IN THE MATTER OF the Inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") between the **BC Freedom of Information and Privacy Association ("applicant")** and **the Ministry of Health ("public body")**

OIPC File No.: F12-50727
Public Body File No: HTH – 2012 - 00142

March 4, 2014

Initial Submissions of the Applicant BC Freedom of Information and Privacy Association

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1. Description of the Inquiry

1. This is an inquiry under *the Freedom of Information and Protection of Privacy Act* (the "*Act*"). The inquiry is set for December 19, 2013 and is pursuant to Part 5 of the *Act*.

2. This inquiry arose out of a request for review by the Applicant of the decision by the public body (the Ministry of Health) to deny access to information in the requested records.

2. Issues under Review in the Inquiry and the Burden of Proof

3. The issue in dispute in this inquiry is whether the Ministry was authorized to withhold the information under ss.3(1)(e), 13, 15, 17 and 22 of the *Act* (the "Information").

4. Section 57 of the *Act* establishes the burden of proof on the parties in an inquiry.

5. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, the Ministry must prove that it was authorized/required to withhold the Information under sections 13, 15 and 17 of the *Act*.

1. Under section 57 (2) it is up to is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy if s.22 exemptions are claimed by the public body.
2. Section 57 is silent as to the burden of proof regarding claims by a public body that information is excluded under s.3(1)(e).

3. Argument

I. Background

6. On August 2, 2012 the applicant requested the Ministry of Health provide copies of data sharing and other agreements related to four named individuals and correspondence related to those agreements, along with other internal communications. A file [HTH-2012-00142] was opened as a result of this request.

7. The Ministry refused to release any of the requested records, claiming exemptions under a variety of sections of the *Act*.

8. The applicant filed this complaint with the Information and Privacy Commissioner as a result.

9. Following mediation, the public body reconsidered its blanket refusal to release records. Approximately 440 pages of records were identified as responsive to this request and heavily redacted records were sent to the Applicant. Severed information was redacted under s.3(1)(e), 13, 15, 17 and 22. The section 14 claim was dropped for reasons unknown.

II Interpretation of the *Act*

11. Interpretation of *FIPPA* has to be made in light of the stated purposes of the *Act*, which are set out in section 2.

> **Purposes of this Act**
>
> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public. (Emphasis added)

12. The limitations on the right of access are set out in s. 4.

> **Information rights**

> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.
>
> (3) The right of access to a record is subject to the payment of any fee required under section 75.

13. It is well established that the purpose of the *Act* is to provide information to the public for the public interest goal of the greater accountability of public bodies.

> "Section 2(1) confirms that the Act's information access rights are intended to make public bodies accountable to "the public" as a whole, not simply to individual requesters. Access rights may be individually exercised, but they benefit the entire community. They also benefit public institutions: accountability enhances public trust in them, thus contributing to their legitimacy."

Order 00-47, *Inquiry Re: Malaspina University-College Records* -[2000] B.C.I.P.C.D. No. 51

14. The Supreme Court of Canada has repeatedly set out the importance of the acknowledging the purpose of FOI laws when applying exemptions:

> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the Access to Information Act recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403. Paras 62-63 per LaForest J.

15. The special status of *FIPPA* is also indicated by s. 79 of the *Act*, which reads as follows:

> "If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act."

III. Section 3

16. Large parts of the released records have been redacted under a claim that they are "teaching materials" or "research information" under s.3(1)(e).

That subsection reads as follows:

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(e) a record containing teaching materials or research information of
(i) a faculty member, as defined in the *College and Institute Act* and the *University Act*, of a post-secondary educational body,
(ii) a teaching assistant or research assistant employed at a post-secondary educational body, or
(iii) other persons teaching or carrying out research at a post-secondary educational body;

17. For s. 3(1)(e) of FIPPA to apply the information must:
1. Constitute research information; and
2. Belong to employees of a post-secondary educational body.

Order F`12-03 para 8

18. It is not obvious how the terms of a data sharing agreement can be described as either "teaching materials" or "research information". These documents are contractual in nature.

19. At p 145 of the released materials, the introductory paragraphs of the Information Sharing Agreement state that the UBC Faculty of Medicine was not only performing the research for the MoH Pharmaceutical Services Division, is was also "a direct service provider to the Province".

20. At page one of the released materials, the University of Victoria is also described as a "Service Provider".

21. Previous Orders have clarified that the simple fact that someone is employed by a post secondary institution and is under contract to or with a public body does not automatically result in their work (or contracts) being covered by s.3(1)(e).

Order 00-36 p.5

22. That Order also stated that the reason for the inclusion of this carve-out in the application of the Act is "intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional purposes, by protecting it from disclosure to those who might exploit it to her disadvantage."
Ibid.

23.. Again, it is not at all obvious how terms of a contract to share information would have" intellectual value…for professional purposes" nor is it clear how its disclosure could be exploited to the university employee's "disadvantage"

24. Sections of the agreement described as either 'design' or 'analysis have been systematically removed. have also been removed under s.3

25. In addition, large blocks of text were redacted elsewhere, including unknown parts of pages 38-55 and all of pages 358-438.

26. It is respectfully submitted that the claims that all this material can somehow be categorized as either “teaching materials” or “research information” for the purposes of s.3(1)(e) must fail.

Section 13

27. Section 13(1) of the Act provides the following exemption from disclosure:

> 13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

28. This is a discretionary, not mandatory exception.

29. Subsection (2) also provides a list of types of material which the public body cannot refuse to disclose under subsection (1):

> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
> (b) a public opinion poll,
> (c) a statistical survey,
> (d) an appraisal,
> (e) an economic forecast,
> (f) an environmental impact statement or similar information,
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
> (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
> (j) a report on the results of field research undertaken before a policy proposal is formulated,
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
> (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights

of the applicant.

30. The principle underlying this exception is to protect a public body's internal decision making, to allow the government's advisors to provide free and frank advice and recommendations to decision makers.

Order F1-15, para. 22

31. The leading case in this province is the 2002 ruling of the BC Court of Appeal in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* [2002] B.C.J. No. 2779 (C.A.

College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner), [2002] B.C.J. No. 2779 (C.A.)

32. The test set out by the BCCA in *College of Physicians* is as follows:

> "In my view, it should be interpreted to include an opinion that involves exercising judgement and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action." (at 113)

College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner), op. cit. at 113

33. The records at issue in *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner* were expert reports dealing with a psychiatric assessment. They were provided to the College in the context of an investigation.

34. The records at issue in this case are not likely to fall into that category of document. They are not legal, medical or similar expert opinions about a particular set of facts which would bring them within the ambit of the *College of Physicians* test. These are contract documents and correspondence related to those documents.

35. The scope for giving advice in contractual documents and e mails related to them is minimal.

Section 15

36. Section 15(1) of the *Act* reads as follows:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,

(b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada or harm the detection, prevention or suppression of espionage, sabotage or terrorism,

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

(d) reveal the identity of a confidential source of law enforcement information,

(e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,

(f) endanger the life or physical safety of a law enforcement officer or any other person,

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

(h) deprive a person of the right to a fair trial or impartial adjudication,

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with an enactment,

(j) facilitate the escape from custody of a person who is under lawful detention,

(k) facilitate the commission of an offence under an enactment of British Columbia or Canada, or

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

37. Section 15 is a discretionary exception, intended to protect the societal interest in allowing law enforcement agencies to carry out their mandates, which in certain specified circumstances, requires information to remain confidential.

38. Section 15 also contains a legal requirement that the public body invoking this exception show that harm may result if the information is disclosed.

Order F08-03 para 19.

39. The Ministry has not indicated which of the subsections of section 15 it intends to rely on to support its position that the information contained in this record should not be released.

40. The Ministry had previously indicated that the earlier blanket refusal to release any records in response to this request was due to an ‘investigation’ into the data breach.

41. In this case, an investigation resulted in the termination of a number of the named individual employees, and cutting off of access to data of others. This was announced by the former Minister of Health in September, 2012.

42. Media reports earlier this year quote Ministry spokespersons as saying that the investigation would be "wound down" by the end of September, 2013.

Times Colonist, September 5, 2013 *Health Ministry Settlement for dead work 'insulting,' family says*

43. As there is no current investigation underway, and the previous investigation presumably ended several months ago, it is not evident how s.15 continues to apply to justify a failure to release these records.

44. There is no indication that the RCMP or other law enforcement bodies have been conducting an investigation, or that they have been involved in any way beyond receiving information from the Ministry from time to time.

45. The Ministry does not have any direct connection to law enforcement, and the records being requested are contractual documents related to data sharing agreements with the ministry. The applicant reserves its right to address the specific claims re. s.15 if the ministry or third party are able to provide any specifics for this claim.

46. The evidence that the public body must provide to meet a harms-based exception must show a clear and direct connection between the disclosure of the information and the anticipated harm. This is on a standard of reasonableness, and general or speculative evidence will not meet the test.

Order F08-03 para. 27

47. To this point no such evidence has been provided.

Section 17

48. Section 17(1) of the *Act* reads as follows:

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

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

49. Again, the Ministry has not provided any detail about which of the six subsections it relies on in denying release of the records in question. However, the test for all is the 'reasonable expectation of harm' set out in s.17(1).

50. Section The test for determining whether or not there is a reasonable expectation of harm to the economic interest of the province has been set out in a number of orders, including Orders F10-24.

51. In that Order, the records in question were provisions of a contract with Maximus under the Alternative Service Delivery (ASD) process.

Order F10-24, para 7

52 The Adjudicator in Order F10-24 restated the long-established test for determining whether there is a reasonable expectation of harm, quoting the former Commissioner from Order F08-22, specifically "that s. 17(1) requires a confident and objective evidentiary basis for concluding that disclosure could reasonably be expected to result in harm. Referring to language used by the Supreme Court of Canada in an access to information case, I have said that "there must be a clear and direct connection between the disclosure of specific information and the harm." The focus is on what a reasonable person would expect, based on evidence."

Order F08-22 para 35

53. The Adjudicator noted that although there might be an argument about not releasing negotiating positions of a public body under s.17, those considerations would not apply to the finalized contractual terms.

Order F10-24, para 44

54. The contract in this case is the data sharing agreement, and had been completed and signed. No negotiations were underway and the terms of the contact are essentially dictated by the Ministry, as they are the repository of the information sought by the researchers. As a result, there is little or no chance that the negotiating position of the government would be affected by the release of these records.

Exercise of discretion:

55. The exceptions contained in ss. 13, 15 and 17 are all discretionary.

56. The criteria for the proper exercise of discretion were set out by the Commissioner in Order 02-38 para 149, and reproduced in the government's *Policy and Procedures Manual* for the *Act*. They include:

- the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;
- the wording of the discretionary exception and the interests which the section attempts to balance;
    - whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
    - the historical practice of the public body with respect to the release of similar types of documents;
    - the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
    - whether the disclosure of the information will increase public confidence in the operation of the public body;
    - the age of the record;
    - whether there is a sympathetic or compelling need to release materials;
    - whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
    - when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

57. In this case, the Ministry either failed to consider, or gave insufficient weight to the general purposes of the *Act* and the stated legislative purpose that public bodies should make information available to the public.

Section 22.

58. Section 22 is a mandatory exception related to personal privacy, and it reads as follows:

22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(b) 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,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

(d) the personal information relates to employment, occupational or educational history,

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax,

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party,

(i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or

(j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

(c) an enactment of British Columbia or Canada authorizes the disclosure,

(d) the disclosure is for a research or statistical purpose and is in accordance with section 35,

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) public access to the information is provided under the *Financial Information Act*,

(h) the information is about expenses incurred by the third party while travelling at the expense of a public body,

(i) the disclosure, in respect of

(i) a licence, a permit or any other similar discretionary benefit, or

(ii) a degree, a diploma or a certificate,

reveals any of the following with respect to the applicable item in subparagraph (i) or (ii):

(iii) the name of the third party to whom the item applies;

(iv) what the item grants or confers on the third party or authorizes the third party to do;

(v) the status of the item;

(vi) the date the item was conferred or granted;

(vii) the period of time the item is valid;

(viii) the date the item expires, or

(j) the disclosure, in respect of a discretionary benefit of a financial nature granted to a third party by a public body, not including personal information referred to in subsection (3) (c), reveals any of the following with respect to the benefit:

(i) the name of the third party to whom the benefit applies;

(ii) what the benefit grants to the third party;

(iii) the date the benefit was granted;

(iv) the period of time the benefit is valid;

(v) the date the benefit ceases.

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless

(a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information, or

(b) with respect to subsection (3) (h), either paragraph (a) of this subsection applies or the applicant could reasonably be expected to know the identity of the third party who supplied the personal recommendation or evaluation, character reference or personnel evaluation.

(6) The head of the public body may allow the third party to prepare the summary of personal information under subsection (5).

59. The approach to proper interpretation of s.22 was most recently set out in Order F14-07.

60. In that Order, the adjudicator stated "It is first necessary to determine if the information in dispute is "personal information" as defined by FIPPA. If so, it must be determined whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, it is necessary to determine whether disclosure of the information falls within s. 22(3). If s. 23(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, it is necessary to consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy." (para 44)

61. It is not clear that the redacted material is in fact personal information as defined in the *Act*.

62. Furthermore, based on the information available, it appears that s.22(4) does apply to the redactions made by the Ministry in this case.

63. On page 26, the entire content below subhead “Utilization and Cost project “ has been severed under s. 22. It is unclear how content under this section could in any way be related to privacy rights.

64. Similarly, “Clinical Epidemiological project (p.28), Seniors Medication Study (SMS) (p.29), Caregiver Study (p.31), were also redacted under s.22.

65. Instead of dealing with personal privacy, most of the claimed s.22 redactions appear to fall under subsection (4), specifically that it is related to a contract to supply goods or services, or in the alternative, that it relates to a “…licence, a permit or any other similar discretionary benefit “ under (4)(i) .

66. Therefore, if these claims fall under subsection (4), they are not an unreasonable invasion of a third party's personal privacy.

4. Conclusion

67. The Ministry should be ordered to release the redacted pages, or in the alternative, should sever the information actually covered by whatever exceptions have been properly claimed and release the remainder.

68. Furthermore, the Ministry either failed to consider, or gave insufficient weight to the general purposes of the *Act* and the stated legislative purpose that public bodies should make information available to the public in exercising its discretion to release the information under s.13, 15 and 17.

All of which is Respectfully Submitted.

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