OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA
In the matter of the inquiry under part 5 of the *Freedom of Information and Protection of Privacy Act*

Between:

ROB WIPOND

The Applicant

And:

THE VICTORIA POLICE DEPARTMENT

The Public Body

INITIAL SUBMISSION OF THE PUBLIC BODY

The Applicant:

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INTRODUCTION

1. The Victoria Police Department ("VicPD") is a public body as defined in the *Freedom of Information and Protection of Privacy Act* (the "Act").

Section 1 of the Act

2. On February 4, 2013, the Applicant requested access to certain records held by VicPD. In particular, the Applicant sought access to records held by VicPD that relate to the British Columbia Association of Chiefs of Police ("BCACP") and the British Columbia Association of Municipal Chiefs of Police ("BCAMCP").

***Investigator's Fact Report,* paragraph 1**

3. The Applicant made similar requests to other municipal police departments and, with the Applicant's consent, VicPD agreed to co-ordinate response to his requests by collecting responsive records from other departments and treating them as if they had all been in VicPD's custody and control.

***Affidavit of Debra Taylor*, paragraph 4**

4. VicPD responded to the Applicant's request and released records related to BCACP on September 11, 2013 and records related to BCAMCP on September 12, 2013. In total, VicPD released approximately 1,850 pages of responsive records.

***Investigator's Fact Report,* paragraphs 2 and 3**

5. VicPD withheld certain information from the responsive records pursuant to sections 3, 13, 14, 15, 16, and 22 of the Act. In addition, certain information has been withheld pursuant to section 182 of the *Police Act*. The Applicant requested review of VicPD's response to his request.

6. Following the issuance of the Notice of Inquiry, VicPD decided to release additional records to the Applicant. As a result, only 20 records remain at issue in this inquiry. The list and

description of these records is part of VicPD's evidence. In VicPD's submissions all references to records in dispute are made using the references from the list of documents included in VicPD's evidence.

***Affidavit of Debra Taylor*, paragraph 7 and Exhibit "A"**

Burden of Proof

7. VicPD accepts that it bears the burden of proof in relation to the application of sections 13, 14, 15 and 16 of the Act and that it is for VicPD to demonstrate that those exceptions apply to the records and information in question. VicPD also accepts that it bears the burden of proof in relation to the records that it says fall outside the scope of the Act by virtue of section 3(1)(c) of the Act or section 182 of the *Police Act* and, therefore, that it must demonstrate that those records fall within the scope of those two sections.

Section 57(1) of the Act

8. In relation to information withheld pursuant to section 22 of the Act, however, the burden of proof rests on the Applicant to demonstrate that disclosure of this information would not be an unreasonable invasion of third party privacy.

Section 57(2) of the Act

BCACP and BCAMCP

9. Because the Applicant's request relates to the records of BCACMP and BCAMCP, it is helpful to understand the nature and purpose of these two associations.

10. BCACP is a society incorporated pursuant to the *Society Act*, and BCAMCP is an unincorporated association. The objectives of the two organizations are very similar and include:

a. Encouraging and developing co-operation among all its members in the pursuit of and attainment of their goals;
b. Promoting a high standard of ethics, integrity, honour and conduct;
c. Fostering uniformity of police practices;
d. Encouraging the development and implementation of efficient and effective practices in the prevention and detection of crime; and

e. Effectively communicating problems and concerns to appropriate levels of authority.

***Affidavit of Debra Taylor*, Exhibits "B", "C" and "D"**
***Affidavit of Steven Ing*, paragraph 7**

11. Membership in the two associations varies but generally membership is limited to senior police officers and persons involved in a restricted sphere of law enforcement whose membership would contribute to the objectives of the associations.

***Affidavit of Steven Ing*, paragraphs 5 and 6;**
***Affidavit of Debra Taylor*, Exhibits "C" and "D"**

12. The two associations are intended for exchange of information and advice between members of the law enforcement community. Membership involves participation rather than direction and the two associations do not typically engage in direct activities on behalf of the members.

***Affidavit of Steven Ing*, paragraphs 7 and 8**

13. Exchange of information and advice between membership of BCACP and BCAMCP is done on an express understanding that the information will be kept confidential. As can be expected, senior members of the BC law enforcement community are in possession of sensitive information. While sharing of this information, including advice based on actual experiences, furthers the goals of development and implementation of efficient and effective law enforcement, wider disclosure of this information could be damaging to the very objectives of the two associations.

***Affidavit of Steven Ing*, paragraphs 8, 9, and 12**

14. Neither BCACP nor BCAMCP are public bodies under the Act. Records related to BCACP and BCAMCP are subject to the Act solely because they are in the custody and control of VicPD by virtue of VicPD members participating in two associations.

***Affidavit of Steven Ing*, paragraph 11**

SUBMISSIONS ON THE RECORDS IN DISPUTE

Record #1

15. Record #1 is an excerpt from the confidential BCACP meeting minutes of a meeting held on November 18 and 19, 2009. Except for the one portion withheld under section 13, the rest of that meeting's minutes have been released to the Applicant.

16. Section 13 of the Act is intended to protect advice and recommendations developed by or for a public body. Unlike some other exemptions, section 13(1) is not a harm based exemption, i.e., it is not necessary to demonstrate a specific harm that would arise from disclosure of advice or recommendations. The harm, in the form of stifling full, free and frank internal discussion as part of government decision making, is presumed:

> *...the purpose of s. 13(1) is to allow full and frank discussion of advice and 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. Recently, the Supreme Court of Canada in John Doe v. Ontario, 2014 SCC 36 reiterated that point:*
>
> > *Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.*
>
> ***Order F14-31*, paragraph 22**

17. Similarly, nothing in the language of section 13(1) limits its application because the advice or recommendations have been shared with persons outside the public body. All that the section requires is that advice or recommendations be developed by or for a public body. It is irrelevant whether or not the advice or recommendation has been shared with any third parties.

Section 13(1) of the Act

18. The accepted test for application of section 13(1) is to first determine that the record contains advice or recommendations, and whether the advice was developed by or for the public body. If these two conditions are satisfied, section 13(1) applies unless the

information falls within one of the explicit exceptions in section 13(2).

***Order F14-31*, paragraph 21**

19. Section 13(1) applies not only when disclosure of the information would directly reveal the advice and recommendations but also when it would allow accurate inferences about the advice or recommendations.

***Order F14-31*, paragraph 23**

20. In the recent decision dealing with the Ontario equivalent of section 13(1), the Supreme Court of Canada made it clear that the exemption afforded by section 13(1) applies not merely to actual recommendations, i.e., a suggested course of action, but also to "advice", which must have distinct meaning, other than "recommendation".

***John Doe v. Ontario (Finance)*, 2014 SCC 36, paragraph 24**

21. While in the *John Doe* case the Supreme Court of Canada dealt with "policy options", the Court's decision provides clear direction to provide broad and purposive interpretation to section 13(1) and should be applied to other types of records containing advice or recommendations.

22. Recognizing that records containing advice may take many forms, the Supreme Court of Canada approved of an approach that focuses on the true nature of the document which recognizes that the concept of "advice" is broad enough to include purely factual information when provided as part of an opinion developed by or for a public body:

> *...In Telezone, Evan J.A. distinguished this type of objective information seen in s. 13(2) from a public servant's opinion pertaining to a decision that is to be made, which he concluded would fall within the scope of "advice" in the analogous federal exemption. At paragraph 63, he stated:*
>
> > *[A] memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made... . They cannot be characterized as merely informing the Minister of matters than are largely factual in nature.*
>
> *The fact that the legislature saw fit to include four categories of objective information in s. 13(2) suggests that it was aware that "advice" could otherwise be construed as covering such materials, and should therefore be expressly limited.*

> ...
> *The implication of these precisely defined exceptions to the s. 13(1) exemption is that the legislature had regard for the circumstances under which advice or recommendations might be included in such records but should nevertheless be disclosed. It is telling that the legislature, having turned its mind in s. 13(2) to the specific types of records that should be disclosed even though they might contain "advice or recommendations", did not include policy options as a discrete category.*
>
> ***John Doe, supra*, paragraphs 31 and 32**

23. Applying these general principles, VicPD submits that the proper approach to the application of section 13 exemption is as follows:

    a. It has to be determined whether or not information in question constitutes advice or recommendations, applying the generous interpretation applied by the Supreme Court of Canada in *John Doe* case;
    b. If information qualifies as advice or recommendations, it has to be determined whether or not it was developed by a public body or for a public body, it does not matter whether it was shared with other third parties in the process;
    c. If both (a) and (b) is answered in the affirmative, the information is protected under section 13(1) unless it falls within one of the explicit exceptions in section 13(2) or (3) of the Act.

24. The information in Record #1 that has been withheld pursuant to section 13(1) consists of minutes of discussion about a proposed policy and anticipated recommendation regarding an issue of importance to police officers in British Columbia. Implicitly, by identifying a decision made by BCACP, it reveals the nature of advice or recommendation provided. All of this is evident on the face of the withheld information and satisfies the requirement that the information reveal advice or recommendations.

25. Deputy Chief Constable John Ducker, was at the material time, a member of VicPD and participated in the BCACP meeting in his official capacity as such. Therefore, any advice or recommendations provided by him were developed by VicPD satisfying the requirement that the advice or recommendation be developed by a public body. In addition, many of the BCACP members to whom this advice was provided represent other municipal police departments, all of whom are also public bodies within the meaning of the Act.

***Affidavit of Debra Taylor*, paragraph 12 and Exhibit "C"**
***Affidavit of Steven Ing*, paragraph 11**

26. VicPD submits that none of the exceptions in section 13(2) or (3) apply to the information withheld from disclosure of Record #1 and, therefore, section 13(1) exemption applies.

Record #2

27. Record #2 is an excerpt from confidential BCACP meeting minutes of a meeting held on November 16 and 17, 2011, in particular page 6 of those minutes. Information has been withheld from those minutes pursuant to section 14 of the Act.

28. Section 14 of the Act incorporates the common law principles of solicitor-client privilege without any modification or limitation. This was made clear in the very first judicial decision dealing with section 14 of the Act:

> *Section 14 created a class-based exception to protect information that is "subject to solicitor-client privilege". This suggests that the Legislature accepted the principle of privilege without exception and that it should be accorded its full common law weight. Solicitor-client privilege is more than a rule of evidence. In Solosky v. The Queen [1980] 1 S.C.R. 821 at 839 Dickson J. put it in this way:*
>
> > *...the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client...*
>
> *This was reiterated by Lamer J. in Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 873:*
>
> > *Although the right to confidentiality first took form of a rule of evidence, it is now recognized as having a much broader scope, as can be seen from the manner in which this Court dealt with the issues raised in Solosky.*
>
> *It is not open to the Commissioner to dilute the principles of solicitor-client privilege because of respect for the views of a federal colleague. With no disrespect to Mr. Grace, his opinions couched in what appear to be political rhetoric should carry no weight in the process of statutory interpretation.*
>
> *The Commissioner thereby concluded that s. 14 and therefore solicitor-client privilege, is to be interpreted "narrowly" and not "expansively" for the purposes of the Act. Carrying out his interpretation in this manner allowed him to conclude that factual and descriptive information, included in a privileged document, should be released unless to do so would "clearly reveal information related to seeking, formulating, or giving legal advice".*
>
> *In my opinion this approach by the Commissioner was in error. Once the common-law principle of solicitor-client privilege is transported into the Act, as it was, the principle cannot be abridged to accomplish some "narrow" result. It must be read and interpreted in the same manner as any other statute and in conformity with the well-recognized principles of statutory interpretation. A predetermined result cannot be achieved by applying a unique method of statutory interpretation.*
>
> *There is no basis to find that the language of section 14 suggests, even if defined narrowly, that there is to be an exception for factual or descriptive information contained in privileged documents. Section 4(2) specifically states that the right of access to a record does not extend to information excepted from disclosure by solicitor-client privilege.*
>
> [underlining added]
>
> ***British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995),* 16 B.C.L.R. (3d) 64 (S.C.) at paragraphs 49 to 54**

29. Thus, if the record or information is considered to be privileged under the common law of solicitor-client privilege, it falls within section 14 of the Act and can be withheld from the Applicant.

30. Solicitor-client privilege, as incorporated into the Act by section 14, involves two distinct types of privilege, as was noted by Commissioner Loukidelis:

> *... Two kinds of legal professional privilege are recognized for the purposes of s. 14. First, a public body may withhold information that consists of, or would reveal, a confidential communication between a lawyer and his or her client directly related to the giving or receiving of legal advice. See, on this point, British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.), which set aside Order No. 29-1994. Second, a public body may withhold a record that was created for the dominant purpose of preparing for, advising on or conducting, litigation that was under way or in reasonable prospect at the time the record was created.*
>
> ***Order 00-06*, [2000] B.C.I.P.C.D. No. 6 at page 7**

31. The first kind of privilege, often referred to as the "legal professional privilege" does not apply to every communication between a lawyer and client. The following test has been accepted by Commissioner Loukidelis in ***Order F05-35***:

> *It is clear that the City relies on legal professional privilege here. This privilege serves to promote full and frank communications between a lawyer and her or his client. It does this by protecting confidential communications between them that are related to the seeking or giving of legal advice. The elements that must exist for legal professional privilege to be established were set out in the following passage from the judgment of Thackray J. in B. v. Canada:*
>
> > *As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:*
> >
> > 1. *there must be a communication, whether written or oral;*
> > 2. *the communication must be of a confidential character;*
> > 3. *the communication must be between a client (or his agent) and a legal advisor; and*
> > 4. *the communication must be directly related to the seeking, formulating, or giving of legal advice.*
> >
> > *If these four conditions are satisfied then the communication (and papers relating to it) are privileged.*
>
> *It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.*
>
> ***Order F05-35*, [2005] B.C.I.P.C.D. No. 49 at pages 2 and 3**

32. Typically, disclosure of otherwise privileged communication to a third party, constitutes a waiver of privilege resulting in the loss of protection under section 14 of the Act. However,

there are a number of exceptions to this general rule. One of them is the so-called "common interest privilege" where parties who mutually benefit from the sharing of legal advice may disclosed content of legal advice to each other without the loss of protection associated with privileged communication.

33. The common interest privilege was first recognized by the English courts within the context of litigation but it has since been expanded to apply in a non-litigation context. Canadian courts have widely acknowledged the economic and social benefits that flow from distinct parties exchanging legal advice without a loss of privilege.

***Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue – M.N.R.)*, 2002 BCSC 1344, paragraphs 11 to16**

34. Common interest privilege was recognized as a valid element of solicitor-client privilege protected under section 14 of the Act by Commissioner Loukidelis in ***Order 03-02*, [2003] B.C.I.P.C.D. No. 2** (at paragraphs 138 and 140):

> *From British Columbia cases, at least, it appears that a copy of a draft contract may be privileged depending on the relevant circumstances. To answer the question of whether the draft agreement in this inquiry is privileged, I must consider whether the draft agreement was privileged when it was communicated from UBC's outside counsel to its in-house counsel. I must consider whether its disclosure to the banks and their respective counsel was within a common interest privilege between UBC and the banks.*
>
> ...
>
> *UBC's privilege argument falls short, however, when it comes to the circulation of the draft agreement to the banks and their respective legal counsel. UBC says the draft agreement was provided to the banks and to their respective counsel "for the purposes of negotiation among the parties and to receive comment by legal counsel on the draft agreement." The evidence does not establish that the draft agreement was created to provide common legal advice for UBC and the banks. Nor does it establish, alternatively, that, having been created as a privileged communication to UBC, it was circulated to the banks for the purpose of giving and receiving common legal advice for UBC and the banks.*
>
> [underlining added]

35. Although in *Order 03-02*, the Commissioner concluded that the facts did not establish the existence of the common interest privilege, the order confirms applicability of the common interest privilege to section 14 of the Act. It also confirms that the common interest privilege will apply if the privileged record is either created to provide common legal advice or,

having been created to provide advice to one party, it is shared with other parties for the purpose of providing common legal advice.

36. The principle of the common interest privilege has been extended beyond commercial transactions. For example, in ***Order PO-3167*, [2013] O.I.P.C. No. 46**, common interest privilege was accepted in the context of legal advice developed for Ontario's Crown Attorneys being shared with all Ontario Chiefs of Police despite a finding that no solicitor-client relationship existed (at paragraph 43):

> *...The interests of Crown Attorneys, the ministry, the OPP Commissioner and municipal chiefs of police are not identical, and they each play different roles in the administration of criminal justice as it pertains to the subject matter of the memorandum. However, they all share a common interest in having a uniform understanding of the state of the law on the particular point in issue, as well as a uniform approach to its administration as evidenced by the content of the memorandum itself. The words "privileged and confidential" appearing on the face of the memorandum indicate that it is to remain confidential as against others who are not its intended recipients or beneficiaries. The common interest shared by the recipients of the memorandum thus negates any waiver of the privilege that would otherwise have occurred by its disclosure to persons or entities outside the solicitor-client relationship.*

37. Thus, VicPD submits that information that is subject to solicitor-client privilege continues to be protected by section 14 even after disclosure outside the solicitor-client relationship if the parties to whom it is disclosed share a common interest in receipt of this information.

38. Information in Record #2 consists of a summary of legal advice provided to the RCMP by Kyle Friesen, a lawyer with the Department of Justice. There can be no doubt that the initial advice was developed within the context of solicitor-client relationship and is privileged.

***Affidavit of Kyle Friesen*, paragraphs 2 to 5 and 8**

39. The privileged advice provided by Mr. Friesen to the RCMP was shared with other members of BCACP. As is evident from the portion of Record #2 that has been released, Mr. Friesen's legal advice was shared as part of BCACP discussions regarding incorporation under the *Society Act* – an issue all members of BCACP shared a common interest in. Mr.

Friesen's advice was shared for the purpose of providing other members with the benefit of this legal advice. VicPD submits that this meets the requirements of the common interest privilege as established by the Courts and adopted by both Ontario and British Columbia Information and Privacy Commissioners.

Records #3 and #4

40. Records #3 and #4 are excerpts from the minutes of the BCACP meeting of November 16 and 17, 2011. Information in these records had been severed pursuant to sections 14, 16 and 17 of the Act. However, upon further review and consultation with other public bodies, VicPD has decided to release this information to the Applicant.

Record #5

41. Record #5 consists of excerpts from the minutes of the BCACP meeting of November 16 & 17, 2011, in particular, pages 34 and 37 of those minutes. Information withheld from those pages was withheld pursuant to section 13(1) of the Act. Withheld information relates to a briefing provided to members of the BCACP by representatives of the Vancouver Police Department ("VPD") regarding crisis management and lessons learned from the 2011 Vancouver Stanley Cup Riot (the "Riot").

42. VicPD relies on the submissions made in paragraphs 16 to 23 above with regard to the interpretation and application of section 13(1).

43. Record #5 contains a summary of the presentation on the handling of the Riot both during and immediately after the event by Paul Patterson, a Senior Director with the VPD. The presentation was done in private and in expectation of that the information would be kept confidential.

***Affidavit of Paul Patterson*, paragraphs 3 to 5**

44. The presentation contained information about advice and recommendations developed by Mr. Patterson in his capacity as the Senior Director of VPD. This advice and recommendations had also been provided to the VPD Executive.

***Affidavit of Paul Patterson*, paragraph 6**

45. As such, the withheld information in Record #5 meets the *prima facie* test for application of section 13(1).

46. Although some of the withheld information contains factual summaries, as was noted by the Supreme Court of Canada in *John Doe*, supra., this does not preclude it qualifying as "advice" for the purposes of section 13(1).

See paragraph 22 above

47. The selection of the facts that were presented by Mr. Patterson in itself represents an exercise of judgment on his part as to what was relevant for consideration and, as such, is a form of advice.

***Affidavit of Paul Paterson*, paragraphs 7 to 9**
***John Doe, supra.*, paragraphs 27 and 31**

48. VicPD submits that given the broad interpretation of "advice" in section 13(1), as mandated by the Supreme Court of Canada in *John Doe* decision, it is clear that the withheld information falls within the scope of exemption in section 13(1) of the Act.

49. VicPD further submits that none of the exceptions in section 13(2) or (3) of the Act apply to the withheld information. In particular, for the reasons set out above, the withheld information, although it contains a narrative of events, does not fall within the "factual material" exception in section 13(2)(a). Rather, this information is part of advice developed by and for the public body (VPD) – the selection of facts deemed significant, out of an event that is well known and documented in the public media, cannot be viewed as merely factual material. Such interpretation would render much of section 13 exemption ineffective.

Record #6

50. Record #6 is a VPD memorandum dated September 18, 2012 regarding a Crown / Police Liaison Committee meeting. It has been withheld in its entirety pursuant to section 14 of the Act. However, upon further review and consultation with other public bodies, VicPD has decided to release this information to the Applicant.

Record #7

51. Record #7 is a Summary of Incidents regarding Abbotsford Police Department ("APD"). Most of the Record #7 has been released to the Applicant and only information that could identify the subject of the Drug Enforcement Unit's action has been withheld pursuant to section 22(1) of the Act.

52. Section 22 of the Act is intended to protect the privacy of persons referred to in public body's records by requiring the public body to withhold any information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Section 22(1) of the Act

53. It is evident from the disclosed part of Record #7 that it relates to a law enforcement investigation. As such, disclosure of the personal information in Record #7 is presumed to be an unreasonable invasion of privacy.

Section 22(3)(b) of the Act

54. The information that has been withheld consists of the address where the search was conducted and the date when the search was conducted. In the context of Record #7 this information could allow an informed person to ascertain the identity of the property owner (a matter of public record in the Land Titles Office) as well as possible the occupiers of the property. Disclosure of the address would obviously facilitate this. Disclosure of the date of the search could facilitate discovery of the address as it would be possible for neighbours and others who witnessed police attendance at the property on the day in question to

determine that the remaining records, including information about medical marijuana licence, relates to this property. Thus, VicPD submits that this information must be withheld under section 22(1) of the Act, notwithstanding that it does not constitute a traditional form of personal information.

Record #8

55. Record #8 is a letter from the British Columbia Office of the Registrar of Lobbyists. It has been withheld in its entirety (except for the letterhead) pursuant to section 3(1)(c) of the Act which exempts records that are created by or for an officer of the Legislature and that relate to the exercise of that officer's function from the application of the access provisions of the Act.

Section 3(1)(c) of the Act

56. The Information and Privacy Commissioner is designated as the Registrar of Lobbyist. The Commissioner is an officer of the Legislature.

Section 7 of the Lobbyists Registration Act
Section 1 of the Act

57. It is obvious on the face of Record #8 that it was created by the Office of the Registrar of Lobbyists and that it relates to the exercise of the functions under the *Lobbyists Registration Act*. As such, this record is clearly covered by section 3(1)(c) of the Act and is outside the scope of the access provisions of the Act.

Record #9

58. Record #9 is an excerpt from the minutes of a BCAMCP meeting held June 22, 2010. Information has been withheld from the record pursuant to section 14 of the Act.

59. VicPD relies on the submissions made in paragraphs 28 to 37 above with regard to the interpretation and application of section 14.

60. The information withheld from Record #9 consists of dollar amounts of legal costs incurred by BCAMCP for legal representation on behalf of some of its members in dealing with an access request and associated appeal.

***Affidavit of Debra Taylor*, paragraph 13**

61. Solicitor-client privilege extends to all confidential communications related to seeking and obtaining legal advice, including information about legal costs:

> *...The privilege extends to bills – narrative portions, itemized disbursements, time spent and amounts charged – and to composite data from which it is possible to deduce privileged information. The privilege exists whether the beneficiary of the privilege is a public body or a third-party recipient of government-funded legal aid.*
>
> [underlining added]
>
> ***Order 03-28*, [2003] B.C.I.P.C.D. No. 28, paragraph 15**

62. In the present case, the costs were incurred by BCAMCP on behalf of some of its members. Discussion of the privileged information by BCAMCP – the client, therefore, did not waive privilege. In the alternative, VicPD submits that disclosure would fall under the common interest privilege and no waiver of privilege had occurred.

See paragraphs 33 to 37 above

63. Therefore, VicPD submits that it is clear that the information has been properly withheld from Record #9 pursuant to section 14 of the Act.

Records #10 and #11

64. Records #10 and #11 are excerpts from the minutes of the BCAMCP meetings of July 13 and September 14, 2010. Information in these records had been severed pursuant to sections 16 and 17 of the Act. However, upon further review and consultation with other public bodies, VicPD in no longer relying on section 17 of the Act.

65. Section 16(1)(b) protects from disclosure information that has been received in confidence by the public body from the government. As was noted by Commissioner Loukidelis in

previous decisions, confidentiality within the context of section 16 requires an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information.

***Order 331-1999*, [1999] B.C.I.P.C.D. No. 44, paragraphs 30 and 31**

66. The information withheld from Records #10 and #11 relates to review and audit of the Police Academy and is sensitive information about the results of the audit. It was shared with the members of the BCAMCP on an expressed understanding of confidentiality as part of the regular communications between the representatives of the Provincial government and BCAMCP.

***Affidavit of Steven Ing*, paragraph 9**

67. Applying the criteria set out in Order 331-1999 by Commissioner Loukidelis, it is clear that the information in question was supplied in confidence:

a. The information is sensitive in nature, such that a reasonable person would regard it as confidential;
b. Information was provided in the context where it was expressly understood that it would be kept confidential;
c. The information was supplied voluntarily as BCAMCP has no ability to compel disclosure of this information by the government; and
d. Meetings of BCAMCP are held in private and in an expectation of confidentiality.

***Order 331-1999*, [1999] B.C.I.P.C.D. No. 44, paragraph 37**

68. Therefore, VicPD submits that the information in Records #10 and #11 had been received in confidence from agents of the government and, therefore, it is exempt from disclosure pursuant to section 16(1)(b) of the Act.

Record #12

69. Record #12 is an excerpt from minutes of a BCAMCP closed meeting held on December 14, 2010. Information from this record has been withheld pursuant to section 182 of the *Police Act* and, in the alternative, section 22(1) of the Act.

70. As is evident from the part of Record #12 that has been released to the Applicant, the information in question relates to investigations under the *Police Act*. It consists of comments about recent investigations by the Office of the Police Complaint Commissioner under the *Police Act* and includes identity of at least one complainant as well as a number of witnesses, including expert witnesses, and police officers. All this information was clearly collected as part of the complaint process under the *Police Act*. Furthermore, the information includes evaluations of third parties' performance and credibility.

71. Section 182 of the *Police Act* is a "notwithstanding clause" which provides that the Act does not apply to any record of a complaint made under the *Police Act*, or to any record related to a record of a complaint.

Section 182 of the Police Act and Section 79 of the Act

72. VicPD submits that information in Record #12 clearly falls within the scope of the section 182 as it relates to complaints, including public hearings, under the *Police Act*. As such that part of Record #12 is not subject to an access request under the Act.

73. In the alternative, VicPD submits that, even if the information in Record #12 is subject to the Act, it must be withheld pursuant to section 22(1) of the Act because it contains sensitive information regarding identifiable individuals that has been collected as part of a law enforcement investigation and reveals evaluation of third parties.

Section 22(3)(b) and (g) of the Act

Record #13

74. Record #13 is an excerpt from the minutes of BCAMCP meeting of February 15, 2011. Except for the severed personal information, the entire record has been provided to the Applicant.

75. Information withheld from Record #13 consists of the names and other identifying information of applicants for associate memberships with BCAMCP. Because the applications were denied, disclosure of the identities of the applicants could unfairly damage the reputation of these third parties.

Section 22(2)(h) of the Act

76. VicPD submits that, in the circumstances, the concern about the unfair damage to reputation of the third parties outweighs the Applicant's right of access to the information, especially given that the rest of the record has been disclosed. Even assuming that it is in the public interest to scrutinizing activities of BCAMCP, nothing would be served by disclosing the names of the applicants. Record #13, as severed and released to the Applicant, provides insight into the workings of BCAMCP and the considerations given to the addition of new associate members. Nothing would be gained by revealing the names of the unsuccessful applicants.

Record #14

77. Record #14 is an excerpt from minutes of a BCAMCP meeting held on March 8, 2011. The only information withheld from this record relates to the reason for Chief Constable Jamie Graham's absence from the meeting. It has been withheld under section 22(1) of the Act.

78. VicPD submits that it is clear that the withheld information contains personal information about Chief Constable Graham and disclosure of this medical information is presumed to be an unreasonable invasion of his personal privacy under the Act.

Section 22(3)(a) of the Act

Record #15

79. Record #15 is an excerpt from minutes of a BCAMCP meeting of July 12, 2011. Except for one paragraph withheld under section 13(1) of the Act, the rest of those minutes has been provided to the Applicant.

80. VicPD relies on the submissions made in paragraphs 16 to 23 above with regard to the interpretation and application of section 13(1).

81. The withheld information contains a specific "suggestion" to BCAMCP. The suggestion was made by a representative of a municipal police department who was participating in the BCAMCP in his official capacity as the member of a municipal police department.

***Affidavit of Debra Taylor*, paragraph 12**
***Affidavit of Steven Ing*, paragraph 11**

82. Information that suggests a specific course of action or conduct clearly falls within the meaning of "advice or recommendations". When it is provided by a member of a public body, such as a senior member of a municipal police department, it is clearly advice or recommendation developed by the public body. Therefore, all the elements of section 13(1) are met.

See paragraphs 16 to 23 above

83. VicPD submits that none of the exceptions in section 13(2) and (3) apply to the information in Record #15 and, therefore, severed information is protect from disclosure under section 13(1) of the Act.

Record #16

84. Record #16 is an excerpt from the minutes of a BCAMCP meeting of September 13, 2011. Information has been withheld from Record #16 pursuant to section 15(1)(a), (c), (j) and (l). It consists of details of methods used to steal BC Hydro electricity as well as BC Hydro's and police plans to combat electricity theft.

85. As was observed by Commissioner Loukidelis, section 15(1) is intended to protect law enforcement matters:

> *Section 15 of the Act is designed to protect certain important law enforcement interests. The scope of the section is well illustrated by s. 15(1)(a), which authorizes a public body to refuse to disclose*

> *information if the "disclosure could reasonably be expected to ...harm a law enforcement matter". The term "law enforcement" is defined in Schedule 2 of the Act as follows:*
>
> *(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;*
>
> ***Order 00-01*, [2000] B.C.I.P.C.D. No. 1, paragraph 16**

86. Section 15 is a harm based exemption requiring the public body to demonstrate that disclosure of the information in question would cause harm contemplated in section 15(1). However, as was noted by Commissioner Flaherty, there is no need to establish any particular level of harm for section 15 to apply:

> *"Harm" is defined in Webster's Ninth New Collegiate Dictionary (1984 ed.) to mean "injury," "mischief," or "hurt." I agree that the unqualified use of the word "harm" in section 15(1)(a) signifies that there is no need to establish serious or overwhelming harm in order for this exception to apply. A contrasting provision is section 19(s) of the Act, where "harm" is modified by the adjective "grave." On the other hand, I would not agree that section 15(1)(a) is intended to be available where the only impact that can be established is so fleeting or minimal as to be truly insignificant to the law enforcement matter involved. This, in my view "harm" is section 15(1)(a) need not be shown to be grave, but neither would it be sufficient to establish a harmful impact which of an utterly frivolous or insignificant variety.*
>
> ***Order No. 321-1999*, [1999] B.C.I.P.C.D. No. 34, paragraph 44**

87. Disclosure of the withheld information would harm law enforcement matter by providing tips to would be thieves on tools and means for stealing electricity, as well as revealing methods used to combat this serious problem, harming the effectiveness of investigative techniques or procedures, and would harm the security of BC Hydro property or system.

88. VicPD submits that the harm that would be caused by the disclosure of withheld information from Record #16 is self-evident on the face of the record. While there is no evidence of the severity of the potential harm, it is obvious that such harm would not be so fleeting or minimal as to be utterly frivolous or insignificant. Therefore, the withheld information meets the requirements of section 15(1) of the Act.

Record #17

89. Record #17 is a draft document prepared by the Ministry of Justice and provided to members of the BCAMCP. It has been withheld in its entirety pursuant to section 13(1).

90. VicPD relies on the submissions made in paragraphs 16 to 23 above with regard to the interpretation and application of section 13(1).

91. The draft document represents a proposed new procedures and standards related to criminal prosecutions. While the exact origins of the document are not evident from the record, it has been developed by the Ministry of Justice, a public body under the Act.

***Affidavit of Debra Taylor*, paragraph 14**

92. VicPD submits that the Record #17 clearly represents a form of "advice" on potential changes that has been developed by a public body and, therefore, falls within the protection of section 13(1).

See paragraphs 21 to 23 above

93. The exceptions in section 13(2) and (3) do not apply to Record #17 and therefore, it has been properly withheld under section 13(1) of the Act.

Record #18

94. Record #18 is an excerpt from minutes of a BCAMCP meeting held on October 12, 2011. Except for information withheld under section 22(1), the record has been provided to the Applicant.

95. Information withheld from Record #18 consists of the name and other identifying information (including stage name and band name) of an individual which is believed to be an associate of Hells Angels. This information was clearly collected as part of law enforcement investigation and its disclosure is presumed to be an unreasonable invasion of third party personal privacy.

Section 22(3)(b) of the Act

Record #19

96. Record #19 consists of a *Report on the need and viability of enhancing the Provincial Intelligence Centre (PIC) and include a Real Time Crime Centre (RTCC)* (the "Report") as well as the associated PowerPoint presentation (the "Presentation") which formed part of an appendix to the report. Most of the report has been provided to the Applicant. The following exemptions have been applied to information in Record #19:

a. Page 4 – section 13(1)
b. Page 11 – section 15(1)(c)
c. Pages 12-15 – section 13(1)
d. Appendix (six unnumbered pages) – section 13(1)
e. Appendix (three Presentation slides) – section 22(1)
f. Appendix (three Presentation slides) – section 13(1)

97. VicPD relies on the submissions made in paragraphs 16 to 23 above with regard to the interpretation and application of section 13(1) and paragraphs 85 and 86 above with regard to the interpretation and application of section 15(1).

98. Pages 4 and 12 to 15 of Record #19 contain a list of specific recommendations from the Report. These are clearly covered by the section 13(1).

See paragraphs 16 to 19 above

99. Information withheld from page 11 of Record #19 contains a specific example illustrating the effectiveness of the RTCC. If revealed it would disclose the effectiveness of this particular investigative technique, potentially undermining its utility in the future.

Section 15(1)(c) of the Act

100. The six unnumbered pages from the Report contain detailed analysis of three different models for the RTCC labeled "gold", "silver", and "bronze". Each represents a different policy option for the proposed RTCC and associated costs and business case for each model. As such, these clearly represent "advice" within the meaning of section 13(1) of the Act.

See paragraphs 21 to 23 above

101. The three slides from the Presentation, labeled "PIC Successes", contain specific examples of police incidents which were assisted by the Provincial Intelligence Centre. The slides have been released to the Applicant with only the information that could identify specific incidents and individuals withheld under section 22(1).

102. Clearly the information in these slides has been collected as part of a law enforcement matter and disclosure of any information that could link it to identifiable individual is presumed to be an unreasonable invasion of personal privacy.

Section 22(3)(b) of the Act

103. The disclosure in the severed-form satisfies the broad objectives of the Act without compromising privacy and, in VicPD's submission nothing would be added by disclosing additional information. On the other hand, disclosure of this additional information would allow an astute and determined person to identify specific incidents and individuals involved in them.

104. The last three Presentation slides, labeled "Recommendation" and "RTCC Proposed Models and Projected Costs" contain a summary of the same information that was withheld from portions of Record #19 discussed in paragraphs 98 and 100 above. VicPD submits that for the same reasons, this information is covered by section 13(1) of the Act.

Record #20

105. Record #20 is an excerpt from the minutes of a BCAMCP meeting held on December 11, 2012. Part of Record #20 was withheld pursuant to section 14 of the Act.

106. VicPD relies on the submissions made in paragraphs 28 to 37 above with regard to the interpretation and application of section 14.

107. The information withheld from Record #20 consists of the summary of legal advice provided to the members of BCAMCP by Kyle Friesen, a lawyer with the Department of Justice, acting for the RCMP.

***Affidavit of Kyle Friesen*, paragraphs 2 to 4 and 6 to 8**

108. VicPD acknowledges that not all parties who received Mr. Friesen's legal advice were in a solicitor-client relationship. However, it is clear that the advice was provided in a situation where members of BCAMCP shared a common interest in receiving this legal advice. VicPD submits that this meets the requirements of the common interest privilege as established by the Courts and adopted by both Ontario and British Columbia Information and Privacy Commissioners.

CONCLUSION

109. Following further consultations and consideration, VicPD has decided to release to the Applicant records #3, 4, and 6. These records will be made available to the Applicant as soon as practicable and in any event well prior to the deadline for Applicant's response submission.

110. VicPD submits that, for the reasons set out above, it has correctly applied various exemptions in the Act and seeks an order confirming its decisions regarding the information in the remaining records in dispute:

a. Records #1, #5, #15 and #17 – confirmation that it was authorized to withhold information under section,13(1);
b. Records #2, #9, and #20 – confirmation that it was authorized to withhold information under section 14;
c. Record #7, #13, #14, and #18 – confirmation that it was required to withhold information under section 22(1);
d. Record #8 – confirmation that the record is outside the scope of the Act pursuant to section 3(1)(c) of the Act;
e. Record #10 and #11 – confirmation that it was authorized to withhold information under section 16(1)(b);

f. Record #12 – confirmation that the record is protected from disclosure by section 182 of the *Police Act*, or, in the alternative, that it was required to withhold information pursuant to section 22(1);
g. Record #16 – confirmation that it was authorized to withhold information under section 15(1)(a),(c),(j), and (l); and
h. Record #19 – confirmation that it was authorized to withhold information under sections 13(1), 15(1)(c), and that it was required to withhold information under section 22(1).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: March 3, 2015

Tom Zworski, Counsel for the Public Body, Victoria Police Department