



Order F24-20

BRITISH COLUMBIA SECURITIES COMMISSION

Emily Kraft
Adjudicator

March 20, 2024

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the BC Securities Commission (BCSC) for records relating to the BCSC's penalty collection rate, amendments to the *Securities Act*, and the BCSC's collection action against the applicant. The BCSC withheld the information in dispute under ss. 12(1) (Cabinet confidences), 13(1) (advice or recommendations), and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The adjudicator found that ss. 12(1), 13(1), and 22(1) applied to some, but not all, of the information in dispute and ordered the BCSC to disclose the information it was not authorized or required to withhold under those sections. The adjudicator also ordered the BCSC to reconsider its decision to withhold certain information under s. 13(1) because there was insufficient evidence that the BCSC considered all relevant factors in exercising its discretion to withhold that information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 ss. 12(1), 12(2)(c), 13(1), 13(2)(a), 13(2)(g), 13(2)(m), 22(1), 22(2), 22(2)(e), 22(2)(h), 22(3)(b), 22(3)(d), 22(3)(f), and 22(4)(e).

INTRODUCTION

[1] The applicant requested that the British Columbia Securities Commission (BCSC) provide them with access to various communications and records related to the BCSC's penalty collection rate, amendments to the *Securities Act*,¹ and the BCSC's collection action against the applicant.

[2] After receiving the applicant's request, the BCSC provided the Ministries of Finance and Attorney General (Ministries) with a subset of the responsive records relating to amendments to the *Securities Act* and asked them to provide

¹ RSBC 1996, c 418.

their views on disclosure of those records to the applicant. The Ministries recommended that the BCSC withhold some information from those records under ss. 12(1) (Cabinet confidences), 13(1) (advice or recommendations), and 14 (solicitor-client privilege) of FIPPA.²

[3] Following its consultation with the Ministries, the BCSC provided the applicant with the responsive records but withheld some information and pages under ss. 12(1) (Cabinet confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege), 15 (harm to law enforcement), 16 (harm to intergovernmental relations) 17 (harm to financial or economic interests), 21(1) (harm to business interests of a third party) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.

[4] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the BCSC's decision. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[5] The Ministries were notified of this inquiry and invited to participate as "appropriate persons" under s. 54(b) of FIPPA. The Ministries made submissions, but those submissions only address the BCSC's application of ss. 12(1), 13(1), and 14 to the subset of the responsive records that the BCSC asked the Ministries to review. The parties refer to those records as the "Ministry Records" in their submissions, so I will also refer to them as such in this order.

PRELIMINARY MATTERS

Issues and information no longer in dispute

Sections 15, 16, 17, and 21 of FIPPA

[6] In their inquiry submission, the applicant states that they do not dispute any of the BCSC's redactions made on the basis of ss. 15, 16, 17, or 21 of FIPPA.³ Therefore, I conclude ss. 15, 16, 17, and 21 are no longer in dispute in this inquiry and it is not necessary for me to make a decision about any of the information withheld under those sections.⁴

² Ministries' initial submission at paras 10-12.

³ Applicant's response submission at para 51.

⁴ I note that the responsive records contain many duplicates and the BCSC's application of ss. 15 and 16 to those duplicates is inconsistent. Specifically, the BCSC has indicated that it is withholding information under ss. 15 and 16 in some records but indicated that it is only applying s. 13(1) to the same information in duplicate copies of those records. For example, see BCSC002602 and BCSC003171, BCSC001130 and BCSC000313 (p 17), and BCSC002546 and BCSC001142. The BCSC made submissions about how ss. 15 and 16 apply to the information in those records, so I assume it intended to withhold that information under ss. 15 and 16 in all copies of those records, even though it failed to indicate those sections in some cases.

Section 14 of FIPPA

[7] The applicant also says in their inquiry submission that they only dispute the BCSC's decision to withhold a small amount of the information in dispute under s. 14 on the basis that the BCSC had not provided adequate evidence demonstrating that s. 14 applied to that information.⁵ Based on my review of the BCSC's submissions and evidence, I also determined that the BCSC had not provided sufficient evidence to prove its claim of privilege over the information in dispute. Given the importance of solicitor-client privilege, I wrote to the parties and invited the BCSC to provide further submissions or evidence regarding the information in dispute under s. 14.⁶ In response, the BCSC submitted a table of records describing the information in dispute in more detail. The applicant responded to the BCSC's submission and stated they no longer dispute the application of s. 14 to any information in the records.⁷ I conclude s. 14 is no longer an issue in this inquiry.

Section 61(2) of the Administrative Tribunals Act⁸

[8] The BCSC withheld a small amount of information from the responsive records under s. 61(2) of the *Administrative Tribunals Act* (ATA). That provision lists several types of records and information to which FIPPA does not apply. This issue was not listed in the investigator's fact report or notice of inquiry, and none of the parties made submissions about it.

[9] Since s. 61(2) of the ATA is an issue of scope, I gave the BCSC and the applicant the opportunity to make additional submissions about whether s. 61(2) applies to the information the BCSC withheld under that section. In response, the BCSC released most of the information it was withholding under s. 61(2) to the applicant and the applicant advised that they are no longer seeking access to the remaining information the BCSC withheld under s. 61(2).⁹ I conclude that s. 61(2) of the ATA is not an issue in this inquiry.

Commission Staff Information

[10] In their submission, the applicant stated that they do not dispute the BCSC's application of s. 22(1) to the information defined in the BCSC's submissions and evidence as "Commission Staff Information."¹⁰ Accordingly, I conclude the Commission Staff Information, as defined in the BCSC's submission and evidence, is not in dispute.

⁵ Applicant's response submission at para 51.

⁶ Letter dated January 5, 2024.

⁷ Applicant's supplemental submission dated January 24, 2024.

⁸ SBC 2004, c 45.

⁹ Applicant's email dated February 7, 2024. This information appears on pages 151-155 of record BCSC000313.

¹⁰ See affidavit #2 of Privacy Officer, Exhibit K.

ISSUES

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

1. Is the BCSC authorized to refuse to disclose the information in dispute under s. 13(1)?
2. Is the BCSC required to refuse to disclose the information in dispute under ss. 12(1) and 22(1)?

[12] Under s. 57(1), the BCSC has the burden of proving that it is authorized or required to refuse to disclose the information in dispute under ss. 12(1) and 13(1). Under s. 57(2), the applicant has the burden of proving that disclosing any personal information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).¹¹ However, the BCSC has the initial burden of proving the information it is withholding under s. 22(1) is personal information.¹²

DISCUSSION

Background

The BCSC

[13] The BCSC is a provincial government agency established under the *Securities Act* and is responsible for regulating capital markets in BC through the administration of that Act. Some of the BCSC's responsibilities include investigating complaints and collecting administrative penalties against those who violate the Act's provisions.¹³

[14] The BCSC reports to the legislature through the Minister of Finance who is the minister responsible for administering the *Securities Act*.¹⁴

Proceedings against the applicant and their spouse

[15] In 2014, the BCSC's administrative tribunal found that the applicant's spouse perpetrated a fraud contrary to s. 57(b) of the *Securities Act*.¹⁵ In 2015, the tribunal ordered sanctions and penalties against the applicant's spouse,

¹¹ Schedule 1 of FIPPA says that a "third party" in relation to a request for access to a record or for correction of personal information means any person, group of persons or organization other than the person who made the request, or a public body.

¹² Order 03-41, 2003 CanLII 49220 (BCIPC) at para 10.

¹³ BCSC's initial submission at para 5.

¹⁴ BCSC's initial submission at para 3.

¹⁵ BCSC's initial submission at para 6.

including a multimillion-dollar administrative penalty. Shortly thereafter, the BCSC registered one of the penalties as a judgment of the BC Supreme Court.¹⁶

[16] In 2018, the BCSC filed proceedings against the applicant seeking to enforce the judgment against them. The BCSC advanced a claim to interests in multiple properties owned solely by the applicant and filed certificates of pending litigation (CPLs) against the titles to those properties.¹⁷

[17] Prior to the BCSC advancing its claim, in 2017, the Vancouver Sun published an article criticizing the BCSC for failing to collect unpaid fines from various respondents, including the applicant's spouse. The article also identified several real estate assets in which the applicant had an ownership interest.¹⁸ Shortly after the article was published, then Attorney General David Eby informed the public that his government would be receiving proposals from the BCSC to improve enforcement.¹⁹

[18] The applicant believes that the BCSC filed its claim against them in response to the negative publicity about the BCSC's collection record.²⁰

Amendments to the Securities Act and the applicant's claim against the BCSC

[19] Between 2017 and 2019, the BCSC worked with the Ministries to propose amendments to the *Securities Act*. The final amendments, which were brought into force in March 2020,²¹ provided the BCSC with new collections and enforcement powers, among other things.²²

[20] In 2019, the applicant applied to strike the BCSC's claims against them or alternatively cancel the CPLs registered on their properties. The BCSC opposed the application, which was heard in January 2021, and applied to amend its claim, relying on provisions of the amended *Securities Act*. The applicant believes that the BCSC's interest in recovering from their properties was front of mind for the BCSC in crafting and proposing the 2020 amendments to the *Securities Act*.²³

¹⁶ BCSC's initial submission at paras 7-8.

¹⁷ BCSC's initial submission at paras 9-10.

¹⁸ Applicant's response submission at para 16.

¹⁹ Applicant's response submission at para 19.

²⁰ Applicant's response submission at para 22.

²¹ The *Securities Amendment Act*, 2019, SBC 2019, c 38 was assented to on November 28, 2019, and was brought into force on March 2, 2020: Ministries' initial submission at paras 22-23.

²² BCSC's initial submission at para 18.

²³ Applicant's response submission at para 47.

[21] The applicant commenced a civil claim against the BCSC in 2019 for tortious abuse of process.²⁴ They assert that the BCSC had no legitimate basis to claim any estate or interest in their properties.²⁵

Applicant's access request

[22] The applicant's access request was for communications and records relating to the BCSC's penalty collection rate, media articles about the BCSC's penalty collection rate, the BCSC's collection action against the applicant, and the amendments to the *Securities Act*. The applicant says that the records sought relate to issues and allegations raised in their tortious abuse of process claim against the BCSC and whether the BCSC acted in good faith.²⁶

Records and information at issue

[23] There are 7,250 pages of records before me, many of which have been disclosed, in full or in part, to the applicant. There are various types of records in dispute, which I will describe in more detail below.

Section 12(1) – Cabinet confidences

[24] Section 12(1) requires public bodies to refuse to disclose information that would reveal the substance of deliberations of the Executive Council (Cabinet) or 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.

[25] The purpose of s. 12(1) is to protect the confidentiality of the deliberations of Cabinet and its committees and encourage candour in Cabinet discussions.²⁷ As stated by the Supreme Court of Canada, "[t]he process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet unreservedly."²⁸

[26] The Supreme Court of Canada also recently said that, "[i]n approaching assertions of Cabinet confidentiality, administrative decision makers and reviewing courts must be attentive not only to the vital importance of public access to government-held information but also to Cabinet secrecy's core

²⁴ These proceedings have been stayed until the issues in the BCSC's collection action have been determined: Applicant's response submission at para 39.

²⁵ Affidavit #2 of AD, Exhibit E.

²⁶ Applicant's response submission at para 3.

²⁷ *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para 92.

²⁸ *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 18.

purpose of enabling effective government, and its underlying rationales of efficiency, candour, and solidarity.”²⁹

[27] 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 term “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.³⁰

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

[29] The information in dispute under s. 12(1) is contained in the following records:

- Various copies and versions of a document referred to as “the Three Column Document,” which I will describe in more detail below;
- Emails and attachments;
- A meeting agenda;
- Briefing notes;
- An issue note; and
- A document titled “Fee Issue Paper.”

Three Column Document

Parties’ submissions

[30] The BCSC gave little submissions and evidence on s. 12(1). Instead, it says it repeats and relies on the submissions and evidence provided by the Ministries.

[31] The Ministries explain that, in 2018, the Minister of Finance made a formal submission to Cabinet, known as a request for legislation (RFL) setting out an extensive legislative proposal to amend the *Securities Act* and other legislation. The RFL included a description of the proposed legislative changes and the consultations undertaken. Attached to the RFL was a policy review document in

²⁹ *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 at para 61.

³⁰ *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner)* 1998 CanLII 6444 (BCCA) at para 39 [Aquasource]. See also *British Columbia (Minister of Public Safety) v British Columbia (Information and Privacy Commissioner)*, 2024 BCSC 345 at para 69 where the court found that *Aquasource* remains good law in light of the Supreme Court of Canada’s recent decision in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4.

a three-column format (the Three Column Document). The Three Column Document presented a high-level policy overview of the legislative proposal, setting out the pre-amendment legislation (first column), the proposed amendments (second column) and reasons for the proposed amendments (third column).³¹

[32] The Ministries provided affidavit evidence from the Ministry of Finance's director of capital markets policy (Director) who deposes that he helped prepare the RFL in consultation with, and based on recommendations from, the BCSC. The Director deposes that he is informed by the executive director of the Ministry's financial and corporate sector policy branch, and he believes it to be true, that the RFL was presented to Cabinet.³² Following the presentation, Cabinet decided to proceed with the proposal to amend the *Securities Act*. The Director deposes that he then worked with others in the Ministries and the BCSC to draft a bill giving effect to Cabinet's instruction to introduce the proposed amendments in the legislature. The Director deposes that he attended a meeting where the draft amendments were submitted to Cabinet.

[33] The Director further deposes that the information withheld under s. 12(1) is substantially similar to, or would reveal, the amendments submitted to Cabinet.³³ Specifically, he deposes that certain records in dispute are draft versions of the Three Column Document that are substantially similar to and reveal the substance of the Three Column Document that was submitted to Cabinet.³⁴

[34] The applicant says that the BCSC has failed to discharge its burden with respect to many records withheld under s. 12(1).³⁵

Analysis and findings

[35] Neither the BCSC nor the Ministries provided me with a copy of the Three Column Document that was actually submitted to Cabinet. Instead, the Ministries provided affidavit evidence from the Director who deposes that he was involved in preparing the RFL, that the Three Column Document was part of the RFL, that the Director was informed by the executive director that the RFL was submitted to Cabinet, and that the versions of the Three Column Document that appear in the records package are "substantially similar" to the version included in the RFL.

³¹ Affidavit of Director of Capital Markets Policy (Director) at paras 10-11.

³² The Director deposes that the executive director informed him that he participated in the presentation of the RFL to Cabinet: Affidavit of Director at para 13.

³³ Affidavit of Director at para 20.

³⁴ Specifically, records BCSC003362, BCSC003065, BCSC003089, and BCSC003487. See Affidavit of Director at para 21.

³⁵ Applicant's response submission at para 57.

[36] Previous OIPC orders have found that s. 12(1) applies to information that would reveal information that is the same or similar to information considered by Cabinet or one of its committees.³⁶ I accept the Director's evidence that a version of the Three Column Document was submitted to Cabinet as part of the RFL and that the versions of that document included in the records package are substantially similar to the version submitted to Cabinet. I conclude that the versions of the Three Column Document included in the records package would reveal the information that Cabinet considered in deciding whether to approve the legislative proposal set out in the RFL. However, I find that the headings in the versions of the Three Column Document that appear in the records do not reveal the substance of Cabinet's deliberations, so s. 12(1) does not apply to the headings.³⁷

Emails and attachments

[37] The BCSC is also withholding various emails and attachments under s. 12(1).³⁸ I can see that the emails and attachments at issue were exchanged among BCSC staff or between BCSC staff and Ministry of Finance staff and that most of them repeat the same information contained in the versions of the Three Column Document which I have found would reveal information considered by Cabinet. Therefore, I find that this information would also reveal the substance of Cabinet's deliberations.

[38] However, some of the withheld information would not reveal anything contained in the versions of the Three Column Document that appear in the records package, and neither the BCSC nor the Ministries have explained how s. 12(1) otherwise applies.³⁹ I am not persuaded that s. 12(1) applies to this information.⁴⁰

[39] I also do not see, and neither the BCSC nor the Ministries explain, how s. 12(1) applies to email headers, memo headers, greetings and pleasantries, and information about meeting times. Therefore, I find that s. 12(1) does not apply to that type of information in the emails and attachments.

Meeting agenda

[40] The BCSC withheld some information in the agenda for a meeting between the BCSC and the Assistant Deputy Minister of Finance under s. 12(1).⁴¹ I can see that some of information in the agenda would reveal

³⁶ Order F23-34, 2023 BCIPC 40 at para 52.

³⁷ For a similar finding, see Order F16-08, 2016 BCIPC 10 at para 17 and Order F19-17, 2019 BCIPC 19 at para 48.

³⁸ For instance, BCSC000102, BCSC003057, BCSC003058, BCSC3059, BCSC3067, BCSC003088, BCSC002712, BCSC003028, BCSC003055, BCSC003064, and BCSC003074.

³⁹ For instance, BCSC000102.

⁴⁰ The BCSC also withheld some of this information under s. 13(1), which I will consider below.

⁴¹ See BCSC000155. This document appears several times throughout the records.

proposed amendments contained in the versions of the Three Column Document that appear in the records, so I am satisfied that this information would reveal information considered by Cabinet. However, there is some general information that would not reveal anything contained in the versions Three Column Document that I can see, so I find s. 12(1) does not apply to that information.

Briefing notes

[41] The BCSC withheld a small amount of information under s. 12(1) from various “briefing notes” prepared by BCSC staff for the Minister of Finance. The withheld information reveals the proposed amendments contained in the Three Column Document drafts, so I am satisfied that this information would reveal information considered by Cabinet.

Issue note

[42] The BCSC also withheld the entire content of an issue note under s. 12(1). The issue note is attached to one of the briefing notes prepared for the Minister of Finance and is titled “Constitutional challenges to the BCSC’s freeze order power.”⁴² Neither the BCSC nor the Ministries make specific arguments about this issue note in their submissions. I can see that some information in the final bullet point of the issue note reveals information contained in the versions of the Three Column Document that appear in the records package. I accept that the information in the last bullet point reveals information that was considered by Cabinet. However, there is nothing in the records indicating that the rest of the information in this issue note was submitted to or prepared for Cabinet. In the absence of a clear explanation and adequate supporting evidence, I am not satisfied that the balance of the information in the issue note is subject to s. 12(1).⁴³

Fee Issue Paper

[43] The BCSC withheld the entire content of a record titled “Fee Issue Paper” under s. 12(1). Neither the Ministries nor the BCSC address this record in their submissions. Based on the surrounding records, I can see that in December 2018, the BCSC increased some of its service fees.⁴⁴ The Fee Issue Paper is about the proposed fee changes and includes explanations of the rationale behind them.

⁴² BCSC002547, BCSC002577, BCSC002584, and BCSC002603. The title of this issue note is disclosed in the briefing note that it is attached to as well as in the cover email (BCSC002575).

⁴³ The BCSC also withheld information in this record under s. 13(1), which I will consider below.

⁴⁴ See BCSC000289 at p 4.

[44] The applicant notes that there is no evidence on the nature of the Fee Issue Paper and says that it is not apparent that the withheld information would reveal the substance of Cabinet deliberations.⁴⁵

[45] The only evidence before me is the records themselves. The records mention that the Treasury Board, which is a Cabinet committee,⁴⁶ considered the BCSC's "fee proposal" in the fall of 2018.⁴⁷ However, I have insufficient evidence that the Fee Issue Paper is the same or similar to the material that was submitted to or prepared for the Treasury Board as part of the "fee proposal."

[46] The BCSC has the burden of proving that s. 12(1) applies to the information in dispute and in the absence of clear evidence or persuasive argument, I am unable to conclude that s. 12(1) applies to the Fee Issue Paper.⁴⁸

Section 12(2)

[47] 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 would reveal the substance of Cabinet's deliberations.

[48] Section 12(2) says:

(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

[49] The parties do not suggest that ss. 12(2)(a) or (b) apply, and I find that they do not apply.

[50] The applicant suggests that s. 12(2)(c) applies to the information in the first column of the Three Column Document. That column describes the pre-amendment legislation, which, the applicant argues, constitutes background

⁴⁵ Applicant's response submission at para 61(c).

⁴⁶ Order F21-63, 2021 BCIPC 72 at para 62.

⁴⁷ See BCSC000303 at p 8.

⁴⁸ The BCSC also withheld information in this record under s. 13(1), which I will consider below.

information which presumably does not reveal anything about the substance of Cabinet deliberations.⁴⁹

[51] The Ministries submit that in the context of the Three Column Document, descriptions of a particular aspect of the pre-amendment legislation are not just factual background; rather, they constitute recommendations to Cabinet about which specific aspects of the legislation need to be amended. They say that the information is clearly advice and recommendations under s. 12(1), not background explanations or analysis.

[52] Previous OIPC orders have found that background explanations under s. 12(2)(c) include “everything factual that Cabinet used to make a decision” and that analysis includes “discussion about the background explanations but would not include analysis of policy options presented to Cabinet.”⁵⁰

[53] Applying these principles, I find that the information in the first column of all versions of the Three Column Document is not background explanation or analysis. Rather, I find that this information reveals recommendations made to Cabinet about which sections of the *Securities Act* to amend. Therefore, I find that s. 12(2)(c) does not apply to any information in the versions of the Three Column Document contained in the records.

[54] I have considered whether s. 12(2)(c) applies to any of the other information I found would reveal the substance of Cabinet’s deliberations, and I find it does not.

Conclusion – s. 12(1)

[55] To conclude, I find that s. 12(1) applies to most, but not all, of the information withheld under s. 12(1), and that none of the circumstances in ss. 12(2)(a) to (c) apply. The BCSC is required to withhold the information I have found would reveal the substance of Cabinet’s deliberations.

Section 13(1) – advice or recommendations

[56] The BCSC withheld most of the information in dispute under s. 13(1). There was some overlap between the BCSC’s application of ss. 12(1) and 13(1). Given my findings above, where there is overlap between the BCSC’s application of ss. 12(1) and 13(1), I will only consider the application of s. 13(1) to the information I have found the BCSC is not required to withhold under s. 12(1).

⁴⁹ Applicant’s response submission at para 58.

⁵⁰ Order F23-34, 2023 BCIPC 40 at para 64.

[57] Section 13(1) states that 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 minister.

[58] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.⁵¹

[59] “Recommendations” include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.⁵² “Advice” has a broader meaning than “recommendations and includes an analysis of options or an opinion that involves exercising judgment and skill to weigh the significant of matters of fact on which a public body must make a decision for future action.⁵³ Section 13(1) also extends to factual or background information that is a necessary and integrated part of advice or recommendations. This includes factual information compiled and selected by an expert, using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.⁵⁴

[60] Section 13(1) applies to information that would directly reveal advice or recommendations, as well as information that would enable an individual to draw accurate inferences about advice or recommendations provided by or for a public body.⁵⁵

[61] In order for s. 13(1) to apply, there must have been a deliberative process where one or more advisors provided advice or recommendations.⁵⁶

[62] Previous OIPC orders have found that s. 13(1) does not apply to the following types of information:

- General descriptions of the subject matter to which the advice or recommendations relates unless that description reveals the actual advice or recommendations that the advisor offered.⁵⁷
- Directions and instructions to staff.⁵⁸

⁵¹ *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 43-45.

⁵² *Ibid* at paras 23-24.

⁵³ *Ibid* at para 26; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

⁵⁴ Order F20-08, 2020 BCIPC 9 at para 39 (last bullet point).

⁵⁵ Order F16-11, 2016 BCIPC 13 at para 21.

⁵⁶ Order F23-03, 2023 BCIPC 4 at para 12.

⁵⁷ Order F23-03, 2023 BCIPC 4 at para 12.

⁵⁸ Order F19-27, 2019 BCIPC 29 at para 32.

- Questions and requests for advice unless the question or request for advice would allow for accurate inferences as to advice actually received.⁵⁹
- Factual information in the form of a “heads up” (i.e., information that informs or alerts someone about an action or step that has been or will be taken).⁶⁰
- Information that communicates a decision that has already been made.⁶¹
- Updates about a program, unrelated to any decision a public body must make.⁶²
- Opinions that are not related to any pending action or decision.⁶³
- Information that has already been disclosed to an applicant, since disclosing this information would not “reveal” anything for the purposes of s. 13(1).⁶⁴

[63] The first step in the s. 13 analysis is to determine whether the information in dispute would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether the information falls into any of the categories listed in s. 13(2) or whether it has been in existence for more than 10 years under s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, that information cannot be withheld under s. 13(1).

[64] The information in dispute under s. 13(1) is contained in various types of records, including:

- A briefing document, also referred to as a decision note, dated November 22, 2017;
- A memo dated October 18, 2017;
- Briefing notes dated September 18, 2018, January 15, 2019, June 11, 2019, and October 8, 2019;
- Estimates notes;
- Issue notes;
- The Fee Issue Paper;
- Emails and attachments;
- Communications materials;
- Board meeting materials; and
- Draft publications.

⁵⁹ Order F19-27, 2019 BCIPC 29 at para 32.

⁶⁰ Order F15-52, 2015 BCIPC 55 at para 25.

⁶¹ Order F19-27, 2019 BCIPC 29 at para 32.

⁶² Order F18-41, 2018 BCIPC 44 at para 21.

⁶³ Order F23-49, 2023 BCIPC 57 at para 16.

⁶⁴ Order F20-32, 2020 BCIPC 38 at para 36.

Analysis and findings

November 22, 2017, briefing document

[65] This document was prepared for the Minister of Finance by Ministry and BCSC staff and is titled “Potential Actions to Increase BC Securities Commission (BCSC) Collection Rates.”⁶⁵ The information in this document is organized under the following headings: date, title, issue, background, and discussion. The BCSC disclosed the information under the date, title, and issue headings, and most of the information under the background heading. It withheld all the information under the discussion heading. I find that the withheld information in the discussion section is recommendations about proposed courses of action to increase BCSC collection rates. I also find that the withheld information in the background section is a necessary part of the recommendations. However, I find there is one sentence that does not fall under s. 13(1) because it was disclosed in other copies of this briefing document that appear elsewhere in the records.

[66] I can see that there are two other documents that were provided to the Minister of Finance alongside the briefing document. These documents are titled “BCSC enforcement sanctions collection,”⁶⁶ and “BCSC administrative and criminal investigations.”⁶⁷ I have reviewed these documents and the surrounding context, and I find that the information in these documents consists of factual and background information that was compiled and selected by BCSC and Ministry staff and is integral to the recommendations in the briefing document. I am satisfied that this information qualifies as advice or recommendations under s. 13(1). The content of these documents is also summarized in an email from a BCSC employee, so I find that information would also reveal advice or recommendations under s. 13(1).⁶⁸

[67] However, there is some information in the BCSC enforcement sanctions collection document that does not fall under s. 13(1) because it is disclosed in other copies of this document that appear elsewhere in the records. The BCSC is not authorized to withhold that information because it would not “reveal” anything for the purposes of s. 13(1).

⁶⁵ This document and draft versions of it appear several times throughout the records. For instance, BCSC003142, BCSC003086, BCSC000177, and BCSC000179.

⁶⁶ This document and draft versions of it appear dozens of times throughout the records. For instance, BCSC003177 and BCSC002761. I note that the BCSC withheld some information under s. 22(1) in a few copies of this document, but it withheld the same information under s. 13(1) in over two dozen other duplicate copies. I assume the BCSC meant to withhold this information under s. 13(1) in every copy of this document.

⁶⁷ This document appears several times throughout the records. For instance, BCSC003178, BCSC003588, BCSC003608, and BCSC004843.

⁶⁸ This email appears several times throughout the records. For instance, BCSC003115 at p 2.

October 18, 2017 memo

[68] This memo is titled “BCSC Collection Strategy Messaging”⁶⁹ and is from the BCSC’s media relations and public affairs advisor (Media Advisor) to the BCSC executive director. The information in this memo is organized under three headings: background, collections results, and key messages. The BCSC withheld a small amount of information in the collections results section and all of the information in the key messages section. The BCSC did not provide any submissions about how s. 13(1) applies to this record. However, based on my review of this record, I am satisfied that all the withheld information is advice and recommendations from the Media Advisor to the executive director about the key messages to convey to the public regarding the BCSC’s collections strategy.

Briefing notes

[69] The BCSC is withholding four “briefing notes” dated September 18, 2018, January 15, 2019, June 11, 2019, and October 8, 2019, under s. 13(1). These briefing notes appear dozens of times in the records in various forms. All of the briefing notes are addressed to the Minister of Finance and are from the BCSC chair. The BCSC withheld the briefing notes almost in their entirety under s. 13(1).⁷⁰

[70] The BCSC explains that the BCSC chair and the Minister of Finance routinely meet to discuss matters concerning the mandate and activities of the BCSC. The BCSC says the briefing notes were prepared by BCSC staff for the chair in advance of meetings with the Minister and that they would reveal or would allow accurate inferences to be drawn about advice or recommendations developed by BCSC staff for the chair that was shared with the Minister of Finance in relation to the BCSC’s work on securities regulation.⁷¹ It says that certain finalized briefing notes contain advice and recommendations to the Minister on programs or activities that fall within the BCSC’s mandate.⁷²

[71] The BCSC says that the OIPC has consistently recognized that records such as briefing notes and background information relied on for briefing notes are a type of record that fall within s. 13. It points me to several OIPC orders to support its position.⁷³

⁶⁹ This document appears several times throughout the records. For instance, BCSC000016, BCSC000034, BCSC000039, and BCSC000143.

⁷⁰ The BCSC disclosed the general topics discussed in the briefing notes.

⁷¹ BCSC’s initial submission at paras 70-73.

⁷² BCSC’s initial submission at para 75.

⁷³ Order F18-18, 2018 BCIPC 21, Order F17-30, 2017 BCIPC 32, and Order F16-26, 2016 BCIPC 28.

[72] For the reasons that follow, I find that s. 13(1) does not apply to most of the withheld information in the briefing notes.

[73] I find that most of the withheld information in the briefing notes is factual information about the BCSC's progress and activities in a number of areas, including collections and enforcement, work on *Securities Act* amendments, and financial forecasts and media strategies. This information only reveals decisions that the BCSC had already made, steps that the BCSC had already taken, and general information about BCSC procedures. Based on my review of the records, this information was not connected to any particular deliberative processes but was provided to the Minister of Finance to keep her generally apprised of the BCSC's activities.

[74] The briefing notes themselves also all begin with the following statement: “[t]hank you for the opportunity to update you on the work we have been doing since we last met...” or “[t]hank you for the opportunity to keep you apprised of the work we have been doing since we last met...” I find that this is evidence that the purpose of the briefing notes was to provide updates, not advice or recommendations. As mentioned above, providing an update on a program, unrelated to any decision a public body must make, does not fall within s. 13(1).⁷⁴

[75] I have considered the OIPC orders cited by the BCSC, and none of them persuade me that s. 13(1) applies to the briefing notes in dispute here. I acknowledge that previous orders have found that s. 13(1) has applied to advice or recommendations contained in briefing notes, but the fact that a document is titled or characterized by a public body as a briefing note does not mean that it necessarily contains advice or recommendations.

[76] In this case, I am unable to find that most of the withheld information in the briefing notes would reveal advice or recommendations based on the evidence and argument provided by the BCSC.

[77] However, I do find that there is a small amount of information in the briefing notes that would reveal some recommendations the BCSC made to the Ministry of Finance about amendments to the *Securities Act*, so I accept that information falls under s. 13(1). There is also a small amount of information in some of the briefing notes about certain issues the Minister should consider in deciding whether to prioritize a particular BCSC project, and I find that information is also covered by s. 13(1).⁷⁵

[78] The BCSC also withheld draft versions of some of the briefing notes.⁷⁶ A document is not advice or recommendations just because it is a draft.⁷⁷ However,

⁷⁴ Order F18-41, 2018 BCIPC 44 at para 21 citing Order F15-52, 2015 BCIPC 55 at para 28.

⁷⁵ For instance, BCSC000293 at p 7.

⁷⁶ For instance, BCSC001206.

⁷⁷ Order 03-37, 2003 CanLII 49216 (BC IPC) at para 59.

some draft versions of the briefing notes contain editorial comments and suggestions made in the margins or within the text of the drafts, which I accept qualify as advice or recommendations under s. 13(1).

Estimates notes

[79] The BCSC withheld information in certain documents called “estimates notes.”⁷⁸ The estimates notes concern the following topics: enforcement and collections,⁷⁹ fintech initiatives and crypto-assets,⁸⁰ client focused reforms,⁸¹ and mutual fund reform.⁸² The estimates notes are all dated March 2019.

[80] The BCSC explains that “estimates” for each fiscal year are presented to the legislative assembly by the Minister of Finance. It says the estimates notes in dispute were prepared to assist the Minister of Finance with answering questions about the proposed budget for the 2020 fiscal year and other questions from the opposition in the legislative assembly during the estimates debates.⁸³ I gather that the Minister of Finance generally expects to receive questions about different BCSC program areas when she presents the estimates each fiscal year. The BCSC says the estimates notes were prepared by BCSC staff, at times in consultation with Ministry of Finance staff, as advice and recommendations for the Minister of Finance.

[81] The applicant submits that certain information in the estimates notes appears to be factual material that is not integral to the advice and recommendations within the record.⁸⁴

[82] The estimates notes only contain factual information about their respective topics. However, I accept that the estimates notes were provided to the Minister of Finance to assist her with answering questions from members of the legislative assembly about the BCSC’s programs. I can see that some of the information is worded in a way to present certain facts in the best light. Although the BCSC did not expressly say so, I find that the Minister had the option to choose what information in the estimates notes, if any, to convey to the legislative assembly. Therefore, I am satisfied that the information in the estimates notes constitutes

⁷⁸ These documents are referred to as estimates notes in their footers and in cover emails.

⁷⁹ BCSC002956 is the final version of this estimate note. The BCSC says the other copies of this estimate note that appear throughout the records are drafts.

⁸⁰ BCSC003599 is the final version of this estimate note. The BCSC says the other copies of this estimate note that appear throughout the records are drafts.

⁸¹ This estimate note appears several times throughout the records. For instance, BCSC003123. The BCSC says that all copies of this estimate note that appear in the records are drafts.

⁸² BCSC003597 is the final version of this estimate note. The BCSC says the other copies of this estimate note that appear throughout the records are drafts.

⁸³ BCSC’s initial submission at paras 86 and 88.

⁸⁴ Applicant’s response submission at para 68(f).

recommendations developed by the BCSC for the Minister about what information to tell the legislative assembly during the 2019 estimates debates.⁸⁵

[83] I note that, on December 15, 2020, the Minister of Citizens' Services issued a ministerial directive under s. 71.1(1) of FIPPA establishing estimates notes as a category of records available to the public without a request under FIPPA.⁸⁶ The ministerial directive is effective as of December 15, 2020, and it only applies to ministries. It does not change my finding with respect to the application of s. 13(1). However, I will address this matter further in my discussion about the BCSC's exercise of discretion below.

Issue notes

[84] The BCSC withheld information from a number of "issue notes" which the BCSC says were provided to the Minister of Finance by BCSC staff. The BCSC explains that, in general, issue notes provide advice and recommendations from the BCSC executive director and the chair to the Minister about specific issues.⁸⁷ It says they may include key facts for advice and recommendations and potential outcomes of the topic issue.⁸⁸

[85] I will consider the application of s. 13(1) to the withheld information in each of the issue notes, referred to by title, below.

Constitutional challenge to the BCSC's freeze order power

[86] I found above that the BCSC is not required or authorized under s. 12(1) to withhold most of the information in this issue note.⁸⁹ The BCSC also applied s. 13(1) to the information it withheld from this record. As explained above, this issue note is attached to a briefing note prepared by the BCSC for the Minister of Finance.

[87] The issue note outlines the background of the matter it concerns, the "key facts," and the potential outcomes. I do not see, and neither the BCSC nor the Ministries adequately explain, how the withheld information in this issue note would reveal advice or recommendations. Based on what I can see in this issue note, its purpose was to notify the Minister about the issue, not to provide any advice or recommendations regarding the issue. I find that s. 13(1) does not apply to any of the withheld information in this issue note.

⁸⁵ For a similar finding, see Order F23, 2023 BCIPC 40 at para 82.

⁸⁶ Directive 01-2020: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/initiatives-plans-strategies/open-government/open-information/ministerial_directive_01-2020_estimates_notes.pdf

⁸⁷ BCSC's initial submission at para 92.

⁸⁸ BCSC's initial submission at para 93.

⁸⁹ This record appears several times throughout the records. For instance, BCSC002547.

Consultation on proposed fee changes

[88] I can see that this issue note was prepared by the BCSC for the Ministry of Finance.⁹⁰ The issue note includes the BCSC's communications plan, key messaging, and background information about the BCSC's proposed fee changes. Although the BCSC did not make specific submissions about this record, it is apparent on its face that it contains recommendations to the Ministry about public messaging regarding the proposed fee changes. However, it also includes some information about the BCSC's media strategy which I find only serves to inform and provide a "heads up" for the Ministry. That kind of information does not reveal advice or recommendations, so s. 13(1) does not apply.

[89] There is also a related document titled "Advice to Minister" which contains information similar to what is in the issue note.⁹¹ The withheld information in this document is clearly recommendations under s. 13(1).

BCSC Executive Compensation and Retention Payments

[90] I can see that this issue note was also provided to Ministry of Finance staff by the BCSC.⁹² It contains suggested responses to anticipated questions about BCSC executive compensation and retention payments: a matter that was the subject of media requests. The information in this issue note is clearly recommendations under s. 13(1).

[91] There is another related document that is titled "Advice to Minister" and also contains suggested responses to possible questions about executive compensation and retention payments.⁹³ I find the information withheld from this document is also recommendations under s. 13(1).

BCSC005475

[92] The BCSC says that the record it refers to as "BCSC005475" is another issue note containing advice to the Minister of Finance.⁹⁴ I have reviewed this record and I find that it is not an issue note. Rather, it is a PDF that lists BCSC employees who received retention payments and the amounts of those payments. It contains only factual information. The BCSC has not adequately explained how this information would reveal advice or recommendations and I find that s. 13(1) does not apply.

⁹⁰ BCSC003096

⁹¹ BCSC003099.

⁹² BCSC005473.

⁹³ BCSC005474.

⁹⁴ BCSC's initial submission at para 127(l).

[93] I will also note here that the BCSC says the issue notes were “in some cases provided to the Minister to prepare her for possible questions on draft legislation during question-and-answer period in the legislative assembly.”⁹⁵ There is nothing in the records indicating that any of the issue notes were used for such a purpose. Other than the issue note about the BCSC’s proposed fee changes, I do not see how the issue notes in dispute relate to any draft legislation. In my view, the BCSC’s evidence on this point is too vague and I do not find it persuasive.

Fee issue paper

[94] I found above that s. 12(1) does not apply to the Fee Issue Paper. The BCSC also applied s. 13(1) to the withheld information in this record. As explained above, in December 2018, the BCSC increased some of its service fees.⁹⁶ The Fee Issue Paper was prepared by the BCSC with the assistance of the Ministry of Finance and discusses the fee changes, provides relevant background information, and explains the underlying rationale for the increases.

[95] In my view, most of the information in this record is the BCSC’s recommendations about the fee changes, including some factual and background information that is integral to the recommendations. Therefore, I am satisfied that this information qualifies as advice and recommendations under s. 13(1). However, I find s. 13(1) does not apply to any of the headings in this document because they do not reveal any advice or recommendations.⁹⁷

Emails and attachments

[96] The BCSC withheld entire emails and attachments and portions of emails and attachments under s. 13(1). I have reviewed the information in the emails and attachments, and I find that s. 13(1) applies to some of the withheld information because it is:

- Advice or recommendations developed for the BCSC about how to respond to media requests or questions from a member of the public.⁹⁸
- Advice or recommendations developed for the BCSC about actions to take in response to criticism from the media.⁹⁹
- Advice or recommendations developed for the BCSC about how to respond to certain requests for information made under FIPPA.¹⁰⁰

⁹⁵ BCSC’s initial submission at para 100; affidavit #2 of Privacy Officer at para 70.

⁹⁶ See BCSC000289 at p 4.

⁹⁷ For a similar finding, see Order F23-57, 2023 BCIPC 67 at para 98.

⁹⁸ For instance, BCSC000007, BCSC000035, BCSC002995, BCSC005337, and BCSC005344.

⁹⁹ For instance, BCSC000042 and BCSC000044.

¹⁰⁰ For instance, BCSC000032 and BCSC003047.

- Advice or recommendations about what to include in documents such as briefing notes,¹⁰¹ “backgrounders,”¹⁰² presentations,¹⁰³ annual service plans and service plan reports,¹⁰⁴ and the Fee Issue Paper.¹⁰⁵
- Information that would reveal or allow a reader to infer some recommendations made to the Ministry of Finance about how to improve the BCSC’s fine collection efforts or recommendations about amending the *Securities Act*.¹⁰⁶

[97] However, I find that s. 13(1) does not apply to the remaining information in the emails and attachments because it is:

- Information about decisions already made.¹⁰⁷
- Information about what has been done and what will be done.¹⁰⁸
- Information about what occurred during meetings that does not reveal any advice or recommendations.¹⁰⁹
- Information that reveals the fact that advice or recommendations were provided but does not reveal the substance of the advice or recommendations.¹¹⁰
- Information that only reveals discussion topics for a meeting.¹¹¹
- Opinions or speculations that do not relate to a decision about future action.¹¹²
- Questions and answers about factual information.¹¹³
- Factual information that does not relate to any deliberative process.¹¹⁴
- Requests for advice that do not reveal the advice received.¹¹⁵
- Information about administrative matters such as scheduling interviews.¹¹⁶
- Information that reveals a direction or a request for a certain action as opposed to advice or recommendations.¹¹⁷

¹⁰¹ For instance, BCSC004154, BCSC004186, BCSC004187, and BCSC005292.

¹⁰² BCSC005272.

¹⁰³ BCSC005280.

¹⁰⁴ For instance, BCSC003563.

¹⁰⁵ For instance, BCSC003576.

¹⁰⁶ For instance, BCSC000184, BCSC000212, BCSC000297, BCSC000299, and BCSC003040.

¹⁰⁷ For instance, BCSC000009, BCSC003170, and BCSC005320.

¹⁰⁸ For instance, BCSC000015, BCSC000114, BCSC002982, and BCSC005387.

¹⁰⁹ For instance, BCSC000183.

¹¹⁰ For instance, 005334.

¹¹¹ BCSC003554 at p 1.

¹¹² For instance, BCSC000015 at p 2, BCSC00031 at p 1-2, BCSC000087 at p 1, BCSC000457 at p 1, and BCSC003611 at p 1.

¹¹³ For instance, BCSC000031 at p 2, BCSC000128 at p 2, BCSC001149 at p 3, BCSC004281 at pp 2-4, and BCSC005595.

¹¹⁴ For instance, BCSC000140 and BCSC000141.

¹¹⁵ For instance, BCSC004228.

¹¹⁶ For instance, BCSC000035 at pp 2-3.

¹¹⁷ For instance, BCSC000015, BCSC003565, BCSC003579, and BCSC004154.

- Information in the body of certain emails that is disclosed in the subject lines of the emails.
- Information that is withheld in some copies of emails and attachments that is disclosed in duplicate copies that appear in the records.¹¹⁸
- Emails from a journalist requesting information.¹¹⁹
- Emails from a member of the public requesting information.¹²⁰
- Emails headers, subject lines, greetings, and signature lines that do not reveal any advice or recommendations.

[98] The BCSC is not authorized under s. 13(1) to withhold this information.

Communications materials

[99] I can see that many of the records in dispute were prepared to assist the Minister of Finance or BCSC executives in answering questions from the legislative assembly's Committee of the Whole or from the media about the following topics:

- the amendments to the *Securities Act*;
- the BCSC's fee increase;
- the BCSC's fine collection efforts; and
- a particular court case.

[100] These records include "Q and A" documents listing anticipated questions and topics and suggested responses,¹²¹ and "key messaging" documents outlining the recommended language to use and information to share when discussing particular subject matters.¹²² I am satisfied that this type of information is advice or recommendations.¹²³

[101] There is also a record that contains answers to specific questions about BCSC fine collection matters received from a member of the public.¹²⁴ The surrounding records indicate that those answers were not directly provided to the member of the public, but prepared to serve as talking points for the executive director to guide a discussion with the individual.¹²⁵ As such, I find they are

¹¹⁸ For instance, information that is withheld on BCSC000035, BCSC003053, BCSC001144, BCSC002589, and BCSC002654 is disclosed elsewhere in the records.

¹¹⁹ For instance, BCSC000035 at p 4.

¹²⁰ For instance, BCSC002952.

¹²¹ These documents appear in draft and final forms in the records package. For instance, BCSC000043, BCSC000295, BCSC000985-000988, BCSC001166, BCSC005317, and BCSC005373.

¹²² For instance, BCSC002593.

¹²³ For a similar finding, see Order F21-58, 2021 BCIPC 67 at paras 23-24 and Order F19-41, 2019 BCIPC 46 at paras 19-20.

¹²⁴ BCSC002984.

¹²⁵ See BCSC002978 at p 3.

advice and recommendations about how to respond to that individual's questions. However, the BCSC also applied s. 13(1) to the questions themselves, which are clearly not advice or recommendations, so the BCSC is not authorized to withhold that information. There is another document that outlines suggestions about what kind of information to provide to the individual.¹²⁶ I find that information also qualifies as advice or recommendations. However, some of the information is phrased as a direction or instruction as opposed to a suggestion, so s. 13(1) does not apply.¹²⁷

[102] The BCSC also withheld information in a PowerPoint presentation titled "Summary of BCSC Collections."¹²⁸ The BCSC says the presentation contains "draft advice and recommendations for responding" to the member of the public's questions.¹²⁹ The BCSC says that it showed this PowerPoint presentation to the member of the public.¹³⁰ The PowerPoint presentation does not contain advice or recommendations about how to respond to the individual's questions. It only contains factual information relevant to their questions. The BCSC does not provide sufficient evidence or persuasive argument to support a finding that the withheld information is advice or recommendations. I am not persuaded that s. 13(1) applies.

Board meeting materials

[103] The BCSC withheld some information under s. 13(1) from its board meeting materials, including:

- board meeting agendas;¹³¹
- board meeting minutes;¹³²
- its executive director's monthly and quarterly reports to the board;¹³³
- reports and memos from various employees, external organizations, and internal committees, including the BCSC's audit¹³⁴ and human resources committees;¹³⁵ and
- PowerPoint presentations made to the board regarding various topics.

[104] The BCSC submits that the information withheld from these records "constitutes advice and recommendations on law, policy, programs or activities,

¹²⁶ BCSC002960.

¹²⁷ BCSC002960 at pp 1-2.

¹²⁸ BCSC002953

¹²⁹ BCSC's initial submission at para 124(i).

¹³⁰ Affidavit #2 of Privacy Officer at para 89.

¹³¹ For example, BCSC000309 at p 1.

¹³² For example, BCSC000310 at p 26.

¹³³ For example, BCSC000309 at p 12 and BCSC000311 at p 10.

¹³⁴ For example, BCSC000310 at p 67.

¹³⁵ For example, BCSC000310 at p 71.

enforcement actions or other important matters for the board's consideration, deliberation, and oversight."¹³⁶

[105] I have reviewed the board meeting agendas and minutes, the executive director's monthly and quarterly reports and the other internal and external reports and memos, and I find that some of the withheld information would reveal advice or recommendations developed by or for the BCSC.¹³⁷ However, the remaining information does not qualify as advice or recommendations because it is:

- Updates about programs and initiatives that do not reveal any advice or recommendations.¹³⁸
- Information about decisions that have already been made.¹³⁹
- Information that is withheld on some pages but disclosed on others.¹⁴⁰
- Resolutions passed by the board.¹⁴¹ The resolutions only reveal the decisions the board made; they do not reveal any advice or recommendations the board considered in reaching its decisions.
- Financial information that does not appear to be connected to any decision-making process.¹⁴²
- Draft agendas that do not reveal any advice or recommendations.¹⁴³

[106] There is also some information in the board minutes that reveals proposed amendments to the rules of certain associations, regulatory organizations, and exchanges, including the Mutual Fund Dealers Association, the Investment Regulatory Organization of Canada, and the Canadian Securities Exchange.¹⁴⁴ The BCSC did not address this information in its submissions. The proposed amendments appear to have been developed by the organizations themselves. In the absence of any adequate explanation, I am not persuaded that these proposed amendments would reveal advice or recommendations developed by or for the BCSC. As such, I find s. 13(1) does not apply to this information.

[107] Additionally, the BCSC withheld some information under s. 13(1) in an audit planning report that was prepared by an independent auditor for the BCSC. The report was prepared in October 2019 and relates to the planning of the fiscal 2020 audit that would be performed by the independent auditor beginning in December 2019. The BCSC withheld general information about the upcoming

¹³⁶ BCSC's initial submission at para 138.

¹³⁷ For instance, BCSC000310 at pp 113-116.

¹³⁸ For instance, BCSC000309 at p 15.

¹³⁹ For instance, BCSC001130 at p 6.

¹⁴⁰ For instance, information that is withheld on pp 79-80 of record BCSC000315 is disclosed elsewhere in that record.

¹⁴¹ For instance, BCSC000309 at pp 4 and 10 and BCSC000310 at pp 30-31.

¹⁴² For instance, BCSC000312 at p 76.

¹⁴³ For instance, BCSC000313 at p 3.

¹⁴⁴ For instance, BCSC000291 at p 5.

audit, example audit opinions, and information about new accounting standards.¹⁴⁵ I do not see, and the BCSC does not adequately explain, how this information qualifies as advice or recommendations. I find s. 13(1) does not apply.¹⁴⁶

[108] As mentioned above, the BCSC also withheld information in several PowerPoint presentations that were presented at various board meetings. I will consider whether s. 13(1) applies to the information withheld from each of these presentations, organized by their titles, below.

Strategic planning for FY2020

[109] This presentation was prepared by the BCSC's senior management committee.¹⁴⁷ I can see that it identifies a number of potential priorities for the BCSC to focus on for the 2020 fiscal year. It includes background information about why each potential priority area is important. In my view, this information qualifies as advice or recommendations under s. 13(1). However, some of the withheld information is requests for opinions and feedback that I find does not reveal any advice or recommendations, and some withheld information only reveals broad next steps for the BCSC's service plan. Section 13(1) does not apply to that information.

TSX Venture Exchange Annual Presentation to BCSC

[110] One of the presentations was prepared for the board by TSX Venture Exchange Inc. (TSX).¹⁴⁸ The surrounding records indicate that the TSX prepares a presentation for the BCSC every year. I can see that, in preparation for the presentation, the BCSC chair wrote a letter to the TSX managing director and requested that they provide an update on market conditions and discuss their views on issues related to securities.¹⁴⁹ The chair's letter said that she was "looking forward to exchanging views with [the TSX managing director] on important issues of mutual interest..." The presentation includes 54 slides and covers a variety of topics.

[111] The BCSC relied on s. 13(1) to withhold information on 20 of the slides. It did not make specific arguments about how s. 13(1) applies to this information.

[112] On its face, most of the withheld information is factual information and not advice or recommendations. For instance, the withheld information includes

¹⁴⁵ BCSC001608 at pp 127, 132, 148, and 154-160. I also note that the information that is withheld on p 127 of BCSC001608 is disclosed elsewhere in that record.

¹⁴⁶ I note that the BCSC published the final independent auditor's report for the fiscal year 2020 in one of its annual service plan reports.

¹⁴⁷ BCSC000310 at p 3.

¹⁴⁸ BCSC000312.

¹⁴⁹ See letter to TSX at BCSC000312 at p 2.

information about the TSX's public interest mandate,¹⁵⁰ numerical data and other information about the TSX's activities, plans, processes, or strategies,¹⁵¹ and information about certain regulatory challenges faced by the TSX.¹⁵² Some of the withheld information reveals changes that the TSX was considering making to one of its own policies.¹⁵³ I do not see, and the BCSC has not adequately explained, how this information qualifies as advice or recommendations developed by or for the BCSC. I find that s. 13(1) does not apply to the above information. However, I do find that there is a small amount of information on two of the slides that clearly reveals recommendations developed for the BCSC about regulatory matters.¹⁵⁴ I conclude this information qualifies as recommendations under s. 13(1).

BC Securities Commission Value Proposition Framework

[113] The BCSC disclosed most of the information in this presentation but withheld some information recommending why the BCSC should develop a "value proposition."¹⁵⁵ I accept that this information qualifies as recommendations under s. 13(1).

The BCSC Collections Story

[114] The BCSC explains that this presentation was prepared for a "board education session."¹⁵⁶ The BCSC says generally that board education sessions are held for board members to inform them of proposed approaches to different program areas. It says this PowerPoint presentation includes "proposed approaches for the collections program for the board to consider under the purview of regulation and policy making."¹⁵⁷ It does not provide any further explanation about how s. 13(1) applies to the withheld information in this presentation.

[115] I do not see any proposed approaches in the presentation. Rather, I find that it only contains factual information about the BCSC's collections history and current collections processes. The BCSC does not adequately explain how this factual information qualifies as advice or recommendations. I find the BCSC has failed to meet its burden of proof with respect to the information in this record and I conclude s. 13(1) does not apply.

[116] I note that BCSC005489 is a similar version of this same PowerPoint presentation that the BCSC says was emailed to one of its public relations

¹⁵⁰ BCSC000312 at pp 17-18

¹⁵¹ BCSC000312 at pp 6, 22-25, 33, 35-40.

¹⁵² BCSC00312 at p 49.

¹⁵³ BCSC000312 at p 53.

¹⁵⁴ BCSC000312 at pp 27-28.

¹⁵⁵ BCSC000313 at pp 139-140.

¹⁵⁶ BCSC004308.

¹⁵⁷ BCSC's initial submission at para 140.

professionals for their “advice and recommendations” regarding its contents. It also says that this version of the presentation was “prepared as a communications approach for addressing collections at a high level.”¹⁵⁸ It is not clear to me what the BCSC means by this statement. In my view, the BCSC has not adequately explained how this version of the presentation qualifies as advice or recommendations. I conclude s. 13(1) does not apply.

Draft publications

[117] The BCSC is withholding several draft versions of its annual service plans and service plan reports in their entirety under s. 13(1). It says that it released some copies of its service plans and service plan reports in the responsive records except for draft copies which deviated from the final versions.¹⁵⁹ I note that the BCSC publishes its final service plans and service plan reports on its website. The BCSC explains that it received advice and recommendations from BCSC staff, Ministry of Finance staff, CABRO staff and Treasury Board staff about the content of the service plans and service plan reports.¹⁶⁰

[118] Section 13(1) does not apply to drafts simply because they are drafts.¹⁶¹ Section 13(1) only applies to information in drafts that would reveal advice or recommendations. I can see that the drafts contain editorial comments and suggestions, which I accept are advice or recommendations under s. 13(1). Further, I can see that the portions of text that are subject to the editorial comments and suggestions often differ from the final versions of the same text. On this basis, I find that a reader could compare the final versions of these records with the drafts to infer the advice or recommendations contained in the editorial comments.¹⁶² Accordingly, I find that those portions of text also reveal advice or recommendations under s. 13(1).

[119] The BCSC is also withholding a draft news release in its entirety under s. 13(1).¹⁶³ It says that this draft was provided to the director of enforcement for his comment and review.¹⁶⁴ I have reviewed the final version of the news release that was published on the BCSC’s website, and I do not see how a reader could infer any advice or recommendations based on what is contained in the draft copy. The BCSC has not adequately explained how this record would reveal any advice or recommendations. I find that s. 13(1) does not apply.

¹⁵⁸ BCSC’s initial submission at para 127(p).

¹⁵⁹ BCSC’s initial submission at para 110.

¹⁶⁰ BCSC’s initial submission at para 111.

¹⁶¹ Order F14-44, 2014 BCIPC 47 at para 32.

¹⁶² For a similar finding, see Order F15-33, 2015 BCIPC 36 at para 23.

¹⁶³ BCSC005319.

¹⁶⁴ BCSC’s initial submission at para 134(b).

[120] The BCSC also withheld other draft news releases as well as “backgrounders” that contain editorial suggestions made by BCSC staff.¹⁶⁵ I am satisfied that the editorial suggestions are advice or recommendations under s. 13(1). As with the draft service plans and service plan reports, I am also satisfied that a reader could compare the draft and final versions of some of these records and draw accurate inferences about advice or recommendations contained in the editorial suggestions. Accordingly, I find that some of the text in some of these drafts would also reveal advice or recommendations under s. 13(1).

Other records

[121] There are a number of records that do not fit into any of the categories above. These records, and my findings, are as follows.

[122] I find that some of the withheld information in the following records would reveal advice or recommendations under s. 13(1):

- Handwritten notes: these appear to reveal the BCSC’s recommended amendments to the *Securities Act*, anticipated questions from the media about those amendments, and key messaging.¹⁶⁶
- Draft versions of a letter to the editor prepared by BCSC staff: in my view, these documents reveal proposed approaches to responding to criticism from the media about the BCSC’s collection rates.¹⁶⁷
- An agenda for a meeting between the BCSC and the Deputy Minister of Finance, including appendices: there is a small amount of information that reveals advice developed by the BCSC about a particular securities-related matter. However, the remaining withheld information is only updates about BCSC work.¹⁶⁸
- A document titled “Proposed Narratives for Testing”: this document contains proposals about how to frame certain BCSC issues.¹⁶⁹
- A table listing news articles about the BCSC and suggested actions to take in response.¹⁷⁰
- A table listing the BCSC’s recommended amendments to the *Securities Act*.¹⁷¹
- A list of suggested topics for media training for the BCSC executive director.¹⁷²

¹⁶⁵ For instance, BCSC001084 and BCSC005328.

¹⁶⁶ BCSC000279 and BCSC000288.

¹⁶⁷ For instance, BCSC000077. The letter to the editor does not appear to have been published.

¹⁶⁸ This agenda appears several times throughout the records. For instance, BCSC000155, BCSC005590, BCSC005594, BCSC005606, and BCSC005611.

¹⁶⁹ BCSC000081.

¹⁷⁰ BCSC000002.

¹⁷¹ BCSC000304. However, s. 13(1) does not apply to the headings in these documents.

¹⁷² BCSC002958.

- A project proposal outline.¹⁷³
- A draft Supreme Court of British Columbia application response: in my view, the withheld information in this document is advice or recommendations from the BCSC’s legal counsel about what to include in the application response.¹⁷⁴

[123] I find that the withheld information in the following records do not reveal any advice or recommendations under s. 13(1):

- A memo to the BCSC’s legal counsel about a FIPPA access request: this memo only reveals actions BCSC staff took in response to a FIPPA access request.¹⁷⁵
- An agenda for an internal BCSC meeting: some of the withheld information only reveals topics of discussion for the meeting.¹⁷⁶ The remaining withheld information is handwritten notes that are only partially legible to me. The BCSC says the notes contain “internal staff discussion” about a number of issues.¹⁷⁷ I find that the information I can decipher is not advice or recommendations, and the BCSC’s submission does not persuade me that the remaining information qualifies as advice or recommendations.
- Documents that list factual information about collections matters: the BCSC says that these documents are notes about “proposed approaches to ongoing matters.”¹⁷⁸ Based on my review of these documents, I find they only list factual information about the BCSC’s past collections efforts in a number of files. I am not satisfied that s. 13(1) applies.¹⁷⁹

Sections 13(2) and (3)

[124] The next step in the s. 13(1) analysis is to consider whether any of the circumstances under ss. 13(2) or (3) apply to the information I found would reveal advice or recommendations. Subsections 13(2) and (3) identify certain types of records and information that a public body may not withhold under s. 13(1).

[125] The BCSC and the Ministries argue that none of the categories listed under s. 13(2) apply.

¹⁷³ BCSC000086 at p 12.

¹⁷⁴ BCSC004484.

¹⁷⁵ BCSC000160.

¹⁷⁶ BCSC000281.

¹⁷⁷ Affidavit #2 of Privacy Officer at para 116.

¹⁷⁸ Affidavit #2 of Privacy Officer at para 117.

¹⁷⁹ BCSC003620 and BCSC003621.

[126] The applicant argues that ss. 13(2)(a) and 13(2)(m) apply to some of the information in dispute.

[127] During my preliminary review of the records, I also determined that s. 13(2)(g) is a relevant circumstance to consider, and I gave the applicant and the BCSC an opportunity to make submissions on whether that subsection applies to a particular record in dispute.¹⁸⁰ I will outline the parties' submissions below.

Section 13(2)(a) – factual material

[128] Section 13(2)(a) says the head of a public body must not refuse to disclose any factual material under s. 13(2)(a). "Factual material" is narrower than "factual information" and means background facts in isolation which are not intermingled with provided advice or recommendations.¹⁸¹ Section 13(2)(a) does not apply to factual information where the factual information has been compiled by an expert as a necessary part of that expert's advice.¹⁸²

[129] The applicant says that s. 13(2)(a) likely applies to some of the information the BCSC has withheld under s. 13(1).

[130] I found above that certain factual information in the records qualifies as advice or recommendations under s. 13(1). I am satisfied that this factual information is either an integral part of the advice or recommendations or itself constitutes advice or recommendations. I find s. 13(2)(a) does not apply to any of the information in dispute.

Section 13(2)(g) – final report

[131] Section 13(2)(g) says that a public body must not refuse to disclose under s. 13(1) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities.

[132] One of the records in dispute is a report that was prepared by an external consultant for the BCSC. It is included in the board's November 7, 2019, meeting materials and is titled "Succession Planning Review Report" (Consultant Report).¹⁸³ The Consultant Report reviews the BCSC's succession management practices and provides recommendations for improving them.

[133] The Consultant Report examines, for example, whether:

¹⁸⁰ I did not provide the Ministries with an opportunity to make submissions about this record because it was not part of the Ministry Records.

¹⁸¹ Order F24-12, 2024 BCIPC 16 at para 77.

¹⁸² *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

¹⁸³ BCSC1608 pp 224-240.

- The purpose and objectives for succession planning are clear and understood.
- Emergency/interim replacement plans are in place for mission-critical roles.
- Comprehensive success profiles are in place for critical roles.
- Succession plans include short and long-term options.
- Succession plans consider performance, potential, aspirations, best impact, and diversity.
- Potential is measured and explored in terms of real indicators and depth vs. breadth.
- Assessments are selected, scaled to the need, focused on development.
- Programs are in place to grow high potential talent, people with critical skills, etc.¹⁸⁴

[134] The BCSC accepts that the Consultant Report is a final report on its succession management practices. Therefore, the issues are:

1. whether the succession management practices are one of BCSC's "policies or its programs or activities;"¹⁸⁵ and
2. whether the Consultant Report is concerned with the "performance or efficiency" of the succession management practices.

Are the succession management practices a BCSC "program or activity"?

[135] The BCSC says that its succession management practices are not a "program or activity" under s. 13(2)(g). It says that succession management practices are aimed at managing personnel and identifying and developing specific high-potential employees for critical roles within an organization.

[136] Alternatively, the BCSC argues that, if the succession management practices are a program or activity, then they are part of a broader program or activity related to human resource management, so s. 13(2)(g) does not apply. It cites Order F12-02, where the adjudicator found as follows:

I agree with the PHSA that s. 13(2)(g) applies when the scope of the audit covers the performance or efficiency of the public body as a whole. I also agree with the PHSA that s. 13(2)(g) applies when the scope of the audit covers a program as a whole. Conversely, it does not apply when the scope of the audit is limited to particular departments of a public body or restricted to portions of its programs. It does apply, however, with respect to an audit of a policy.

¹⁸⁴ This information is disclosed on p 226 of BCSC001608.

¹⁸⁵ It is clear that the Consultant Report is not on the performance or efficiency of the BCSC as a whole.

[137] Section 13(2)(g) was amended on November 14, 2011. The current wording of s. 13(2)(g) is “a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities.” Before November 14, 2011, s. 13(2)(g) read as follows: “a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies.” Order F12-02 was released after this amendment, but it appears the adjudicator only considered the earlier version of s. 13(2)(g). Section 13(2)(g), in its current wording, is clearly not limited to a final report or final audit on a “program as a whole.”

[138] For the reasons that follow, I find that the succession management practices are a BCSC “activity” under s. 13(2)(g).

[139] FIPPA does not define the terms “program” or “activity” individually. However, the phrase “program or activity” is defined in FIPPA as follows:

“Program or activity” includes, when used in relation to a public body, a common or integrated program or activity respecting which the public body provides one or more services.

[140] The definition above begins with the word “includes,” which indicates that the definition is not exhaustive.

[141] In Order 325-1999, former Commissioner Loukidelis said that a “program” for the purpose of s. 13(2) was “an operational or administrative program that involves the delivery of services under a specific statutory or other authority.” He found that a policy review process was not a program of the public body.¹⁸⁶ In Order F16-47, the adjudicator said that a “program” or “activity” involves a public body’s designed delivery of services to more than one individual and found that a plan that only applied to a specific individual was not a program under s. 13(2)(l).¹⁸⁷

[142] In Order F19-37, the adjudicator found that the above decisions do not restrict the meaning of the word “program” to that of a “service” for the purpose of FIPPA. The adjudicator considered the Canadian Oxford Dictionary definition of “program,” which is “a course of activities or actions undertaken to achieve a certain result.” In that case, the adjudicator found that an organized effort by a public body to implement a law was a “program” for the purposes of s. 26(c) of FIPPA.¹⁸⁸

¹⁸⁶ Order 325-1999, 1999 CanLII 4017 (BC IPC) at page 4. I note that this order was issued before FIPPA was amended to add “activities” to s. 13(2)(g) and to add a definition for “program or activity.”

¹⁸⁷ Order F16-47, 2016 BCIPC 52 at para 25.

¹⁸⁸ Order F19-37, 2019 BCIPC 41 at para 30.

[143] The Concise Oxford Dictionary defines “activity” as “2. an action taken in pursuit of an objective.”¹⁸⁹ Consistent with this definition and the reasoning in Order F19-37, which I adopt, I find the term “activity” in s. 13(2)(g) is not limited to an activity that is part of a public body’s delivery of services. Rather, I find that the term “activity” is broad enough to encompass any actions taken by a public body in pursuit of a specific objective.

[144] In my view, the BCSC’s succession management practices are clearly actions taken in pursuit of an identifiable objective (that is, to identify and develop employees for critical roles within the BCSC and establish succession plans). I conclude that the succession management practices are a BCSC “activity” for the purposes of s. 13(2)(g).

Is the Consultant Report “on the performance or efficiency” of the succession management practices?

[145] FIPPA does not define the terms “performance” or efficiency.” However, the Collins English Dictionary defines “performance” as follows: “2. someone or something’s ‘performance’ is how successful they are or how well they do something”¹⁹⁰ and the Merriam-Webster Dictionary defines “efficient” as “1. productive of desired effects, especially: capable of producing desired results with little or no waste (as of time or materials).”¹⁹¹

[146] The Consultant Report reviewed the BCSC’s succession management practices relative to best practices, identified areas of strength and areas concern, and made recommendations for improving those practices. I am satisfied that the Consultant Report is concerned with the performance or efficiency of the BCSC’s succession management practices.¹⁹²

Conclusion on s. 13(2)(g)

[147] I am satisfied that the Consultant Report is a final report on the performance or efficiency of a BCSC activity, namely its succession management practices. Accordingly, I find that s. 13(2)(g) applies to the Consultant Report, so the BCSC is not authorized to withhold any portion of it under s. 13(1).¹⁹³

Section 13(2)(m) – information that has been cited publicly

¹⁸⁹ Concise Oxford Dictionary, 10th ed. (Oxford: Oxford University Press, 1999).

¹⁹⁰ <https://www.collinsdictionary.com/dictionary/english/performance>.

¹⁹¹ <https://www.merriam-webster.com/dictionary/efficient>.

¹⁹² For a similar finding on performance or efficiency, see Order F11-04, 2011 BCIPC 4 at para 54.

¹⁹³ Order F11-04, 2011 BCIPC 4 at para 56.

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

[149] The applicant submits that s. 13(2)(m) may apply to information in the Q and A documents about the *Securities Act* amendments that were prepared by Ministry of Finance and BCSC staff to assist the Minister of Finance in answering questions about the amendments in a meeting of the legislative assembly's Committee of the Whole. The Q and A documents contain proposed responses to anticipated questions about the *Securities Act* amendments.

[150] The applicant says that *Securities Amendment Act* was subject to a section-by-section review, with substantive discussion and questions from the legislature on the nature and purpose of each of the amendments. It says that “the OIPC would likely be able to determine whether and how the discussions on [the *Securities Amendment Act*] sections linked to or arose from” the Q and A documents.¹⁹⁴

[151] The applicant provided me with copies of the October 28, 2019, to October 31, 2019 Hansard debates of the legislative assembly in support of their position.¹⁹⁵

[152] The applicant's argument is somewhat unclear to me. It seems to me that they are saying that the Minister of Finance may have simply repeated the proposed responses provided in the Q and A documents during the Hansard debates (in other words, followed the recommendations in the Q and A documents). However, that would not engage s. 13(2)(m). Section 13(2)(m) applies when the head of a public body has publicly cited advice or recommendations as the basis for making a decision. I have reviewed the Q and A documents as well as the Hansard debates, and I am not satisfied that the BCSC publicly cited any advice or recommendations from the Q and A documents as the basis for making any particular decision or formulating a policy. I find that s. 13(2)(m) does not apply.

Section 13(3) – information in a record that has existed for 10 or more years

[153] Under s. 13(3), any information in a record that has been in existence for 10 or more years cannot be withheld under s. 13(1). The records in dispute here are not that old, so I find s. 13(3) does not apply.

Exercise of discretion under s. 13(1)

¹⁹⁴ Applicant's response submission at para 69.

¹⁹⁵ Affidavit #1 of ISF, Exhibit L; Affidavit #1 of AD, Exhibits I-L.

[154] Section 13 is a discretionary exemption to access under FIPPA and a public body must exercise that discretion in deciding whether to refuse access to information that it is authorized to withhold. A public body must only consider proper and relevant factors when making this determination.¹⁹⁶ Previous OIPC orders have stated that when exercising discretion to refuse access under s. 13(1), a public body should typically consider factors such as the age of the records, the public body's past practice in releasing similar records, and the nature and sensitivity of the records.¹⁹⁷

[155] If a public body has failed to exercise its discretion, the Commissioner can require it to do so. The Commissioner can also order the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or the decision failed to take into account relevant considerations.”¹⁹⁸ My role is to determine whether the BCSC properly exercised its discretion to withhold the information in dispute under s. 13(1), not to substitute my own decision.

[156] The applicant says that the BCSC engaged in improper conduct by unlawfully tying up their properties until it could complete its work on the *Securities Act* amendments. As a result, they question whether the BCSC's severing decisions were made in bad faith or for an improper purpose, took into account irrelevant considerations, or failed to account for relevant considerations.¹⁹⁹

[157] The BCSC says that it has not acted improperly or in bad faith,²⁰⁰ and that the applicant's submission on this point is not supported by evidence.²⁰¹ It also provided affidavit evidence from its privacy officer who deposes that, in refusing to disclose the information in dispute under s. 13(1) the BCSC considered:

- The age of the records;
- The BCSC's past practice of withholding all records that contain advice or recommendations made by staff on policy direction internally or with the Ministry; and
- The nature and sensitivity of the record, particularly in relation to:
 - The highly sensitive records that brief the government on policy direction; and
 - Records that contain the BCSC's confidential risks and controls, recommendations made or implemented by the BCSC, or briefings

¹⁹⁶ Order 02-50, 2002 CanLII 42486 (BC IPC) at para 144.

¹⁹⁷ Order F19-48, 2019 BCIPC 54 at para 29.

¹⁹⁸ *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 52.

¹⁹⁹ Applicant's response submission at para 74.

²⁰⁰ BCSC's reply submission at para 7.

²⁰¹ BCSC's reply submission at para 23.

for the Minister of Finance on or about the general regulation of the securities market.²⁰²

[158] Based on the BCSC's submission, I am satisfied that it properly exercised its discretion with respect to most of the information I found it is authorized to withhold under s. 13(1). However, I find that the BCSC failed to account for relevant considerations when making its decision to withhold information in one category of records in dispute, namely, the estimates notes.

[159] As I mentioned above, in December 2020, the Minister of Citizens' Services issued a directive under s. 71.1(1) of FIPPA that estimates notes prepared for ministers are a category of records that are available to the public without a request under FIPPA. The directive is effective as of December 15, 2020, and it applies to all ministries.

[160] I recognize that the estimates notes in dispute here predate the directive. However, in my view, the BCSC should still have considered this directive in exercising its discretion to withhold the information in the estimates notes under s. 13(1).

[161] I wrote to the BCSC to confirm whether it still intended to withhold information from the estimates notes under s. 13(1) in light of the ministerial directive, and it confirmed that it does. It also made submissions that the directive allows estimates notes to be redacted to remove any information that may be excepted from disclosure under FIPPA. It says that, had the directive been in effect at the time the estimates notes were created, it would have requested the same information be withheld under s. 13(1).

[162] I found above that s. 13(1) applies to the information in the estimates notes because it is advice or recommendations to the Minister of Finance about what to say during the estimates debates. It is true that the directive allows estimates notes to be redacted to remove any information that may be excepted from disclosure under FIPPA; however, in my view, it would be illogical if the directive permitted ministries to withhold information in estimates notes under s. 13(1) on the basis that they contain advice or recommendations to ministers about what to say in the estimates debates, because that is the very nature of estimates notes.²⁰³ As such, in my view, the Minister of Citizens' Services must have issued the directive for estimates notes to be released without an access request *despite the fact* that they qualify as advice or recommendations.

[163] I am not convinced that the BCSC properly understood or considered the ministerial directive in exercising its discretion to withhold information in the estimates notes under s. 13(1). Therefore, it is appropriate for me in this case to

²⁰² Affidavit #2 of Privacy Officer at para 39.

²⁰³ I accept that the directive would allow any other kinds of advice or recommendations to be withheld under s. 13(1).

order the BCSC to reconsider its decision to refuse access to the information I found it may withhold from the estimates notes under s. 13(1).²⁰⁴

[164] Regarding the remaining records in dispute, there is nothing to indicate that the BCSC exercised its discretion under s. 13(1) improperly. I acknowledge that the applicant believes the BCSC has acted improperly during its collection action against them, but their submission does not persuade me that the BCSC exercised its discretion under s. 13(1) in bad faith or for an improper purpose, or that it took into account irrelevant considerations, or failed to account for relevant considerations with respect to any other records in dispute.

Section 22(1) – unreasonable invasion of third-party personal privacy

[165] The BCSC relied on s. 22(1) to withhold information in numerous records, including emails, board meeting materials, briefing notes, and issue notes.

[166] Section 22(1) requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Personal information

[167] Section 22(1) only applies to personal information, so the first step in the s. 22(1) analysis is to determine whether the information in dispute is personal information.

[168] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.²⁰⁵ Information is about an identifiable individual when it is reasonably capable of identifying the individual, either alone or when combined with other available sources of information.²⁰⁶

[169] Contact information is defined in FIPPA as information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, address, business email or business fax number of the individual.²⁰⁷

[170] The following information is in dispute under s. 22(1):

- Information about criminal and administrative enforcement proceedings against named individuals (Enforcement Information).

²⁰⁴ BCSC002956, BCSC003597, and BCSC003599 (the final versions of the estimates notes).

²⁰⁵ Schedule 1 of FIPPA.

²⁰⁶ Order F19-42, 2019 BCIPC 47 at para 15.

²⁰⁷ Schedule 1 of FIPPA.

- Information about what a named journalist said during an interview with the BCSC.²⁰⁸
- The name of a journalist who is no longer covering BCSC matters.²⁰⁹
- Information about named BCSC,²¹⁰ Ministry of Finance, and Treasury Board employees, specifically:
 - information about employee retirements²¹¹ and resignations;²¹²
 - photos of BCSC employees;²¹³ and
 - employees' opinions about news articles.²¹⁴
- The name of an individual who provided advice to the BCSC about a media relations matter.²¹⁵
- The surname of a member of the legislative assembly.²¹⁶
- The name, email address, phone number, postal code, and a few statements made by a member of the public who emailed the BCSC asking questions about its collection rate.
- The addresses and occupations of individuals who signed BCSC settlement agreements as witnesses.²¹⁷
- Information in a complaint letter written by a member of the public and forwarded to the BCSC (Complaint Letter).²¹⁸ In the Complaint Letter, most of which was disclosed to the applicant, the member of the public complained about two journalists who wrote stories about the BCSC. The member of the public argued that the journalists' stories contained false and misleading statements. The BCSC withheld the member of the public's email address, telephone number, postal code, and a few statements contained in the body of the Complaint Letter.²¹⁹

[171] I am satisfied that all of the information in dispute under s. 22(1) is personal information. The information is clearly about individuals who are directly identified in the records or are otherwise identifiable. While some of the information is names, email addresses, telephone numbers, and addresses, I find that this information was not provided by the individuals to enable them to be

²⁰⁸ BCSC005478.

²⁰⁹ BCSC000031.

²¹⁰ I note that the information defined as the "Commission Staff Information" in Exhibit K of affidavit #2 of Privacy Officer is not in dispute; however, there is other information about BCSC staff in the records that is not listed in Exhibit K, so I find that information is still in dispute.

²¹¹ BCSC001608 at pp 4 and 212-213.

²¹² BCSC001608 at p 213.

²¹³ BCSC000053 at pp 3-4.

²¹⁴ BCSC000457.

²¹⁵ BCSC000133.

²¹⁶ BCSC000289 at p 4.

²¹⁷ BCSC000311 at p 133 and 143.

²¹⁸ The Complaint Letter appears several times throughout the records package. For instance, BCSC005508.

²¹⁹ The member of the public told the BCSC that they could circulate the Complaint Letter as they saw fit: BCSC005423 at p 1.

contacted at a place of business, so it is personal information and not contact information under s. 22(1).

[172] I will now determine whether disclosure of the personal information in dispute would be an unreasonable invasion of third-party personal privacy.

Not an unreasonable invasion of privacy – s. 22(4)

[173] Having found that the information in dispute qualifies as personal information, the next step is to consider s. 22(4), which sets out various circumstances in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[174] The BCSC says that none of the provisions of s. 22(4) apply to the personal information in dispute.

[175] The applicant does not address s. 22(4) in their submission.

[176] In my view, s. 22(4)(e) applies to the name of an individual who provided advice to the BCSC about a media relations matter.²²⁰

[177] Section 22(4)(e) provides that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. Past orders have found that the names and personal information of public body employees fall under s. 22(4)(e) when they relate to the employees' job duties in the normal course of work-related activities.²²¹

[178] The term "employee" under FIPPA includes a "service provider," which is defined in FIPPA as a person retained under a contract to perform services for a public body.²²² The individual who provided advice to the BCSC was clearly doing work for the BCSC, and I find they were either a BCSC employee in the normal sense of the term or based on the definitions of "employee" and "service provider" in FIPPA. Further, I find that the individual provided advice to the BCSC in the normal course of their work-related activities, so s. 22(4)(e) applies to their name in this context. The BCSC is not required or authorized to withhold this information under s. 22(1). I will not consider this information any further.

[179] I have considered whether any other factors listed in s. 22(4) apply to the remaining personal information in dispute, and I find that none apply.

²²⁰ BCSC000133.

²²¹ Order F19-27, 2019 BCIPC 29 at para 51.

²²² Schedule 1 of FIPPA.

Presumed unreasonable invasion of privacy – s. 22(3)

[180] The third step in the s. 22(1) analysis is to consider whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of personal privacy.

[181] The BCSC submits that ss. 22(3)(b) and 22(3)(f) apply to the Enforcement Information in dispute under s. 22(1). It does not submit that s. 22(3) applies to any other personal information in dispute. The applicant does not address s. 22(3) in their submission.

[182] In addition to the s. 22(3) provisions raised by the BCSC, I also find s. 22(3)(d) to be relevant in this case, so I consider it below.

Section 22(3)(b) – compiled and identifiable as part of an investigation

[183] Section 22(3)(b) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[184] The BCSC says that s. 22(3)(b) applies to the Enforcement Information because it was compiled and is identifiable as part of investigations into possible violations of law, including offences under the *Securities Act* and criminal offences under the *Criminal Code*.²²³

[185] The Enforcement Information is summaries about named third parties' charges, pleas, and sentences under the *Securities Act* and the *Criminal Code*, as well as the BCSC's efforts to collect money owed by those third parties. Based on what I read in the records, this personal information is only about the outcome or results of criminal or administrative proceedings under the *Securities Act* or the *Criminal Code*. It does not appear to be information that was "compiled and is identifiable as part of an investigation" into a possible violation of the *Securities Act* or the *Criminal Code*. In my view, this type of information is not captured by s. 22(3)(b). I find that s. 22(3)(b) does not apply.

Section 22(3)(f) – third party's finances

[186] Section 22(3)(f) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

²²³ BCSC's initial submission at para 260.

[187] The BCSC says that the Enforcement Information describes third parties' finances, assets, liabilities, financial history, and creditworthiness.

[188] I can see that some of the Enforcement Information is about third parties' assets and amounts they have paid to the BCSC and amounts that remain owing to the BCSC. I accept that this information is about third-party assets and liabilities and therefore s. 22(3)(f) applies.

Section 22(3)(d) – employment history

[189] Section 22(3)(d) applies to information that relates to a third party's employment, occupational or educational history.

[190] The BCSC did not raise s. 22(3)(d), but I find that it applies to the personal information about employee retirements and resignations as this information relates to the employment histories of third parties.

[191] I have considered whether any other s. 22(3) presumptions apply to the information in dispute and find none apply.

Relevant circumstances – s. 22(2)

[192] The last step in the s. 22(1) analysis is to determine whether disclosure of the personal information in dispute would be an unreasonable invasion of a third party's personal privacy, considering all relevant circumstances including those listed in s. 22(2). It is at this step that any applicable s. 22(3) presumptions may be rebutted.

[193] The parties raise arguments that relate to s. 22(2)(e) and 22(2)(h) as well as other factors not listed in s. 22(2).

Section 22(2)(e)

[194] Section 22(2)(e) says that when deciding whether it must withhold third-party personal information, a public body must consider whether releasing the information would unfairly expose a third party to financial or other harm. Previous OIPC orders have established that "other harm" under s. 22(2)(e) includes "serious mental distress or anguish or harassment." However, such mental harm must exceed embarrassment, upset or a negative reaction to someone's behaviour.²²⁴

[195] The BCSC says that releasing some of the personal information in dispute would unfairly subject the third parties to financial or other harms under s. 22(2)(e). Specifically, it says that disclosing the Enforcement Information would unfairly subject the third parties identified in that information to serious mental

²²⁴ Order F23-60, 2023 BCIPC 70 at para 34.

distress or anguish.²²⁵ The BCSC also submits disclosing some of the information from the Complaint Letter would subject the author of that letter and the journalists referenced in the letter to unfair financial harm and “unfair career harm.”²²⁶

[196] I acknowledge that disclosing information about a third party’s criminal activity or wrongdoing might be embarrassing or upsetting to that third party. However, the BCSC’s evidence and submissions do not demonstrate that the level of harm that may fall on the third parties identified in the Enforcement Information rises to the level of “serious mental distress, anguish, or harassment.” Moreover, in order for s. 22(2)(e) to apply, the harm to a third party must relate directly to the release of the personal information in dispute.²²⁷ As I will explain more below, nearly all of the Enforcement Information is either already publicly available on the BCSC’s website, or has been reported on by the media, so I do not see how disclosure in this context would result in a new or increased risk of the third parties experiencing “serious mental distress, anguish, or harassment.”

[197] Turning to the information in the Complaint Letter, I can see that it amounts to only a few words and short sentences summarizing the nature of the complaint. I am not persuaded that disclosing this information would expose the author of the letter or the journalists referenced in the letter to unfair financial or other harm, particularly given that the BCSC has not adequately explained what it means when it says that releasing the withheld information would result in “unfair career harm” or “unfair financial harm” to those third parties.

[198] I conclude that s. 22(2)(e) does not weigh in favour of withholding any of the personal information in dispute.

Section 22(2)(h)

[199] Section 22(2)(h) requires a public body to consider whether disclosure of the personal information in dispute may unfairly damage the reputation of a person referred to in the records. Two requirements must be met in order to engage s. 22(2)(h). First, the information must damage an individual’s reputation. Second, the damage must be unfair.²²⁸

[200] The BCSC says that s. 22(2)(h) applies to some of the information it has withheld from the Complaint Letter. It says this information is “qualitative assessments of third-party journalists’ professional work” and that disclosing that

²²⁵ BCSC’s initial submission at para 263.

²²⁶ BCSC’s initial submission at para 266.

²²⁷ Order F14-10, 2014 BCIPC 12 at para 37.

²²⁸ Order F19-02, 2019 BCIPC 2 at para 69.

information “would unfairly impugn the professional reputations of the identifiable third-party journalists.”²²⁹

[201] As explained above, the BCSC disclosed the substance of the Complaint Letter to the applicant and only withheld a couple of words and short sentences in the body of the Complaint Letter that summarize the nature of the complaint. I do not see how this small amount of personal information could damage the journalists’ reputations.

[202] I conclude s. 22(2)(h) does not weigh in favour of withholding any of the personal information in dispute.

Sensitivity

[203] Sensitivity is not listed as a factor under s. 22(2), however, past orders have considered it as a relevant circumstance. For instance, where personal information is highly sensitive (e.g. medical or other intimate information), this factor weighs against disclosure.²³⁰ However, where information is innocuous and not sensitive in nature, then this factor may weigh in favour of disclosure.²³¹

[204] I find that some of the Enforcement Information is sensitive in nature because it is about the criminal convictions of certain third parties.²³² This factor weighs against disclosure.

[205] However, some of the other information withheld under s. 22(1) is entirely non-sensitive. Specifically, I find that employees’ opinions about certain news articles, the surname of a member of the legislative assembly, information about what a journalist said in an interview with the BCSC, and the name of a journalist who is no longer covering BCSC matters is not sensitive. This weighs in favour of disclosing that information.

Publicly available information

[206] Although it is not listed as a factor under s. 22(2) previous orders have found that public knowledge or public availability of the personal information in dispute is a factor that should be considered.²³³ Previous orders have said that, if the applicant or public already knows the information, then it is not private and this may weigh in favour of disclosure. In general, it would not be an

²²⁹ BCSC’s initial submission at para 270.

²³⁰ Order F21-64, 2021 BCIPC 75 at para 107.

²³¹ See for example Order F16-06, 2016 BCIPC 7 at para 38 and Order F17-13 BCIPC 14 at para 62.

²³² For a similar finding, see Order F23-83, 2023 BCIPC 99 at para 78.

²³³ Order F18-38, 2018 BCIPC 41 at para 92.

unreasonable invasion of a third party's personal privacy to disclose information that is already known.²³⁴

[207] The applicant says that this factor weighs in favour of disclosing the Enforcement Information. They say that the BCSC's website posts information about criminal and enforcement proceedings against individuals, the payment status of monetary penalties, and settlement agreements.²³⁵

[208] I have reviewed the BCSC's website as well as the Enforcement Information. I am satisfied that most of the Enforcement Information is the same information that the BCSC has published on its website. I can also see based on the records that much of the Enforcement Information has been publicly reported on by the media.²³⁶ This factor weighs in favour of disclosing the Enforcement Information that is already publicly known or publicly available.²³⁷

Information already disclosed

[209] Previous orders have said where information has already been disclosed in the records at issue, this factor weighs in favour of disclosure.²³⁸ As explained above, the BCSC disclosed the substance of the Complaint Letter to the applicant but withheld a few words and short sentences in the body of the Complaint Letter summarizing the nature of the complaint. I find that the personal information withheld from the body of the Complaint Letter is essentially the same as information that has already been disclosed to the applicant. Therefore, I do not see how disclosing this information would be an unreasonable invasion of personal privacy. I find that this factor weighs in favour of disclosing the withheld information in the body of the Complaint Letter.

Summary and conclusion on s. 22(1)

[210] I find that all of the information in dispute under s. 22(1) is personal information.

[211] I find that s. 22(4)(e) applies to a small amount of personal information in dispute, specifically, the name of an individual who provided advice to the BCSC in the normal course of their work-related activities.

[212] I find that some of the Enforcement Information is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(f) because it is

²³⁴ Order F22-31, 2022 BCIPC 34 at para 78.

²³⁵ Applicant's response submission at para 88.

²³⁶ For instance, BCSC000313 at p 44 indicates that some information has been reported on by media outlets.

²³⁷ Some of the Enforcement Information has not been published on the BCSC's website or reported on by the media (e.g., information on p 18 of BCSC004308 and p 4 of BCSC000293), so this factor does not weigh in favour of disclosing that information.

²³⁸ For instance, Order F19-38, 2019 BCIPC 43 at para 159.

information about third parties' assets and liabilities. Additionally, I find that some of the Enforcement Information is sensitive in nature because it is about third parties' criminal convictions. However, I find that most of the Enforcement Information is already publicly available, which outweighs the sensitivity factor and rebuts the s. 22(3)(f) presumption. Therefore, I find that disclosure of the publicly available Enforcement Information would not be an unreasonable invasion of personal privacy and the BCSC is not required or authorized under s. 22(1) to withhold this information.

[213] I find that some of the information in dispute is also presumed to be an unreasonable invasion of personal privacy under s. 22(3)(d) because it is about certain third parties' employment histories. None of the factors under s. 22(2) rebut this presumption and the BCSC is therefore required to withhold this information under s. 22(1).

[214] Some of the information in dispute is not sensitive in nature and I find that disclosure of this information would not be an unreasonable invasion of third-party personal privacy on that basis. The BCSC is not required or authorized under s. 22(1) to withhold this information.

[215] Additionally, some of the personal information in the body of the Complaint Letter is essentially the same as information that has already been disclosed to the applicant. Therefore, I find that disclosing the personal information in the body of the Complaint Letter would also not be an unreasonable invasion of third-party personal privacy. The BCSC is not required or authorized under s. 22(1) to withhold this information.

[216] Regarding the remaining personal information in dispute, no s. 22(3) presumptions apply and there are no relevant factors under s. 22(2) which weigh either in favour of or against disclosure. The applicant has the burden of proving that the disclosure of the personal information in dispute would not be an unreasonable invasion of personal privacy. I conclude the applicant has not met their burden of proof regarding the remaining personal information in dispute. I conclude the BCSC is required to withhold this information under s. 22(1).

CONCLUSION

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

1. Subject to item 2, below, the BCSC is required to withhold the information in dispute under s. 12(1).
2. The BCSC is not required under s. 12(1) to withhold the information I have highlighted in pink in the copy of the records provided to the BCSC

with this order. The BCSC is required to give the applicant access to this highlighted information.

3. Subject to item 4, below, I confirm, in part, the BCSC's decision to withhold the information in dispute under s. 13(1).
4. The BCSC is not authorized under s. 13(1) to withhold the information I have highlighted in pink in the copy of the records provided to the BCSC with this order. The BCSC is required to give the applicant access to this highlighted information.
5. Subject to item 6, below, the BCSC is required to withhold the information in dispute under s. 22(1).
6. The BCSC is not required under s. 22(1) to withhold the information I have highlighted in pink in the copy of the records provided to the BCSC with this order. The BCSC is required to give the applicant access to this highlighted information.
7. The BCSC must provide the OIPC registrar of inquiries with a copy of its cover letter and the records it sends to the applicant in compliance with items 2, 4, and 6 above.
8. The BCSC is required to reconsider its decision to refuse access to the information I find it is authorized to withhold under s. 13(1) in records BCSC002956, BCSC003597, and BCSC003599. The BCSC is required to exercise its discretion and consider, on proper grounds and considering all relevant factors, whether it should release this information even though it is covered by the discretionary exemption. It must deliver its reconsideration decision, along with the factors it considered and the reasons for its decision, to the applicant and to the OIPC registrar of inquiries by the compliance date set out in paragraph 218 below.

[218] Pursuant to s. 59(1) of FIPPA, the BCSC is required to comply with this order by **May 3, 2024**.

March 20, 2024

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

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