry employees in their daily work. As a result, s. 13(2)(k) does not apply.

### *Summary*

[39] In summary, the ministries have properly withheld most of the information in dispute under s. 13(1). However, I have concluded that s. 13(1) does not apply to information about general meeting topics, instructions, solicitations for advice, advice to the federal government and in two draft letters. Most of the material withheld under s. 13(1) is not required to be disclosed under s. 13(2). However, a small amount of objective information about the ministries past and ongoing activities and industry lobbying which is “factual material” within s. 13(2)(a) and must be severed from the information properly withheld under s. 13(1).

### **Section 12 – Cabinet Confidences**

[40] All of the information to which the ministries have applied s. 12(1), is properly withheld under s. 13 with the exception of one sentence.<sup>58</sup> As a result, I will only consider the application of s. 12(1) to that sentence.

[41] The ministries appeared before the Environment and Land Use Committee of cabinet (ELUC) on November 20, 2014.<sup>59</sup> Prior to the presentation, the ELUC asked the ministries to develop a more comprehensive approach for dealing with SARA.<sup>60</sup> The ministries provided the ELUC with materials outlining the ministries’ proposed approach. The ELUC deliberated on the materials and provided direction to the ministries regarding their approach.<sup>61</sup> The ministries rely on s. 12(1) to withhold information they say relates directly to materials created for and presented to the ELUC for their deliberation.

[42] Section 12(1) is a mandatory exception, requiring public bodies to withhold information under s. 12(1) provided that s. 12(2) does not apply. The relevant sections state:

12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations,

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<sup>58</sup> The sentence appears on pp. 12, 73, 75, and 78 of MoE records; pp. 84 and 85 of MoF records.

<sup>59</sup> Affidavit of AD at para. 6.

<sup>60</sup> Affidavit #2 of AD at para. 8.

<sup>61</sup> *Ibid.*

policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

...

(5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.

[43] The Supreme Court of Canada has stated that the purpose of cabinet confidentiality is to permit those with the responsibility for making government decisions the freedom to “discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny.”<sup>62</sup>

[44] Section 12(1) protects information which would reveal the “substance of deliberations” of the Executive Council, also called Cabinet, or its committees. Section 12(1) is not limited to information which reveals the thinking of Cabinet.<sup>63</sup> Rather, the “substance of deliberations” is the body of information which Cabinet considered, or would consider in the case of submissions not yet presented in making a decision.<sup>64</sup>

#### *Committees of the Executive Council*

[45] Section 12(1) protects information that would reveal the substance of deliberations of the Executive Council or any of its committees. The first issue is whether the ELUC is a committee of the Executive Council. Section 12(5) of FIPPA permits the Lieutenant Governor in Council to designate a committee for the purposes of s. 12. The ELUC was designated as such a committee under *Committees of the Executive Council Regulation* during the time period in issue and so qualifies as a committee of the Executive Council.<sup>65</sup>

#### *Would disclosure reveal the substance of deliberations?*

[46] The sentence at issue lists the general contents of a draft slide presentation. Although the ministries do not specifically say, I presume that a version of the presentation was presented to the ELUC.

[47] Past orders have found that s. 12(1) does not apply to headings or titles that reveal only bare-bones information about the topics of discussion.<sup>66</sup> The

<sup>62</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para. 18.

<sup>63</sup> *Aquasource v British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) at para. 40.

<sup>64</sup> *Ibid* at para. 39.

<sup>65</sup> BC Reg 229/2005.

<sup>66</sup> *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 94-97 upholding the decision about Cabinet meeting agenda items in Order F08-17, 2008 CanLII 57360 (BC IPC) at paras. 18-24. See also: Order

same reasoning applies here. Disclosing the general content of the draft presentation here would not reveal the substance of deliberations of Cabinet and therefore s. 12(1) does not apply.

**Section 15(1)(l) – Security of property or system**

[48] The ministries submit that they are authorized to withhold a small amount of information under s. 15(1)(l) of FIPPA. The applicant only objects to the ministries' severance under s. 15(1)(l) in one instance.<sup>67</sup> Thus, I have limited my analysis to the information identified by the applicant as being in dispute.

Section 15(1)(l) reads 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

...

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

[49] Section 15(1)(l) requires that the hypothetical harm to property or a system “could reasonably be expected to” occur. In order to meet this test, a party must provide evidence to prove that the likelihood of a particular harm resulting from disclosure of the disputed information is “well beyond” or “considerably above” a mere possibility. The test is contextual and depends on the seriousness of the possible consequences and the probability of the harm occurring.<sup>68</sup>

[50] The ministries have applied s. 15(1)(l) to the file pathway for a policy document stored on their computer network. An executive director with the Ministry of Environment asserts that disclosure of the file pathway would increase the risk that an individual with network access could gain “inappropriate” access to ministry files.<sup>69</sup>

[51] The executive director's assertion about such a potential security risk, without anything further, is not persuasive. In my view, it is unlikely that someone with network access would have any desire to inappropriately access the file, which is a one page policy document from 2015. The ministries do not suggest that there is anything particularly sensitive about the record. Even if that were the case, the network administrator could presumably restrict access to the file

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F12-01, 2012 BCIPC 1 at para. 22; Order F14-51, 2014 BCIPC 55 at para. 25; Order F14-55, 2014 BCIPC 59 at para. 35.

<sup>67</sup> Page 107 of MoE records.

<sup>68</sup> *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

<sup>69</sup> Affidavit of AD at para. 12.

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location to those with a “need to know” about the document. The ministries’ evidence is simply not sufficient to satisfy their burden under s. 15(1)(l).

## **CONCLUSION**

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

1. The Ministry of Environment and the Ministry of Forests are not authorized under ss. 12(1) and 15(1)(l) to refuse access to the information in dispute.
2. The Ministry of Environment and the Ministry of Forests are authorized under s. 13 to refuse access to the information in dispute, with the exception of the information outlined in blue, as well as pursuant to my instructions on p. 27 of the Ministry of Forests records, in copies of the records provided to the ministries with this order.
3. I require the Ministry of Environment and the Ministry of Forests to give the applicant access to the information described in paragraph 2 by November 16, 2018. The ministries must concurrently provide the OIPC registrar of inquiries with a copy of its cover letter and the records sent to the applicant.

October 3, 2018

## **ORIGINAL SIGNED BY**

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Chelsea Lott, Adjudicator

OIPC Files: F16-65932 & F16-65946