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 18 2014

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

==========

We have reviewed the Public Body's and the Applicant's initial submissions in this matter and make the following submissions in reply;

Section 13

1. The Ministry is seeking to expand the scope of s.13 from the protection of actual advice or recommendations to a public body to virtually any information associated with written information inside the public body.

2. They are also conflating the test under s.12 related to revealing the substance of deliberations of cabinet (a mandatory exception) with disclosing information that could reveal advice or recommendations to a minister (a discretionary exception).

3. The public body has referred in footnotes to a number of orders to try to justify a vast expansion of this exception through a number of brief obiter comments.

Initial submission of the public body, paras 4:07-4:09 and footnotes.

4. In order 03-25, the relevant paragraph reads as follows

[21] Last, the roughly three lines that BC Hydro has withheld from p. 60, under the heading "Option – Public Panel", reveal a recommendation made by a BC Hydro employee to a member of BC Hydro's greenhouse gas emissions team. I accept that this information would, if disclosed, both reveal that recommendation directly and, in the case of the accompanying information respecting the background for the recommendation, would indirectly reveal that same recommendation.

5. In Order 13-01, the Assistant Commissioner states at para 14 that he is " unable to fully set out my analysis of the application of s. 13(1) of FIPPA to the correspondence and briefing material in this case because the Ministries' submissions relating to it was received, appropriately, in camera."

6. This should be not taken as authority for the proposition that "options, implications of options' are protected under s.13 (1). These are not the equivalent of 'recommendations' and should not be conflated.

Initial Submission of the public body, para 4:11

7. Similarly, Order 00-28, para 131 states the following:

[131] I am unable to see how the information severed on p. 2 differs from the remainder of this record, which has correctly been disclosed to the applicant. The severed information does not offer advice or recommendations, as defined above, and I fail to see how it would allow an accurate inference to be drawn about any advice or recommendations.

8. This is paragraph can also be taken to mean that 'not even an inference can be drawn' never mind actually revealing the advice or recommendation.

9. The redaction referred to in para 4:13 of the Ministry's initial submission points to page 254 (and presumably the blank p. 255) as an example of the type of information that has been redacted.

10. Clearly, this is an exchange of correspondence regarding these contractual document and are responsive to the request. If there is a briefing note on the same subject, that fact does not transform the correspondence into 'advice or recommendations' for the purposes of s.13.

11. To follow that logic, any record containing a discussion of the topic of any briefing note containing advice or recommendations would be captured by s.13, which would amount to a dramatic broadening of the scope of this exception, whose purpose is to protect the provision of advice or recommendations to decision makers, not to exempt from disclosure all discussion by public servants.

12. The protection of a public body's internal decision making, to allow the government's advisors to provide free and frank advice and recommendations to decision makers, is the purpose of this exception. The Ministry's approach would expand this to all internal discussion of policy, and must be rejected.

***Order F1-15*, para. 22**

Section 15

13. The public body relies on two subsections to prevent release of these records, and neither is applicable on the facts in this case.

<u>Section 15(1)(a)</u>

14. This subsection 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,

15. The definition of law enforcement is set out in Schedule 1 of the Act:

"law enforcement" means
(a) policing, including criminal intelligence operations,
(b) investigations that lead or could lead to a penalty or sanction being imposed, or
(c) proceedings that lead or could lead to a penalty or sanction being imposed;

16. It is not clear that there is any activity currently underway or anticipated by any government or police body which would fall within this definition.

17. In the e mail released by the Ministry during this inquiry, Sergeant Andrew Cowan of the RCMP describes the supposed RCMP investigation as "suspended pending the final report/investigation by your office". He notes that the RCMP has in its possession various exhibits from the BC government.

Exhibit 'B' to Affidavit of Johnson

18. As for the risk of harm, Sgt. Cowan does not use that word. Instead, he claims release of working papers and source document information "…may interfere with the investigation."

ibid

19. This is in contrast to the statement in the Taylor Affidavit, that release of the information at issue "…could reasonably be expected to harm the ongoing OCG investigation."

Taylor Affidavit para 10 and 15

20. The affidavit tendered by the Ministry seeks to expand the risk of harm from 'interference' (as described by Sgt Cowan) to 'reasonable expectation of harm'. This should be rejected.

21. The wording of s.15 uses the higher standard of 'harm', and in legislative debate on FIPPA, the then-Attorney General noted the reason for using that term:

"Originally, in the legislation, we had used the word 'interfere' with law enforcement activity. The general feeling was that the word "interfere" was not the appropriate one, and that harm to the actual investigation was the most important issue."

Hon. Colin Gabelmann, Attorney General, B.C. Debates, June 22, 1992 at p. 2875

22. As a result, the claims made about the applicability of s.15 to the materials in the context of the RCMP investigation must fail.

23. In addition, the tentative and condition use of the word 'may' by Sergeant Cowan likewise does not meet the requirement "to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived." There is no such evidence in this case.

Order 00-01 p5

24. Likewise, what has been brought forward by the public body regarding the 'investigation' by the Office of the Comptroller-General (OGC) does not meet this test.

25. The affidavits submitted raise the specter of witnesses altering their testimony, destroying potential evidence and otherwise interfering with the operation of the investigation.

26. We understand after conversations with counsel for the ministry that BC FIPA is not being identified as either a target of the investigation or threat to disrupt the investigation.

Ministry Initial submission, paras 4:28, 4:29

27. The affidavits also state that the OCG was informed of the situation in May 2012, or 20 months ago. An investigation that has been underway for 20 months presumably has interviewed witnesses and taken other measures to obtain evidence that would be relevant to its inquiries. It seems unlikely that a potential witness or target of the investigation would not have had some inkling that their activities were of interest to the authorities, and if they were determined to undermine any investigation by destroying evidence or alternative testimony that they would have done so by now.

28. If the ripples and waves coming from a large investigation were not enough to alert potential targets or witnesses, certainly the massive media coverage that has gone on since September 2012 would have tipped them off, allowing them to take whatever measures they deemed necessary to destroy or alter the evidence alluded to in the affidavits.

29. Unlike the situation in numerous other orders dealing with s.15 (1)(a), there is little indication that the OCG has a statutory or other mandate to carry out investigations that would fit the definition of law enforcement is set out in Schedule 1 of the Act.

30. The description of the role of the Office of the Comptroller General set out on the OCG's web page outlined a number of different functions, and six branches. There is no mention of the word 'investigation' either on the home page, or on any of the linked pages to each of these branches.
http://www.fin.gov.bc.ca/ocg.htm

31. Other public bodies which have claimed to be exercising an investigative function in previous orders have usually been able to point to a section in a relevant provincial statute that empowers them to undertake investigations with a view to preventing breaches of that law. (eg. Law Society, municipalities, etc)

32. There is no such provision for an investigative function in the *Financial Administration Act*, including the subsection cited by the ministry as supporting its claim to an exception under this subsection, which reads as follows:

Duties of the Comptroller General

9 The Comptroller General must, subject to any direction of the Treasury Board, do all of the following:

(e) evaluate financial management throughout the government and recommend to the Treasury Board improvements considered necessary;

33. The activities undertaken by the OCG, however valuable they may be for the proper administration of government and its policies, do not come within the scope of 'law enforcement' for the purposes of s. 15.

Section 15 (1)(l)

34. The wording of this subsection is set out below:

15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

35. 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.

36. The Ministry's initial submission at 4:38 claims the Madden affidavit sets out 'a clear and direct connection' between the disclosure of this information and the harm claimed.

37. That is not the case. The Madden affidavit, although quite detailed, can be summed up by his contention in para 23 that "…the less information an attacker has about a system, the harder it will be for him or her to attack or otherwise compromise the security of a system."

Madden affidavit, para 23, Initial submission of ministry para 4:39.

38. This blanket assertion that release of any information about any aspect of a system would compromise its security has been rejected in a number of previous Orders related to this subsection.

39. In Order 10-39, the government raised similar concerns under s.15(1)(l), and they were categorically rejected by the Adjudicator:

"…the Ministry submits that the release of the information ―increases ‖ the ― chances ‖ of a successful attack.13 By what factor these chances are increased the Ministry does not explain. In effect, the Ministry asks me to assume that the information disclosure could lead to a series of contingent events, the likelihood of which it leaves me to guess, that might in turn lead to an unauthorized breach of the computer system. This proposition is clearly speculative. It certainly falls short of the evidence required to show that the specific harm claimed is likelier than not to follow from the requested information's disclosure.

Order 10-39, para 16.

40. In Order 11-14, similar claims were also rejected, on the same basis. We therefore request that these speculative claims also be rejected in this instance.

41. Although they are admitted in para 5 of the Madden affidavit to have likely expired or been replaced, we are not seeking the release of passwords.

42. It is also somewhat ironic that the Ministry is claiming to be justified in redacting significant parts of the records responsive to this request on the ground of security of the system. In her Investigation of the breach which provides the context for this proceeding, Commissioner Denham found that:

FINDING 1: I find that, at the time of the unauthorized disclosures, the Ministry did not have reasonable security in place to protect personally identifiable information from unauthorized access or disclosure to the standard that s. 30 of FIPPA requires.

IR F13-03 Ministry of Health

43. The evidence that the public body is required to provide must show a clear and direct connection between the disclosure of the information and the anticipated harm. It is respectfully submitted that the evidence tendered by the Ministry does not meet this test.

Section 22.

44. The Ministry claims that s. 22(3)(d) applies in this instance, and therefore there is a presumption that release of the records would be an unreasonable invasion of privacy.

45. The Ministry claims the employment and workplace records were "collected by the Ministry for the purpose of a workplace investigation".

Initial submission para 4:52

46. It is important to distinguish the situation in Order 01-53 from the instant case. As the Ministry states at para 4:52 of its Initial Submission, the personal information was collected as part of the investigation.

47. This was not the situation in Order 01-53, where the information was created for the investigation, rather than being accumulated from existing files. Former Commissioner Loukidelis describes the type of information to which s.22(3)(d) applies as follows:

It follows that disclosure of evidence of, or statements made by, witnesses about the third party's workplace behaviour or actions (including any opinions or views expressed by others about the third party) is presumed, under s. 22(3)(d), to be an unreasonable invasion of the third party's personal privacy. This includes the investigator's views or opinions, any evidence given by, or statements made by, the applicant about the third party, and any findings or conclusions expressed by the investigator.

Order 01-53 para 35

48. As for the Ministry's contention that s.22(2)(h) applies to a number of people who were not targets of the investigations, it is overbroad.

49. Failure to release the information could also undermine the reputation of anyone who is associated with the ministry and its research programs. There has been extensive media coverage following the ministry's announcement of the data breach in September 2012, and a continued search for answers. There has also been an investigation by the Information and Privacy Commissioner, cited earlier.

50. In fact, these factors also support our contention that the release of this information is appropriate under s. 22(2)(a) in order to subject the ministry to public scrutiny.

51. There has been much speculation and little information released about what has been a very serious breach of personal information by the government's own account. The Commissioner's Investigation Report dealt with some aspects of what happened, but many questions remain unanswered, and the ministry has made a number of claims of exceptions to release which it has since dropped.

52. Finally, we want to clarify that we are not seeking the release of personal or home e mail addresses.

Non-responsive records

53. These records have been completely redacted and we have no context in which to assess their responsiveness. We have also had no communication with the ministry about the relevance or responsiveness of these records, but given the initial blanket refusal to release any records and the subsequent very expansive claims of exceptions under the *Act*, we view these redactions with a great deal of suspicion.

4. Conclusion

54. The Ministry has not made the case for its claims of exceptions to release, and should be ordered to release the redacted pages (except for passwords and personal e mail as noted).

55. The Ministry has also 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 and s.15.

All of which is Respectfully Submitted.

Vincent Gogolek
Executive Director
BC FIPA