



Order F21-63

**MINISTRY OF ATTORNEY GENERAL AND  
THE MINISTER RESPONSIBLE FOR HOUSING**

**OFFICE OF THE PREMIER**

Lisa Siew  
Adjudicator

December 13, 2021

CanLII Cite: 2021 BCIPC 72  
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**Summary:** An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to a provincial government program that provided eligible first-time home buyers with a down payment loan. The Office of the Premier and the Ministry of Attorney General and the Minister responsible for Housing (collectively the “Public Bodies”) provided partial access to the requested records, but withheld information under ss. 12(1) (cabinet confidences) and 14 (solicitor-client privilege) of FIPPA. The adjudicator determined the Public Bodies were authorized to withhold information under s. 14 and they were required to withhold only some of the information at issue under ss. 12(1). Specifically, the Public Bodies were not required to withhold information that the adjudicator determined qualified as background explanations or analysis under s. 12(2)(c).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2)(c) and 14. *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005.

## **INTRODUCTION**

[1] An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to a provincial government program that provided eligible first-time home buyers with a down payment loan. The applicant directed his request to three public bodies: the Ministry of Finance, the Office of the Premier (Premier’s Office) and the Ministry of Attorney General (Ministry).<sup>1</sup> The Attorney General is also currently the Minister responsible for Housing.

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<sup>1</sup> The public body who responded to the applicant’s access request was the Ministry of Natural Gas Development/Minister Responsible for Housing. Since then, the public body now responsible

[2] The Ministry provided the applicant with partial access to the records in its custody or under its control, withholding information under ss. 12(1), 13(1), 14 and 17(1) of FIPPA. The Premier's Office provided the applicant with partial access to the records in its custody or under its control, withholding information under ss. 12(1) and 13(1) of FIPPA. The response of the Premier's Office and the Ministry (collectively, the "Public Bodies") is the focus of this inquiry.<sup>2</sup>

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review each public body's decision. Mediation did not resolve the issues between the parties and each matter proceeded separately to inquiry. During the inquiry, the Public Bodies requested and received the OIPC's approval and the applicant's consent for the two inquiries to be combined into one inquiry.

[4] The Public Bodies also reconsidered their access decisions and released additional information to the applicant. As part of the reconsideration, the Public Bodies withdrew their application of ss. 13(1) and 17(1), but continued to rely on ss. 12(1) and 14 to withhold information from the records. The Premier's Office also received the OIPC's approval to apply s. 14 to information that was previously withheld under another FIPPA exception.

[5] The applicant and the Public Bodies provided submissions for the inquiry. The Public Bodies' submissions include pre-approved *in camera* material. Where information is approved *in camera*, the decision-maker considers this information privately and the other party will receive the inquiry submissions with the *in camera* material redacted.

## PRELIMINARY MATTER

### *Disclosure in the public interest – s. 25*

[6] As part of his submission, the applicant contends that it is in the public interest under s. 25 that the information at issue be disclosed.<sup>3</sup> Among other things, the applicant submits that disclosure is necessary so the public is informed about an "expensive" government program that the applicant alleges was crafted by the then-BC Liberal government in order to garner votes for re-election.<sup>4</sup>

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is the Ministry of the Attorney General, who is also the Minister responsible for Housing. Nothing turns on this fact. Therefore, for consistency and clarity, I will use the name of the public bodies currently responsible for responding to the access request.

<sup>2</sup> The Ministry of Finance assessed the applicant a fee and its response is not a part of this inquiry.

<sup>3</sup> Applicant's submission at paras. 27-30.

<sup>4</sup> Applicant's submission at para. 29.

[7] Section 25 of FIPPA requires a public body to disclose information without delay, in certain circumstances, despite any other provision of FIPPA. This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.<sup>5</sup> Therefore, there is a high threshold before s. 25 can properly come into play. Specifically, the duty to disclose under s. 25 exists only in the "clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest."<sup>6</sup>

[8] Section 25 was not set out in the notice of inquiry or the OIPC investigator's fact report as an issue for consideration in this inquiry. Previous OIPC orders have consistently said parties may raise new issues at the inquiry stage only if they request and receive permission to do so.<sup>7</sup>

[9] The applicant did not seek permission to add this issue to the inquiry or explain why he should be permitted to do so at this late stage. There is also nothing in the materials before me to suggest that s. 25 may be engaged. For these reasons, I decline to add s. 25 as an issue in this inquiry.

## ISSUES

[10] The issues to be decided in this inquiry are as follows:

1. Are the Public Bodies authorized to refuse to disclose the information at issue under s. 14?
2. Are the Public Bodies required to refuse to disclose the information at issue under s. 12(1)?

[11] Section 57(1) places the burden on the Public Bodies to prove the applicant has no right of access to the information withheld under ss. 12(1) and 14.

## DISCUSSION

### ***Background***<sup>8</sup>

[12] The applicant requested access to the "business case and cost/benefit analysis" for the BC Home Owner Mortgage and Equity (HOME) Partnership program.<sup>9</sup> In 2016, the BC government publicly announced its intention to create the HOME program. This program provided eligible first-time home buyers a loan

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<sup>5</sup> *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

<sup>6</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, emphasis in original.

<sup>7</sup> For example, Order F19-41, 2019 BCIPC 46 at para. 5.

<sup>8</sup> Most of the information in this background section is from the Public Bodies' submissions and affidavit evidence and information disclosed in the responsive records.

<sup>9</sup> Applicant's access request dated December 15, 2016.

to assist with the down payment on a home, up to a maximum of 5% of the purchase price.

[13] The Office of Housing and Construction Standards (Office) was involved in the development of the HOME program. The Office's responsibilities include "working to ensure British Columbians have access to safe, affordable and functional housing through market and non-market housing policy and programs."<sup>10</sup>

[14] The Office has moved through several different government ministries over the years, but is currently located in the Ministry of Attorney General. The Attorney General is currently the Minister responsible for Housing. At the time of the applicant's access request, the Minister of Natural Gas Development was responsible for Housing.

[15] The HOME program stopped accepting new applications on March 31, 2018. During its operation, the BC Housing Management Commission (BC Housing) administered the program and it continues to do so for any existing program recipients who applied prior to that deadline. BC Housing is a crown corporation that reports to the Attorney General/Minister responsible for Housing.

### ***Records at issue***

[16] The responsive records total 365 pages with approximately 174 of those pages containing the information at issue.<sup>11</sup> The records consist of presentation slides, Issues Notes, tables, Treasury Board submissions and a briefing note.

### ***Section 14 – solicitor client privilege***

[17] The Public Bodies applied s. 14 to withhold information on one page each of three different Treasury Board submissions.<sup>12</sup>

[18] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.<sup>13</sup> The Public Bodies are withholding the information at issue on the basis it is protected by legal advice privilege.

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<sup>10</sup> Public Bodies' submissions dated May 28, 2021 at para. 4.

<sup>11</sup> The Premier's Office records total 171 pages and they are referred to as OOP-2016-65166. The Ministry's records total 194 pages and they are referred to as HOU-2016-65165. I will use these references in discussing the records.

<sup>12</sup> Treasury Board Submission dated September 2, 2016 (pp. 51, 139 of HOU-2016-65165 and p. 51 of OOP-2016-65166), Treasury Board Submission dated November 25, 2016 (p. 193 of HOU-2016-65165) and Treasury Board Submission dated July 20, 2016 (p. 11 of OOP-2016-65166).

<sup>13</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 26.

[19] The Public Bodies applied the following three-part test, which I accept, for determining whether legal advice privilege applies to the information in dispute:

1. the communication must be between a solicitor and client;
2. entail the seeking or giving of legal advice; and
3. the parties must have intended it to be confidential.<sup>14</sup>

[20] The courts have also found that solicitor-client privilege extends to communications that are “part of the continuum of information exchanged” between the client and the lawyer in order to obtain or provide the legal advice.<sup>15</sup> The continuum also covers communications after the client receives the legal advice, such as internal client communications about the legal advice and its implications.<sup>16</sup>

### **Section 14 evidence**

[21] The Public Bodies chose not to provide the information it is withholding under s. 14 for my review. Where a public body declines to provide the information or records withheld under s. 14, it is expected to provide a description of the information or records in a manner that, without revealing privileged information, enables the other parties and the adjudicator to assess the validity of the claim of privilege.<sup>17</sup>

[22] To establish that s. 14 applies, the Public Bodies provided a description of the withheld information in its submissions and included affidavits from the following individuals:

- The Executive Director of Finance for BC Housing;
- The Director of Policy and Legislation for the Office; and
- A lawyer with the Legal Services Branch (LSB) of the Ministry.

[23] Where affidavit evidence is relied upon to support a claim of solicitor-client privilege, the evidence should specifically address the documents subject to the privilege claim.<sup>18</sup> I find that the Public Bodies’ affidavit evidence addresses the information at issue.

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<sup>14</sup> *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13. Public Bodies’ submission dated May 28, 2021 at para. 74.

<sup>15</sup> *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

<sup>16</sup> *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.

<sup>17</sup> *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78.

<sup>18</sup> *Ibid* at para. 91.

[24] As a result, I conclude the Public Bodies' description of the information at issue and its affidavit evidence, including an affidavit from an LSB lawyer, and the records themselves is sufficient to allow me to determine whether s. 14 applies. I will refer to that evidence as required in my determination of s. 14.

**Parties' position on s. 14**

[25] The Public Bodies submit the s. 14 information consists of:

- Information that references legal advice that the Office previously sought and received from two LSB lawyers.<sup>19</sup>
- Information that reveals BC Housing's intention to seek legal advice on a matter where it did later obtain that legal advice from an external lawyer.<sup>20</sup>

[26] The Public Bodies contend that privilege applies to the information that would reveal references to previously obtained legal advice. The Director of Policy and Legislation for the Office (Policy Director) attests that the Office obtained legal advice from two named LSB lawyers regarding the HOME program. The Policy Director says he reviewed the information at issue and explains how some of the information at issue references or reveals that legal advice.<sup>21</sup>

[27] For instance, the Policy Director says one of the lawyers provided legal advice to the Office that is referenced under a section titled "Legislation" in two of the Treasury Board Submissions.<sup>22</sup> He attests that the withheld information "reflects" or "would allow an individual to infer legal advice" that the lawyer provided in confidence to the Office on certain matters that he describes in his affidavit.<sup>23</sup>

[28] The Policy Director also described the surrounding circumstances leading to the creation of those records and attests to the general subject matter of the legal advice that the Office sought and obtained. The Policy Director adds that he was involved in various meetings regarding the records at issue.<sup>24</sup>

[29] One of the LSB lawyers provided an affidavit to support information withheld under a section titled "Legal Advice" in one of the Treasury Board

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<sup>19</sup> Information located on pp. 111 and 193 of HOU-2016-65165.

<sup>20</sup> Information located on pp. 51 and 139 of HOU-2016-65165 and p. 51 of OOP-2016-65166.

<sup>21</sup> Policy Director's affidavit at paras. 30-33.

<sup>22</sup> Information located on pages 111 and 193 of HOU-2016-65165.

<sup>23</sup> Policy Director's affidavit at paras. 31-32.

<sup>24</sup> Policy Director's affidavit at para. 18.

submissions.<sup>25</sup> The lawyer explains that, at the request of the other named lawyer, he drafted a legal memorandum containing legal advice. He attests that the information at issue summarizes that legal advice and refers to his legal memorandum.<sup>26</sup> The lawyer also deposes that his legal opinion specifically includes a clause about the confidentiality of its contents.

[30] The Policy Director confirms that this lawyer provided a “legal opinion” to the Office and that the other named lawyer assisted the Office with obtaining that legal advice.<sup>27</sup>

[31] Turning now to the withheld information that reveals an intention to seek legal advice, the Public Bodies submit that privilege applies where there is evidence of “both the intention to seek legal advice as well as confirmation that the advice was actually sought and received.”<sup>28</sup>

[32] The Executive Director of Finance for BC Housing (Executive Director) attests that she reviewed the specific information at issue and confirms that this information references legal advice that BC Housing intended to seek on a matter relating to the HOME program.<sup>29</sup> The Executive Director says that BC Housing subsequently obtained that legal advice in confidence from a lawyer external to government and she identifies that lawyer and their law firm.<sup>30</sup> She also attests to the confidentiality of those solicitor-client communications.

[33] The Policy Director deposes that he reviewed the specific information at issue and confirms that it references “a legal opinion that BC Housing intended to seek.”<sup>31</sup> He says that the Executive Director advised him that BC Housing did seek and receive this legal advice from the named lawyer.

[34] The applicant disputes the Public Bodies’ application of s. 14 to withhold information from the records. Citing Order F17-53, the applicant notes that not every communication between a client and solicitor is protected by solicitor-client privilege.<sup>32</sup>

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<sup>25</sup> Information located on p. 193 of HOU-2016-65165.

<sup>26</sup> J.L.’s affidavit at para. 5.

<sup>27</sup> Policy Director’s affidavit at para. 33.

<sup>28</sup> Public Bodies’ submission dated May 28, 2021 at para. 101.

<sup>29</sup> Executive Director’s affidavit at para. 10. Information located on pp. 51 and 139 of HOU-2016-65165 and p. 51 of OOP-2016-65166.

<sup>30</sup> Executive Director’s affidavit at para. 12.

<sup>31</sup> Policy Director’s affidavit at para. 30.

<sup>32</sup> Order F17-53, 2017 BCIPC 58 (CanLII).

### **Analysis and conclusions on s. 14**

[35] The Public Bodies submit that s. 14 applies to information that references legal advice and information that reveals an intention to seek legal advice. I will address each category below.

#### *Information that references legal advice*

[36] I conclude that legal advice privilege applies to the information that reveals legal advice that the Office previously sought and received from two LSB lawyers.<sup>33</sup> Past OIPC orders and the courts have found that the scope of solicitor-client privilege may extend to information that reveals legal advice previously obtained by a public body.<sup>34</sup> I accept the Policy Director's evidence that the Office sought and obtained legal advice in confidence from one of the named lawyers regarding the HOME program.

[37] Although there is no evidence that the Policy Director was directly involved in or reviewed the communications where legal advice was sought and obtained, I accept his evidence since he reviewed the information at issue, was involved in various meetings about the disputed records and sufficiently explained the circumstances leading up to the creation of those records and the general subject matter of the legal advice. As a result, I find that s. 14 applies to the information at issue since it would reveal legal advice provided by a government lawyer in confidence to the Office.

[38] Turning now to the information withheld under a section titled "Legal Advice" in one of the Treasury Board submissions,<sup>35</sup> one of the named lawyers confirms that he provided a legal memorandum in confidence to the Office. He attests that some of the information at issue reveals the legal advice that he provided in his memorandum and confirms the confidentiality of that information.

[39] I accept the lawyer's evidence since he reviewed the information at issue and was the lawyer who provided the relevant legal advice. There is also information in the records that shows the Office obtained legal advice on a matter within the lawyer's area of expertise.<sup>36</sup> As a result, I conclude that disclosing the information at issue would reveal legal advice that a government lawyer provided in confidence to the Office.

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<sup>33</sup> Information located on pp. 111 and 193 of HOU-2016-65165.

<sup>34</sup> *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at paras. 12-13 and, see for example, Order F17-23, 2017 BCIPC 24 at paras. 43-44.

<sup>35</sup> Information located on p. 193 of HOU-2016-65165.

<sup>36</sup> Information located on p. 172 of HOU-2016-65165.

*Information that reveals intention to seek legal advice*

[40] The Public Bodies submit that s. 14 applies to information in the records that reveals an intention to seek legal advice. Typically, the fact that there is information that reveals the intent or need to seek legal advice at some point in the future does not suffice on its own to establish that privilege applies.<sup>37</sup> There must be evidence that disclosure of this information would reveal actual confidential communications between legal counsel and the client.<sup>38</sup>

[41] To establish such a claim, previous OIPC orders accept evidence that the public body eventually did seek and receive legal advice about the particular matters revealed in the withheld information.<sup>39</sup> I agree with that approach as the disclosure of this information would then reveal confidential communications that later occurred between a lawyer and client.

[42] First, I accept the Executive Director and the Policy Director's evidence that the information at issue references legal advice that will be sought on a matter related to the HOME program.<sup>40</sup> They both attest to reviewing the information at issue.

[43] Second, I accept on a balance of probabilities that BC Housing actually sought and received the legal advice that it intended to obtain. The Executive Director deposes that BC Housing did obtain that legal advice from an external lawyer, whom she identifies, and she attests to the confidentiality of those solicitor-client communications. Although the Executive Director does not identify the source of her belief and conclusions, I accept her evidence.

[44] I conclude, therefore, that s. 14 applies since the disclosure of the information at issue would reveal communications made in confidence between a lawyer and a client related to the seeking and giving of legal advice.

[45] The Public Bodies also applied s. 12(1) to the same information that it withheld under s. 14. Since I have found that s. 14 applies, it is not necessary to consider whether s. 12(1) applies to the same information. I turn now to consider whether s. 12(1) applies to other information.

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<sup>37</sup> Order F17-23, 2017 BCIPC 24 (CanLII) at para. 49.

<sup>38</sup> *Ibid* at para. 49.

<sup>39</sup> Order F18-38, 2018 BCIPC 41 (CanLII) at para. 37 and Order F17-23, 2017 BCIPC 24 (CanLII) at para. 50.

<sup>40</sup> Executive Director's affidavit at para. 10-11. Policy Director's affidavit at para. 30. Information located on pp. 51 and 139 of HOU-2016-65165 and p. 51 of OOP-2016-65166.

**Section 12(1) – cabinet confidences**

[46] Section 12(1) requires a public body to withhold information that would reveal the substance of deliberations of Executive Council (also known as Cabinet) and any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[47] The purpose of s. 12(1) is to protect the confidentiality of the deliberations of Cabinet and its committees, including committees designated under s. 12(5).<sup>41</sup> Past OIPC orders and court decisions have recognized the public interest in maintaining Cabinet confidentiality to ensure and encourage full discussion by Cabinet members.<sup>42</sup>

[48] Determining whether information is properly withheld under s. 12(1) involves a two-part analysis. The first question is whether disclosure of the withheld information would reveal the “substance of deliberations” of Cabinet or any of its committees. The BC Court of Appeal has determined that “substance of deliberations” refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.<sup>43</sup>

[49] According to the Court of Appeal, the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee’s deliberations.<sup>44</sup> In other words, the term “substance of deliberations” includes any recorded information Cabinet or one of its committees considered in deliberations. I am bound by this interpretation of s. 12(1).

[50] The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) applies. If so, then the information cannot be withheld under s. 12(1).

**The Public Bodies’ position on s. 12**

[51] The Public Bodies emphasize that s. 12(1) is a mandatory exception to access in that “a public body cannot exercise discretion with respect to whether it

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<sup>41</sup> *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.

<sup>42</sup> Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 69-70. *Babcock v Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 at para. 18 (McLachlin C.J.’s comments were made in regards to federal legislation, but previous OIPC orders recognize its applicability to interpreting s. 12 of FIPPA: see, for example, Order 02-38 at para. 69).

<sup>43</sup> *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) [*Aquasource*] at para. 39.

<sup>44</sup> *Aquasource* at para. 48.

will disclose the information subject to s. 12(1).”<sup>45</sup> They also note that “unlike many other exceptions to disclosure, s. 12 does not require consideration of whether or not harm could reasonably be expected to result from disclosure of the information.”<sup>46</sup>

[52] The Public Bodies submit that s. 12(1) applies because the information at issue was either considered by the Treasury Board, Cabinet or by both. Starting with records considered by the Treasury Board, I will generally outline below how the Public Bodies have categorized the disputed records and their reasons as to why s. 12(1) applies to the information that they have withheld in the records.

#### *Treasury Board Records*

[53] Except for one record, the Public Bodies claim the Treasury Board considered the records at issue at a meeting that took place on September 8, 2016 or on December 5, 2016. As a result, the Public Bodies submit that s. 12(1) applies because the information in the records were part of the body of information considered by the Treasury Board.

[54] The one exception is a Treasury Board submission dated July 2016. The Public Bodies say this document was a draft that evolved into a final Treasury Board submission and includes information found within that final submission. Therefore, the Public Bodies argue that s. 12(1) applies to the draft submission because it would reveal information that was later considered by the Treasury Board.

[55] In support of its position, the Public Bodies rely on the affidavit from the Policy Director and an affidavit from the Acting Director of Treasury Board (Acting Director) to establish, among other things, that there were Treasury Board meetings where this information was considered. I will consider and discuss the contents of these affidavits in my analysis further below.

#### *Cabinet Records*

[56] The Public Bodies argue that Cabinet considered some of the withheld information at a Cabinet meeting that took place on September 14, 2016, October 19, 2016 or on December 14, 2016.

[57] The Public Bodies note there is some information that was not directly considered by Cabinet, but submit the disclosure of this information would reveal information that Cabinet or a Cabinet committee did consider at one of its meetings.

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<sup>45</sup> Public Bodies submission dated May 28, 2021 at para. 28.

<sup>46</sup> *Ibid.*

[58] In support of its position, the Public Bodies rely on the Policy Director's affidavit and on an affidavit from a records management officer in Cabinet Operations, Premier's Office to establish, among other things, there were Cabinet meetings where this information was considered. I will consider and discuss the contents of these affidavits in my analysis further below.

### **Applicant's position on s. 12**

[59] The applicant submits the Public Bodies have applied s. 12(1) too broadly and have not adequately considered the exceptions under s. 12(2)(c). The applicant also alleges the HOME program was crafted as part of an election campaign and important details were withheld from the public, including any alternatives that were "ignored or rejected by politicians seeking re-election so soon after the decision."<sup>47</sup> The applicant argues that "there is no harm in the public knowing everything about the program" since it has been cancelled.<sup>48</sup>

### **Section 12(1) – substance of deliberations**

[60] The first question in the s. 12 analysis is to consider whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. I will discuss, in turn, each category of records starting with the Treasury Board records and then the Cabinet records.

#### *Treasury Board Records*

[61] The Public Bodies submit the Treasury Board considered all or some of the information in the following records:

- Three copies of a "Treasury Board Submission - Request for Decision" dated September 2, 2016.<sup>49</sup>
- A "Treasury Board Staff Briefing Note" attached to an email dated November 30, 2016.<sup>50</sup>
- A "Treasury Board Submission - Request for Decision" dated November 25, 2016.<sup>51</sup>

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<sup>47</sup> Applicant's submission at para. 22.

<sup>48</sup> Applicant's submission at para. 23.

<sup>49</sup> Pages 9-64 and 97-152 of HOU-2016-65165 and pp. 9-64 of OOP-2016-65166. The Public Bodies argue that this record was also considered by Cabinet. I will first consider whether the Treasury Board considered this information. If so, then it is not necessary to also consider whether Cabinet considered that information.

<sup>50</sup> Pages 82-96 of HOU-2016-65165.

<sup>51</sup> Pages 179-194 of HOU-2016-65165.

- A draft “Treasury Board Submission – Request for Decision” dated July 20, 2016.<sup>52</sup>

[62] Section 12 only applies to the Executive Council (Cabinet) or one of its committees; therefore, the question I must address at this point is whether the Treasury Board is a Cabinet committee. Section 12(5) of FIPPA allows the Lieutenant Governor in Council to designate a committee for the purposes of s. 12. The *Committees of the Executive Council Regulation* lists the Treasury Board as a designated committee.<sup>53</sup> I, therefore, find the Treasury Board was a Cabinet committee for the purposes of s. 12.

[63] The next question is whether disclosing the Treasury Board records would reveal the substance of the Treasury Board’s deliberations. With the exception of the July 2016 submission, the Acting Director attests that the records at issue were considered by the Treasury Board at a meeting on September 8, 2016 or on December 5, 2016.<sup>54</sup> The Acting Director explains that he reached this conclusion by reviewing the Treasury Board’s “internal historical records” which shows that the records were provided to the Treasury Board at those meetings for deliberation.<sup>55</sup>

[64] With regards to the July 2016 Treasury Board submission, the Acting Director refers to this document as a draft and says it is “not clear that this document was ever reviewed by Treasury Board.”<sup>56</sup> However, he notes that the “substance” of this document is found in the September 2016 Treasury Board submission which he says was considered by the Treasury Board.<sup>57</sup>

[65] The Policy Director also confirms that the July 2016 Treasury Board submission was a draft that evolved into the September 2016 Treasury Board submission. The Policy Director says he reviewed the draft and attests that it includes information found in the September 2016 submission.<sup>58</sup>

[66] The Policy Director further confirms that the September 2016 and the November 2016 Treasury Board submissions were provided to the Treasury Board for a decision. He says the records were prepared for submission to the Treasury Board by staff from the Office, Treasury Board or BC Housing. As the basis for his conclusions, the Policy Director says he reviewed the information at

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<sup>52</sup> Pages 83-146 of OOP-2016-65166.

<sup>53</sup> B.C. Reg. 229/2005.

<sup>54</sup> September 2016 Treasury Board Submission (pp. 9-64 and 97-152 of HOU-2016-65165 and pp. 9-64 of OOP-2016-65166) and November 2016 Treasury Board Submission (pp. 179-194 of HOU-2016-65165).

<sup>55</sup> Acting Director’s affidavit at paras. 13-15.

<sup>56</sup> Acting Director’s affidavit at para. 12, referring to the July 2016 Treasury Board Submission (pp. 83-146 of OOP-2016-65166).

<sup>57</sup> Acting Director’s affidavit at para. 12.

<sup>58</sup> Policy Director’s affidavit at para. 20.

issue and attests that he attended various meetings leading up to the submission of those records to the Treasury Board for their consideration.

[67] I accept the Public Bodies' evidence that there were Treasury Board meetings on September 8, 2016 and December 5, 2016. The Acting Director sufficiently explained how he reviewed internal Treasury Board records to confirm those meetings took place. There is also information in the records that confirms the Treasury Board met on September 8, 2016 and on December 5, 2016.<sup>59</sup>

[68] With the exception of the July 2016 submission, I am satisfied the information withheld in the Treasury Board records would reveal what the Treasury Board considered at those meetings. I accept the Public Bodies' evidence that the Treasury Board did consider these records. I can also tell from reviewing the disputed records that the documents were prepared for the Treasury Board's consideration and that the Treasury Board made a decision related to that information.<sup>60</sup>

[69] Regarding the July 2016 submission, the Acting Director and the Policy Director explain how this submission, which was not considered by the Treasury Board, still reveals information the Treasury Board did consider at one of its meetings. They both contend that the July 2016 submission contains information that is the same or substantially similar to the September 2016 submission.

[70] Previous OIPC orders have concluded that s. 12(1) applies to information that would reveal the same or similar information considered by Cabinet or one of its committees.<sup>61</sup> I have compared the July 2016 submission to the September 2016 submission and find there is some information that is the same or similar to information that was considered by the Treasury Board. As a result, I find this information would reveal the substance of a Cabinet committee's deliberations.

[71] However, there is some information in the July 2016 submission that is not the same or similar to information in the September 2016 submission.<sup>62</sup> I do find, though, that this information consists of advice, recommendations and policy recommendations prepared for submission to the Treasury Board.

[72] For instance, some of the information at issue under a section titled "implications and considerations" reveals policy considerations about some initiatives and proposals.<sup>63</sup> There is also information disclosed in the records that

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<sup>59</sup> Pages 82 and 181 of HOU-2016-65165.

<sup>60</sup> Page 181 of HOU-2016-65165.

<sup>61</sup> Order F09-26, 2009 CanLII 66959 (BC IPC) at paras. 21-23.

<sup>62</sup> For instance, information located in the July 2016 submission at pp. 83 and 84 of OOP-2016-65166.

<sup>63</sup> Page 84 of OOP-2016-65166. The heading is openly disclosed in the record.

indicates the July 2016 submission was a draft being prepared for submission to the Treasury Board.<sup>64</sup>

[73] Therefore, even though the Treasury Board did not directly or indirectly consider this information in the July 2016 submission, I conclude that its disclosure would reveal the substance of a Cabinet committee's deliberation in accordance with s. 12(1). The term "substance of deliberations" under s. 12(1) explicitly includes any advice, recommendations or policy considerations *prepared for submission to a Cabinet committee.*

[74] To conclude, for the reasons given, I find the Treasury Board records would reveal, directly or indirectly, the substance of a Cabinet committee's deliberations.

#### *Cabinet Records*

[75] The Public Bodies argue that the September 2016 Treasury Board submission was also considered by Cabinet. Having found this record would reveal the substance of Treasury Board's deliberations, it is not necessary to also consider whether this record would reveal Cabinet's deliberations.

[76] As a result, I only need to consider whether s. 12(1) applies to the following Cabinet records:

- Two copies of a presentation slide deck titled "Downpayment Assistance Program" dated October 19, 2016.<sup>65</sup>
- Two copies of a presentation slide deck titled "Home Owner Mortgage and Equity (HOME) Partnership" dated December 14, 2016.<sup>66</sup>
- Two versions of a table titled "Summary of Provincial Housing Affordability Proposals."<sup>67</sup>
- Four copies of a document titled "Issues Note Prepared for the Minister of Finance and Minister of Natural Gas Development and Minister Responsible for Housing."<sup>68</sup>

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<sup>64</sup> Information located on pp. 80, 81 and 83 of OOP-2016-65166.

<sup>65</sup> Pages 161-178 of HOU-2016-65165 and pp. 154-171 of OOP-2016-65166.

<sup>66</sup> Pages 154-159 of HOU-2016-65165 and pp. 2-7 of OOP-2016-65166.

<sup>67</sup> Pages 4-6 of HOU-2016-65165 (dated July 7, 2016) and pp. 148-150 of OOP-2016-65166 (dated July 19, 2016).

<sup>68</sup> The information at issue is located on pp. 66, 70, 74 and 78 of HOU-2016-65165.

- A presentation slide deck titled “Review of Housing Affordability Actions” with the header “Cabinet Confidential – Draft.”<sup>69</sup>

[77] I will consider each of the records below.

Presentation slides dated October 19, 2016 and December 14, 2016

[78] The Public Bodies submit the presentation slide decks dated October 19, 2016 and December 14, 2016, were each considered by Cabinet at a meeting on those respective dates.<sup>70</sup> The records management officer believes, based on her review of “internal historical records”, that a Cabinet meeting did take place on October 19, 2016 and December 14, 2016.<sup>71</sup>

[79] The records management officer says she believes the presentation slides were distributed at those Cabinet meetings based on her knowledge of Cabinet operations and its record keeping practices. She explains that the role of Cabinet Operations includes distributing meeting materials to Cabinet ministers and to provide records of decisions following the meeting. She attests that she located an identical copy of these two presentation slides in the file for each Cabinet meeting.<sup>72</sup>

[80] The records management officer also attests that she reviewed a “record of decision” for the October 19, 2016 and December 14, 2016 Cabinet meetings.<sup>73</sup> She explains that a “record of decision” documents Cabinet’s decision on a matter deliberated at a Cabinet meeting and communicates that decision to ministers and ministries. She attests that the “record of decision” that she reviewed references the presentation slides and contains a decision about the topic of the presentation.

[81] I am satisfied the October 19, 2016 and December 14, 2016 presentation slides were considered by Cabinet. The Public Bodies evidence establishes that these documents were considered by Cabinet and that a decision was made about some of the information. There is also information, both disclosed and withheld, in the records that supports the Public Bodies’ position.<sup>74</sup> For instance, the title page of each presentation slide indicates that these documents were prepared for Cabinet. Therefore, based on the materials before me, I find disclosing these presentation slides would reveal the body of information considered by Cabinet and, thus, the substance of Cabinet’s deliberations.

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<sup>69</sup> Pages 66-79 of OOP-2016-65166.

<sup>70</sup> October presentation slides (pp. 161-178 of HOU-2016-65165 and pp. 154-171 of OOP-2016-65166). December presentation slides (pp. 154-159 of HOU-2016-65165 and pp. 2-7 of OOP-2016-65166).

<sup>71</sup> Records management officer affidavit at paras. 17 and 22.

<sup>72</sup> Records management officer affidavit at paras. 13-14 and paras. 19-20.

<sup>73</sup> Records management officer affidavit at paras. 17 and 23.

<sup>74</sup> For instance, pp. 153, 155, 160 and 168 of HOU-2016-65165.

### Tables that summarize affordable housing proposals

[82] The records at issue are two tables that outline some proposals to address affordable housing.<sup>75</sup> One table is an earlier version of the other and they both contain the same or similar information. The Policy Director deposes that the tables were drafted by his Office. The Public Bodies submit the disclosure of the information withheld in these tables would reveal the substance of Cabinet’s deliberations or “would lead an individual to be able to determine the substance or topic” of those deliberations.<sup>76</sup>

[83] The Public Bodies rely on the contents of the records and the Policy Director’s affidavit to support their assertions. The Policy Director says he reviewed the tables and believes they include information that would reveal Cabinet’s deliberations.<sup>77</sup> The Public Bodies also submit that it is clear from “the face of the record” that the information directly or indirectly reveals the substance of Cabinet’s deliberations.<sup>78</sup>

[84] Based on my own review of these tables, I am satisfied that the withheld information reveals information that Cabinet considered at one of its meetings. I can see there is information in the tables that is the same or similar to information in the presentation slides that Cabinet considered on October 19, 2016 or December 14, 2016.

[85] Some of the withheld information is also the same or similar to information in the Treasury Board records. The Public Bodies have disclosed some information in the records that indicates the Treasury Board considered the withheld information.<sup>79</sup> Taking all of this into account, I conclude the disclosure of the withheld information would reveal information considered by Cabinet and one of its committees.

### Issues note prepared for two Ministers

[86] The record at issue is a document titled “Issues Note Prepared for the Minister of Finance and Minister of Natural Gas Development and Minister Responsible for Housing.” It identifies and discusses the impact of certain federal mortgage regulation changes on the HOME program.<sup>80</sup> There are four copies in

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<sup>75</sup> Pages 4-6 of HOU-2016-65165 (dated July 7, 2016) and pp. 148-150 of OOP-2016-65166 (dated July 19, 2016).

<sup>76</sup> Public Bodies’ submission dated May 28, 2021 at para. 57.

<sup>77</sup> Policy Director’s affidavit at para. 23.

<sup>78</sup> *Ibid.*

<sup>79</sup> For instance, pp. 3-4 of HOU-2016-65165.

<sup>80</sup> This information is disclosed in the record.

the responsive records and the Public Bodies withheld the same paragraph in each copy.<sup>81</sup>

[87] The Public Bodies submit that the withheld information references a Cabinet decision and would, therefore, reveal the substance of Cabinet's deliberations or "would lead an individual to be able to determine the substance or topic" of those deliberations.<sup>82</sup> The Policy Director attests that he reviewed the information at issue and echoes the Public Bodies assertions.<sup>83</sup>

[88] I agree that the withheld information does include details about Cabinet's decision on a matter. There is information withheld in the records that indicates Cabinet met on a certain date regarding the matter.<sup>84</sup> It is also clear to me that the withheld information would have formed part of the body of information that Cabinet considered in making a decision on this topic. Therefore, I conclude the withheld information would reveal the substance of Cabinet's deliberations in accordance with the BC Court of Appeal's interpretation of s. 12.<sup>85</sup>

Draft presentation slide

[89] The record at issue is a presentation slide deck titled "Review of Housing Affordability Actions."<sup>86</sup> It is included as an attachment to an email which identifies the presentation as a draft with the date of August 2016.<sup>87</sup> The Public Bodies submit that this draft presentation "includes information regarding deliberations of Cabinet, Treasury Board and the Planning and Priorities Committee."<sup>88</sup> It says the Planning and Priorities Committee was a designated committee at that time under s. 12.

[90] The Public Bodies disclosed most of the presentation, but withheld information on several pages within the draft presentation and two entire pages in the appendix of this presentation.<sup>89</sup> The Policy Director deposes that he reviewed the withheld information and says he believes this information "reveals the substance of deliberations of Executive Council [Cabinet] or would lead an individual to be able to determine the substance or topic deliberated on by Executive Council."<sup>90</sup>

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<sup>81</sup> The information at issue is located on pp. 66, 70, 74 and 78 of HOU-2016-65165.

<sup>82</sup> Public Bodies submission dated May 28, 2021 at para. 59.

<sup>83</sup> Policy Director's affidavit at para. 25.

<sup>84</sup> Page 181 of HOU-2016-65165.

<sup>85</sup> *Aquasource* at para. 39.

<sup>86</sup> Pages 66-79 of OOP-2016-65166.

<sup>87</sup> Email openly disclosed and located on p. 65 of OOP-2016-65166.

<sup>88</sup> Public Bodies submission dated May 28, 2021 at para. 58.

<sup>89</sup> Information located on pp. 68, 69, 74 and 78-79 of OOP-2016-65166.

<sup>90</sup> Policy Director's affidavit at para. 24.

[91] Based on my own review of the records, I find some of the information within the draft presentation reveals information that the Treasury Board would later consider or that is similar to information in the Treasury Board records.<sup>91</sup> As previously noted, I am satisfied the Treasury Board is a Cabinet committee for the purposes of s. 12. Therefore, I conclude the withheld information would reveal the substance of a Cabinet's committee's deliberations.

[92] However, I conclude none of the information within the draft presentation would reveal the substance of the Planning and Priorities Committee's deliberations. Although I find the Planning and Priorities Committee was a Cabinet committee for the purposes of s. 12,<sup>92</sup> the Public Bodies withheld information that, at most, reveals the general topic considered by this committee.<sup>93</sup> This information reveals nothing about the committee members' discussion, opinions, arguments or debates on that subject. Therefore, I find s. 12(1) does not apply to this information. My finding is consistent with past OIPC orders which have found that information that identifies the subject of discussion without revealing the substance of those deliberations do not fall within the s. 12(1) exception.<sup>94</sup>

[93] The remaining information at issue is two pages in the appendix of the draft presentation.<sup>95</sup> Although it is not clear from the records or the Public Bodies' evidence when Cabinet considered this information, the term "substance of deliberations" under s. 12(1) explicitly includes any advice, recommendations or policy considerations *prepared for submission* to Cabinet or one of its committees.

[94] I can see that the information at issue consists of some options for Cabinet's consideration. There is also information disclosed in the records that shows the draft presentation was prepared for submission to Cabinet, for example, the header of the document reads "Cabinet Confidential – Draft."<sup>96</sup> Taking all of this into account, I conclude the information at issue qualifies as recommendations prepared for submission to Cabinet. Therefore, I conclude that its disclosure would reveal the substance of Cabinet's deliberations in accordance with s. 12(1).

[95] To conclude, for the reasons given, I find the Treasury Board records and most of the Cabinet records would reveal, directly or indirectly, the substance of

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<sup>91</sup> Information located on pp. 69 and 74 of OOP-2016-65166.

<sup>92</sup> The *Committees of the Executive Council Regulation*, B.C. Reg. 229/2005 lists the Planning and Priorities Committee as a designated committee.

<sup>93</sup> Information located on p. 68 of OOP-2016-65166.

<sup>94</sup> Order F08-17, 2008 CanLII 57360 at para. 18-24 and Order F08-18, 2008 CanLII 57357 at paras. 46-47, both upheld either wholly or in part at *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 93-100.

<sup>95</sup> Information located on pp. 78-79 of OOP-2016-65166.

<sup>96</sup> Information located on p. 66 of OOP-2016-65166.

Cabinet or one of its committee's deliberations. I conclude, however, that none of the information at issue would reveal the substance of the Planning and Priorities Committee's deliberations.

**Section 12(2)(c): background explanations or analysis**

[96] The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) apply to the information that I found would reveal the substance of the Treasury Board's deliberations or Cabinet's deliberations.

[97] Section 12(2) says:

12(2) Subsection (1) does not apply to

- (a) information in a record that has been in existence for 15 or more years,
- (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
  - (i) the decision has been made public,
  - (ii) the decision has been implemented, or
  - (iii) 5 or more years have passed since the decision was made or considered.

[98] Sections 12(2)(a) and (b) clearly do not apply in this case and neither party suggests they do. The only circumstance that may be relevant is s. 12(2)(c).

[99] Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and have also said that analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."<sup>97</sup> However, any information of a factual nature that is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).<sup>98</sup>

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<sup>97</sup> Order No. 48-1995, July 7, 1995 at p. 12. The Court in *Aquasource* confirmed that Order No. 48-1995 correctly interpreted s. 12(2)(c) in relation to s. 12(1). Other BC Orders that have taken the same approach include Order 01-02, 2001 CanLII 21556 (BC IPC).

<sup>98</sup> Order No. 48-1995, July 7, 1995 at p. 13 and *Aquasource* at para. 49.

[100] The Public Bodies argue that any background explanations and analysis in the records are “inextricably interwoven with the policy proposals and on that basis are not subject to section 12(2)(c).”<sup>99</sup> The applicant contends that s. 12(2)(c) applies since the records at issue relate to a decision that was made public and that was also implemented.

[101] I can see that there is some background explanation or analysis in the records, including factual information, that was provided to the Treasury Board in making a decision or is the same or similar to such information.<sup>100</sup> I do not find this information is interwoven with any advice, recommendations or policy considerations. The Public Bodies have in fact easily separated some of this information and disclosed it to the applicant elsewhere in the records.<sup>101</sup> As a result, I conclude this information is background explanations or analysis within the meaning of s. 12(2)(c).

[102] The next question is whether the information I find qualifies as background explanation or analysis meets the remaining requirements of s. 12(2)(c). For s. 12(2)(c) to apply to information that is found to be “background explanations or analysis”, one of the following must also apply: (i) the decision has been made public, (ii) the decision has been implemented, or (iii) 5 or more years have passed since the decision was made or considered.

[103] The information that I found qualifies as background explanations and analysis applies to the HOME program and several other programs identified in the records. Section 12(2)(c) applies when it has been 5 or more years since a decision about these programs was considered. The Public Bodies’ evidence indicates that the Treasury Board considered a decision about these programs in September 8, 2016 and December 5, 2016.<sup>102</sup> It has now been 5 or more years since that time. As a result, I find s. 12(2)(c)(iii) applies in these circumstances.

[104] To conclude, except for the information that I found falls under s. 12(2)(c), I find the Public Bodies have established that they are required under s. 12(1) to refuse to disclose the information at issue. I have highlighted the s. 12(2)(c) information in a copy of the records that is provided to the Public Bodies along with this order.

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<sup>99</sup> Public Bodies’ submission dated May 28, 2021 at para. 67 and submission dated June 29, 2021 at para. 4.

<sup>100</sup> Information located on pp. 9, 13-15, 84, 97, 101-103, 179 and 180 of HOU-2016-65165 and pp. 9, 13-15, 71, 83, 85, 86, 115 of OOP-2016-65166. Most of this information is the same or similar.

<sup>101</sup> For example, information located on pp. 68 and 76 of OOP-2016-65166.

<sup>102</sup> For instance, Acting Director’s affidavit at paras. 13-15 and p. 181 of HOU-2016-65165.

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## **CONCLUSION**

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

1. Subject to item 3 below, I require the Public Bodies to refuse access to part of the records withheld under s. 12(1).
2. I confirm the Public Bodies' decision to refuse access to the information withheld in the records under s. 14.
3. The Public Bodies are not required under s. 12(1) to refuse access to the information highlighted in a copy of the records provided to the Public Bodies with this order.
4. I require the Public Bodies to give the applicant a copy of the records with the highlighted information unredacted. The Public Bodies must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of those records.

[106] Under s. 59 of FIPPA, the Public Bodies are required to give the applicant access to the information it is not required to withhold by January 24, 2022.

December 13, 2021

### **ORIGINAL SIGNED BY**

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Lisa Siew, Adjudicator

OIPC File Nos.: F17-69820 & F17-69822