



Order F19-39

FINANCIAL INSTITUTIONS COMMISSION

Elizabeth Barker
Director of Adjudication

November 1, 2019

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Summary: The applicant asked the public body for access to certain records regarding Coast Capital Savings Credit Union's application to become a federal credit union. The public body gave the applicant partial access to the responsive records. The adjudicator confirmed the public body's decision to refuse the applicant access under s.14 (solicitor client privilege). However, she found that ss. 13(1) (policy advice or recommendations), 17(1) (harm to public body's financial or economic interests), 21(1) (harm to third party business interests) and 22(1) (unreasonable invasion of personal privacy) only applied to some of the information in dispute and ordered the public body to disclose the remainder of the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 14, 17(1), 21(1), 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii), 21(1)(c)(iii), 22(1), 22(2), 22(3), 22(4).

INTRODUCTION

[1] The applicant asked the Financial Institutions Commission (FICOM) for access to records related to an application by Coast Capital Savings Credit Union (Coast Capital) to become a federal credit union. He made three separate access requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for the same information, covering different time periods. This decision is about all three of his access requests.

[2] Specifically, the applicant requested "all information that has been collected and generated regarding the application by Coast Capital Savings to continue as a federal credit union, as announced in the FICOM notice of

February 14, 2017.”¹ FICOM provided the applicant with partial access to the records, but refused him access to some records and parts of records under several FIPPA exceptions to disclosure. The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review FICOM’s decisions regarding his access requests. During mediation, FICOM issued a supplemental decision adding more exceptions to disclosure. Mediation did not resolve the matters in dispute and they proceeded to inquiry.

[3] During the inquiry, FICOM clarified that it was refusing to disclose information under ss. 13 (policy advice or recommendations), 14 (solicitor client privilege), 17 (harm to public body’s financial or economic interests), 21 (harm to third party business interests) and 22 (unreasonable invasion of personal privacy) of FIPPA.² FICOM also said that it was no longer relying on s. 12 (cabinet confidences) and that it had reduced the amount of information being withheld under s. 15(1)(l) (harm to security of property or system). The applicant subsequently withdrew his request for the balance of the information being withheld under s. 15(1)(l).

[4] The OIPC invited Coast Capital as well as Central 1 Credit Union (Central 1) to participate in the inquiry. Written submissions were received from FICOM, the applicant, Coast Capital and Central 1.

[5] For clarity, in these reasons, “FICOM” refers to the Financial Institutions Commission as the larger administrative entity and “Commission” refers specifically to the Financial Institutions Commission’s statutory decision-makers as described in Part 7 of the *Financial Institutions Act* (FIA)³

Preliminary matters

[6] **Section 25** - In his submissions, the applicant says that disclosure of the information in dispute is in the public interest. I understand this to be an argument that s. 25 of FIPPA applies, although he does not expressly reference that provision. Section 25 requires a public body disclose information without delay when it is in the public interest to do so. This section overrides all of FIPPA’s discretionary and mandatory exceptions to disclosure and there is a high threshold before it applies. The s. 25 duty to disclose exists only in the “clearest

¹ His requests are dated March 27, 2017 (F17-70827), June 20, 2017 (F18-74103) and August 23, 2017 (F17-73054). The applicant’s complaint that FICOM failed to conduct an adequate search for records (F18-74184) is not a part of this inquiry and was decided by an OIPC investigator.

² FICOM dropped its reliance on s. 12 (cabinet confidences) of FIPPA.

³ The members of the Financial Institutions Commission are described in s. 202(1) of the FIA and include a chair and members appointed by the Lieutenant Governor in Council and the deputy minister of Finance.

and most serious of situations” and the disclosure must be “not just arguably in the public interest, but *clearly* (*i.e.*, unmistakably) in the public interest”.⁴

[7] Past orders have said that a party may only introduce a new issue into an inquiry if the OIPC grants permission to do so.⁵ Section 25 is not listed as an issue in the OIPC investigators’ fact reports for the applicant’s three access requests, nor is it included in the notice of inquiry. The notice of inquiry specified the issues to be decided and also said that in general the adjudicator will not consider issues not in the investigators’ fact reports. The notice of inquiry also advised the parties to review the OIPC’s *Instructions for Written Inquiries*, which say:

Parties may not add new exceptions or issues into the inquiry without the OIPC’s prior consent. Any request to add a new issue or exception must be made in writing to the Registrar prior to the date for initial submissions. If the OIPC decides to approve the request, the Registrar will amend the notice of inquiry and dates for submissions accordingly. Only in exceptional circumstances will the OIPC accept new exceptions or issues raised for the first time in a party’s submission.

[8] The applicant does not explain why he did not raise the s. 25 issue earlier and seek the OIPC’s permission to add it into the inquiry, or why it should be added now, so late in the proceedings. Moreover, my review of the information in dispute reveals nothing that appears to engage the public interest in the way that previous orders have said is required in order for s. 25 to apply. Therefore, I have determined that s. 25 is not an issue in this inquiry.

ISSUES

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

1. Is FICOM authorized to refuse to disclose information under ss. 13(1), 14 and 17(1) of FIPPA?
2. Is FICOM required to refuse to disclose information under ss. 21(1) and 22(1) of FIPPA?

[10] Section 57(1) of FIPPA places the burden on FICOM to prove that ss. 13(1), 14, 17(1) and 21(1) apply. However, s. 57(2) says that the burden is on the applicant to prove that disclosure of any personal information contained in the

⁴ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, italics in original. See also *Tromp v Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

⁵ Order F07-03, 2007 CanLII 30393 (BC IPC) and Order F11-28, 2011 BCIPC 34 at para. 11.

requested records would not unreasonably invade third party personal privacy under s. 22(1) of FIPPA.

DISCUSSION

Background

[11] FICOM is a provincial agency established under the FIA. FICOM has regulatory responsibility over credit unions operating in BC. FICOM's mandate is to safeguard confidence and stability in BC's financial sector and to protect consumers of financial services from undue loss and unfair market conduct by regulated entities.⁶

[12] Coast Capital, which is the second largest credit union in BC, falls under FICOM's regulatory oversight.⁷ At the time of the applicant's access requests, Coast Capital was in the process of seeking approval under BC's *Credit Union Incorporation Act* (CUIA) to continue as a federal credit union. That process involves Coast Capital submitting an application for approval as set out in s. 15.2 of the CUIA.

[13] Section 15.2 of the CUIA states that a credit union may apply to the officer of another jurisdiction to continue as if it had been incorporated under the laws of that other jurisdiction if the credit union is authorized by a special resolution of its members and has the consent of FICOM and the Credit Union Deposit Insurance Corporation. When deciding a s. 15.2 application, the Commission and the Credit Union Deposit Insurance Corporation consider a number of factors including whether the credit union's members were provided full and fair disclosure of information upon which to make their special resolution decision.⁸

[14] In the present case, Coast Capital's members voted in favour of a special resolution to apply for federal continuance. FICOM staff analyzed Coast Capital's s. 15.2 application materials, including the information Coast Capital provided to its members during the special resolution vote. FICOM also obtained expert reports, consulted other credit unions and held a public consultation. Based on their analysis, FICOM staff recommended that the Commission consent to Coast Capital's federal continuance.⁹

⁶ FICOM's initial submissions at para. 7.

⁷ FICOM's initial submissions at para. 8.

⁸ FICOM's Information Bulletin at Exhibit A of Affidavit of FICOM's Managing Director of Statutory Approvals (VC) at Exhibit A.

⁹ VC's affidavit at para. 17.

[15] The Commission’s decision-making process culminated in a June 21, 2017 meeting, prior to which the Commission members reviewed approximately 575 pages of relevant documents. At the meeting, the Commission members discussed the s. 15.2 application and watched presentations made by FICOM staff and by Coast Capital.¹⁰ On August 11, 2017, the Commission consented to Coast Capital applying to the federal Minister of Finance for authorization to continue under the federal *Bank Act* (Consent Decision).¹¹ Coast Capital’s application was successful and as of November 1, 2018, it has been authorized to carry on business as a federal credit union under the *Bank Act*.¹²

[16] The applicant is a Coast Capital member who disagrees with Coast Capital becoming a federal credit union.¹³ The applicant expresses particular concern about the information and materials Coast Capital disclosed to its staff and members leading up to the members’ special resolution vote, and he alleges that the vote materials and ballot were like a “sales pitch” for a “yes” vote. The applicant wants to know if FICOM considered those facts when assessing the reliability of the members’ special resolution vote.

[17] Some of the information that FICOM refused to disclose under s. 21(1) is about Central 1. Central 1 is a “credit union central” for BC and Ontario. It serves as the primary liquidity manager, payments provider and trade association for its member credit unions in BC and Ontario. Central 1’s key services include maintaining a mandatory liquidity pool for the credit union network. All BC credit unions are required by legislation to hold their statutory liquidity with Central 1. FICOM has regulatory and supervisory oversight over Central 1 and has identified it as a “domestic, systemically important, financial institution”.¹⁴

Information in dispute

[18] There are approximately 6,000 pages of records at issue in this inquiry. For each of the three files, FICOM provided a table of records that lists the

¹⁰ VC’s affidavit at para. 18.

¹¹ VC’s affidavit at paras. 18-20. The Consent Decision is not one of the records at issue in this inquiry.

¹² *Canada Gazette* Part 1, Vol. 152, No. 46.

¹³ The applicant also petitioned for judicial review of the Consent Decision and FICOM’s decision to allow Coast Capital to amend its rules regarding shares and subordinated debt. His petitions were unsuccessful: *Duhamel v Financial Institutions Commission*, 2018 BCSC 1476; *Duhamel v Financial Institutions Commission*, 2018 BCSC 1309; *Duhamel v Financial Institutions Commission*, 2018 BCSC 1620 and *Duhamel v Financial Institutions Commission*, 2018 BCSC 962.

¹⁴ The information in this paragraph about Central 1 comes from its initial submissions at paras 7-19.

FIPPA exceptions applied to each page. Most pages have been completely withheld.

[19] The records include Coast Capital's s. 15.2 application, as well as the records it provided to FICOM during a pre-application consultation phase.¹⁵ The disputed records also include FICOM staff's internal correspondence, email and briefing documents. There are also records that pertain to FICOM's communications with Central 1, as well as a consultant retained to provide FICOM with analysis regarding the impact of Coast Capital leaving the provincial credit union regime.

[20] During the inquiry I wrote to the applicant to seek clarification about whether he was still seeking access to certain disputed information. In response, he narrowed the amount of the s. 22 information at issue and there are now only four pages to consider under s. 22.¹⁶ He also clarified that he no longer wanted access to some of the information withheld under s. 21(1), specifically, the information about Central 1 and certain financial tables and their accompanying cover emails.¹⁷ I will not make a decision about any of that information, as it is no longer in dispute.

[21] In its initial submission, FICOM indicated that it is now prepared to disclose specific records that were withheld under s. 21(1). However, Coast Capital still objects to their disclosure, so I consider them to still be in dispute and I will make a decision about them.¹⁸

[22] The tables list some records as "Not related to request", "Unrelated" and "non-responsive." I conclude that FICOM's decision to refuse access on those grounds is not in dispute because it was not identified as an issue in the OIPC investigators' fact reports or the notice of inquiry, and the applicant does not mention it in his submissions. I will make no decision about those records.

[23] There are many instances where FICOM is withholding records as "duplicates" of other records. The applicant clarified during the inquiry that he does not seek access to true duplicates.¹⁹ I have reviewed the records labelled as "duplicates" in FICOM's tables of records and they are correctly labelled as such. In working through the records, I also found duplicates that were not

¹⁵ Affidavit of Coast Capital's Vice President of Enterprise Transformation (JG) at paras. 21-22.

¹⁶ They are in file F17-70827 at pp. 196-97 and 1342-43.

¹⁷ He also says at para. 75 of his submission, that he takes no position with respect to Central 1's submissions.

¹⁸ FICOM's initial submissions at para. 4-6. These records are described in VC's affidavit at para. 38 and Exhibit F.

¹⁹ Applicant's May 7, 2019 letter.

identified in FICOM's table of records.²⁰ Given that the applicant said he does not want duplicates I conclude that none of those duplicate records are in dispute.

Advice or recommendations - s. 13(1)

[24] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.²¹

[25] Section 13(1) has been the subject of many orders, which have said that the exception applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.²² The BC Court of Appeal, in *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)* [College], said that the term "advice" includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact," including "expert opinion on matters of fact on which a public body must make a decision for future action."²³ In addition, the word "advice" includes policy options, whether or not the advice is communicated to anyone.²⁴

[26] The process for determining whether s. 13(1) applies to information in a record involves two stages.²⁵ The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, one must then decide if the information falls into the categories listed in s. 13(2). If s. 13(2) applies, the public body must not refuse to disclose the information under s. 13(1).

Parties' submissions - s. 13

[27] FICOM's submission regarding the application of s. 13 to the records is brief. It says that recommendations, analysis and advice have been redacted in accordance with s. 13. It also says:

Where the *FIPPA* section 13 exemption is claimed, it is with respect to drafts of, analysis and discussion of, and final copies of briefing notes to the Superintendent of Financial Institutions, Commission, and the

²⁰ For example, in File F17-70827 pp. 103-144 and 1785-1798.

²¹ *John Doe v Ontario (Finance)*, 2014 SCC 36 [John Doe] at para. 45.

²² Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24.

²³ 2002 BCCA 665 at para. 113.

²⁴ *John Doe*, *supra* note 21 at paras. 47-51.

²⁵ Order F07-17, 2007 CanLII 35478 (BC IPC) at para 18.

Credit Union Deposit Insurance Corporation as the respective decision makers on the applications.²⁶

[28] FICOM provides an affidavit from its Managing Director of Statutory Approvals (VC). He says that FICOM staff conducted a lengthy and comprehensive analysis of Coast Capital's s. 15.2 application materials, obtained expert reports, consulted other credit unions and held a public consultation. Based on their analysis, he says, FICOM staff recommended the Commission consent to Coast Capital's s. 15.2 application for federal continuance.²⁷

[29] VC also says the records at issue "consist in large part of analysis and drafts of materials which informed the content of, or were included in the briefing materials put before the Commission to aid it in its decision making on Coast Capital's application."²⁸ VC says the information at issue falls into three categories: commercially sensitive information proprietary to Coast Capital, financial and risk analysis information about Coast Capital, and sensitive and risk analysis information regarding the BC credit union system.²⁹ He does not refer to any specific pages of the records or speak about how any particular record reveals advice or recommendations.

[30] The applicant does not say whether he thinks the information FICOM is withholding under s. 13 is advice and recommendations. However, he says that s. 13(2)(n) applies.³⁰

Findings - s. 13(1)

[31] From my review of the records it is clear that some of the withheld information reveals advice or recommendations under s. 13(1). For instance, some information in the disputed records is expressly stated as a recommendation and other information is clearly advice about how the Commission should consider the issues it is deciding.

[32] I also find that the analysis, opinions and conclusions in reports prepared by FICOM staff and the consultants retained by FICOM are the type of expert opinion that *College* said is advice under s. 13. FICOM's staff and consultants

²⁶ FICOM initial submission at para. 57. FICOM's Chief Executive Officer is the Superintendent of Financial Institutions.

²⁷ VC's affidavit at para. 17.

²⁸ VC's affidavit at para. 22.

²⁹ VC's affidavit at paras. 41-44. He lists 21 documents and says they comprise the type of information that financial institution regulators call "supervisory information." He does not say if these are the same approximately 575 pages of relevant documents that the Commission considered when making its decision.

³⁰ Applicant's submission at para. 69.

are clearly using their expertise and professional judgement to analyze and weigh the significance of matters of fact to provide an opinion about the issues FICOM and the Commission must decide. There is also information of this same type in the decision notes prepared by VC,³¹ and in emails between VC and other FICOM staff and the consultants.

[33] However, FICOM's evidence and submissions fail to establish that other information reveals advice or recommendations developed by or for a public body or minister. For instance, FICOM is withholding entire records that are earlier versions/drafts of records that appear in a final version elsewhere in the records.³² FICOM evidently has not conducted line-by-line severing of these records but instead applied s. 13(1) in a blanket fashion. FICOM's submissions and affidavit evidence do not address these records and the information in them with the specificity necessary to explain how disclosure would reveal advice or recommendations.

[34] Previous orders have said that s. 13(1) does not apply to an entire record simply because it is a draft. The usual analysis applies and a public body may only withhold the information in the earlier version/draft that would reveal advice or recommendations developed by, or for, a public body or a minister.³³ Accordingly, I considered whether the information in the drafts/earlier versions reveals advice or recommendations and I find that some, but not all of it does.

[35] FICOM is also withholding some records under s. 13(1) that contain in-line editing and format changes.³⁴ FICOM said nothing about this information or these specific records. There are no notations or details within these documents to show that the edits were added by someone other than the author of the documents. In my view, the in-line editing and formatting in these particular records reveal drafting decisions, not advice and recommendations. In other records, however, there are comment bubbles in the margins that plainly reveal a reviewer's identity and advice to the author about how best to communicate something, so I find that information would reveal advice.³⁵

[36] FICOM is also withholding some information under s. 13(1) that it has already disclosed to the applicant elsewhere in the records.³⁶ No explanation

³¹ For instance, in F18-74103 at pp. 1590-1612.

³² For example, F17-70827 at pp. 653-659 and 2139-2145; F18-74103 at pp. 202-216. For some of these records, FICOM's table of records says, "Final in Commission Package." The Commission Package refers to F18-74103 at pp. 1590-2168.

³³ Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6. Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59-61; Order F14-44, 2014 BCIPC 47 at para. 32.

³⁴ For example, F18-74103 at pp. 178-201 and F17-73054 at pp. 178-179.

³⁵ For example, F18-74103 at pp. 935-937.

³⁶ For example, F18-74103 at pp. 695-701 and 2094-2099; F17-73054 at pp. 212-233 and F18-74103 at pp. 1591-1612; F17-70827 at pp. 653-659 and 2139-2145.

was provided for this inconsistent severing. I am not persuaded that disclosing this information would “reveal” any advice or recommendations given the information has already been revealed.

[37] For added clarity, the following are other examples of the types of withheld information that I find would not reveal advice or recommendations:

- Factual information in the introductions and background portions of reports, issues notes, emails and the documents Coast Capital provided to FICOM.³⁷
- Factual statements in emails about what topics will be put on a meeting agenda, and factual statements in meeting minutes about what was discussed and the decisions made.³⁸
- Document titles/headings, table of contents, acronym definitions, headers and footers, document dates and page numbers.

[38] The information that I find would not reveal advice or recommendations may not be withheld by FICOM under s. 13(1).

Findings - s. 13(2)

[39] The second step in the s. 13 analysis is to decide if any of the information that I have found would reveal advice or recommendations falls into the categories of information listed in s. 13(2). The applicant says that s. 13(2)(n) applies. Section 13(2)(n) says:

- (2) The head of a public body must not refuse to disclose under subsection (1)
- ...
- (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.

[40] The information that I find is advice or recommendations is about the analysis related to the s. 15.2 application and it does not include the decisions about the application or the decision-makers’ reasons, so s. 13(2)(n) does not apply. I have also considered the other categories of information and records in s. 13(2) and find none of them apply.

[41] In summary, FICOM has established that it is authorized to refuse to disclose a portion of the information in dispute under s. 13(1). Much of this information was also withheld under other exceptions so I will consider it again below.

³⁷ For example, F18-74103 at pp. 867-68 and 1697-1719.

³⁸ For example, F18-74103 at pp. 546-550 and 572.

Solicitor client privilege - s. 14

[42] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.³⁹ FICOM submits that legal advice privilege applies to the information it is withholding under s. 14.⁴⁰ The applicant does not make any submissions about whether s. 14 applies.

[43] When deciding if legal advice privilege applies, BC Orders have consistently applied the following criteria:

1. there must be a communication, whether oral or written;
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.

[44] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.⁴¹

[45] FICOM did not provide me the information withheld under s. 14 for my review. I determined that, with only a few exceptions, FICOM's initial affidavit evidence regarding s. 14 was sufficient to allow me to make a decision. Upon request, FICOM provided a second affidavit regarding the pages that I identified as requiring clarification.⁴² After receiving the additional information, I concluded that I had sufficient information to make a decision without needing to see the records.

[46] FICOM's two affidavits were from JW, a lawyer working in the Ministry of Attorney General's Legal Services Branch (LSB). JW says that she and SW, who is also a LSB lawyer, provided legal advice to FICOM on the matters addressed in the records.⁴³ JW says that she has reviewed the records withheld under s. 14. She also says:

³⁹ *College*, *supra* note 23 at para. 26.

⁴⁰ FICOM's initial submissions at paras. 60-63.

⁴¹ *R v B*, 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v Solosky*, [1980] 1 SCR 821.

⁴² At the same time, FICOM reconsidered the application of s. 14 to F18-74103 pp. 921 and 924 and disclosed those pages as exhibits to the affidavit.

⁴³ SW is the lawyer representing FICOM in this inquiry.

Based on my review of the records, with respect to the pages with pages and content boxed within pages marked under s. 14 as Section 14 Information, I believe:

- the withheld information discloses communications between [SW], as legal counsel at LSB, and our clients at the Public Body;
- the withheld information relates directly to the seeking, formulating or giving of legal advice from [SW] in her role as lawyer, to our clients at the Public Body; and
- the withheld information relating to the communications between [SW] and the Public Body employees were confidential in nature.

The Section 14 Information also includes numerous other instances where the Ministry speaks of legal advice they have received on certain topics and also includes instances where the Ministry speaks of the need to seek legal advice on certain issues. I have reviewed the records related to the advice and spoken with [SW] about that advice that she provided to the Public Body on these matters and am able to confirm that in each instance, [SW] did provide legal advice to the Public Body on these matters where she was acting in her role as legal counsel at LSB.⁴⁴

Findings - s. 14

[47] JW's evidence, combined with the surrounding information and context the records provide, satisfy me that disclosing the information withheld under s. 14 would reveal FICOM's confidential communications with its lawyers about legal advice. FICOM provided evidence from JW, the lawyer directly involved in the communications. For the records that did not directly involve her, JW explains the source of her beliefs and the basis of her opinions. She also explains that she spoke directly to SW about the advice SW gave in her communications. Further, I can see the name of the sender and recipient for most of the emails so I can see that they were communications exclusively between FICOM employees and the LSB lawyers. There was also information disclosed in the records that allows me to understand the context of the communication. Considering all this evidence, I find that FICOM has established that the information may be withheld under s. 14.

Harm to Third Party Business Interests - 21(1)

[48] There is a fair bit of overlap between FICOM's application of s. 21 and s. 17. Most of the information at issue in this inquiry is being withheld under s. 21(1), so I will address that exception first. I will only consider the application of s. 17 to the information that I find s. 21 does not apply to.

⁴⁴ JW's affidavit at paras. 7-8.

[49] The parts of s. 21(1) that are relevant in this case say:

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization,

...

[50] Section 21(1) creates a three-part test: s. 21(1)(a), (b) and (c). A public body is required to withhold third party information only if all three parts of the test have been met.⁴⁵

Type of Information, s. 21(1)(a)

[51] For the reasons that follow, I find that the first part of the test is met because all of the information withheld under s. 21(1) is financial and/or commercial information of or about a third party.

[52] Both FICOM and Coast Capital submit that the information in dispute is financial and commercial information.⁴⁶ The applicant does not make a submission about whether s. 21(1)(a) applies.

[53] FICOM's evidence is that the information is about Coast Capital's business plan, technical reports on its financial position, risk appetite, contingency plans and its ability to weather best and worst case scenarios. VC says that the reports include figures on systematic risk and discuss the rigour and adequacy of the stress testing performed. VC also says some information is analysis about the impact of Coast Capital's continuance on the mandatory liquidity pool and shared services and how that affects the

⁴⁵ Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 6.

⁴⁶ FICOM's initial submissions at paras. 77-78. Coast Capital's initial submission at paras. 25 and 35.

profitability of other credit unions. He also explains how the information includes details about revenue, expenses, liquidity funding and credit ratings. He says the information also includes hypothetical scenarios and their potential impact on the stability of the entire BC credit union system.⁴⁷

[54] Coast Capital provides an affidavit from its Vice President of Enterprise Transformation (JG) who says that the information is about the specific process and strategic steps Coast Capital took to further the s. 15.2 application. He says it also includes information about Coast Capital's growth strategy, appetite for risk, discussion of its business model and financial outlook, risk management and contingency planning.⁴⁸

[55] FIPPA does not define the terms "commercial" or "financial" information. Past orders have said that "commercial" information relates to commerce and the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an independent monetary or marketable value.⁴⁹ I have also considered what prior orders have said about financial information and conclude that the term means information about money and its use or distribution.⁵⁰

[56] It is clear that the information at issue here is a mix of both financial and commercial information of or about Coast Capital and other credit unions. The information is about their finances, liquidity management and business activities in the financial/banking sector. It is also about the financial and business products and services that Coast Capital provides to its members and customers.

Supplied in confidence, s. 21(1)(b)

[57] In order for the second part of the test to be met, the information must have been supplied, either implicitly or explicitly, in confidence. This is a two-part analysis. The first step is to determine whether the information was supplied to a public body. The second step is to determine whether the information was supplied "in confidence." Below, I find that with only a few exceptions, the information was supplied, implicitly or explicitly, in confidence to FICOM.

[58] VC says that the information withheld under s. 21 is "reports or gathered information prepared or requested by FICOM" in the context of the s. 15.2 application.⁵¹ VC says that most of the information was submitted to

⁴⁷ VC's affidavit at paras. 41-44.

⁴⁸ JG's affidavit at para. 24.

⁴⁹ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC) at paras 62-63.

⁵⁰ For example, Order F18-20, 2018 BCIPC 23; Order F14-58, 2014 BCIPC 62.

⁵¹ VC's affidavit at paras. 25.

FICOM with the expectation that FICOM would maintain its confidentiality, or else created by FICOM with the expectation that it would remain confidential. He adds that the information has at all times been treated as confidential by FICOM.⁵²

[59] VC identifies one particular record that contains an express statement of confidentiality. It is a letter sent to FICOM and it requests that FICOM keep the information confidential.⁵³ FICOM says that while some records do not have an explicit statement of confidentiality, there was a "mutuality of understanding" between FICOM and the third parties about treating these records as having been supplied and held in confidence.⁵⁴ FICOM says that one reason for this mutual expectation is that s. 218 of the *Financial Institutions Act* applies and restricts disclosure.⁵⁵ Section 218 states:

218 An individual or entity who, under this Act, obtains

(a) information, or

(b) records

that are submitted in accordance with a request that is made or an obligation that is imposed under this Act must not disclose the information or records to any individual or entity other than for the purposes of administering this Act and the regulations, for the purposes of a prosecution or if required by law.

[60] VC explains how FICOM is not unique amongst regulators of financial institutions in keeping strictly confidential the supervisory information it collects or creates in the context of regulatory examinations or reviews.⁵⁶ He says that regulators keep such information confidential and only share it in very specific contexts, for instance if there is an information-sharing arrangement between regulators.⁵⁷

[61] VC says that most of the records, and especially those which contain supervisory information, were created with the expectation that they would be viewed only by FICOM or its consultants and that FICOM would maintain their confidentiality.⁵⁸ As for the records that were authored by FICOM and its consultants, VC says that based on his involvement with those records, he knows that there was an expectation that they would not be disclosed

⁵² VC's affidavit at para. 46.

⁵³ VC's affidavit at para. 54. This record is at file F18-74103 pp. 1738-41.

⁵⁴ FICOM's initial submissions at para. 80.

⁵⁵ FICOM's initial submissions at paras. 34 and 81.

⁵⁶ VC's affidavit at paras. 26-35.

⁵⁷ VC's affidavit at para. 26.

⁵⁸ VC's affidavit at paras. 47-51.

publicly or otherwise disseminated outside of FICOM other than possibly to the credit union to which they related.⁵⁹

[62] Coast Capital's JG says that he was personally involved in the process of creating, gathering, reviewing and submitting the materials to FICOM. JG says that Coast Capital consulted with FICOM staff for an extended period of time before submitting its formal s. 15.2 application for consent. He says that the records in dispute include both Coast Capital's formal application materials, as well as materials it supplied to FICOM during the pre-application consultation phase.⁶⁰

[63] JG says that Coast Capital understood that the information it disclosed to FICOM during the application process would remain confidential based on the provisions of the CUIA.⁶¹ JG also says:

Coast Capital supplied the Records to the Commission voluntarily, and in good faith, on the understanding that they would remain confidential and would be used for the sole purpose of its Continuance application. In doing so, Coast Capital provided the Commission with competitively and commercially sensitive materials including highly sensitive proprietary information regarding Coast Capital's internal position, business strategy, finances, risk analysis, confidential strategy, liquidity management and draft communications. Coast Capital believed such highly sensitive information would be protected from disclosure.⁶²

[64] JG also provides information about how Coast Capital treats the information internally. He says that Coast Capital has taken significant measures to maintain the confidentiality of the information and avoid disclosure to the public or its competitors. Only its board of directors, executive committee and certain employees involved in strategic business, contingency, liquidity and communication planning were provided access. JG also describes Coast Capital's policies regarding confidentiality for current and former staff and directors.

[65] The applicant does not comment on whether the information at issue was supplied. On the issue of confidentiality he says, "The other parties frequently cite a particular person's (or institution's) subjective expectations of confidentiality in the information that they generated or that is held by the Public Body. But subjective expectations are irrelevant."⁶³ Regarding Coast Capital's

⁵⁹ VC's affidavit at para. 53.

⁶⁰ JG's affidavit paras. 21-22.

⁶¹ He does not say what provision of the CUIA.

⁶² JG's affidavit at para. 26.

⁶³ Applicant's submission at para. 74.

communications materials to its members and staff, the applicant does not think one could expect that information to remain confidential. He says that there is effectively no difference between making those materials available to members and staff and making them available to the broader public given that Coast Capital has over 500,000 members and 1650 staff.

[66] The applicant says, however, that he agrees that some of the information warrants being kept confidential. Specifically information collected from other credit unions to assess the state of the provincial credit union system, information from Coast Capital that has “genuine commercial sensitivity” such as elements of its business plan and the information supplied by Central 1.⁶⁴

Findings - s. 21(1)(b)

[67] I find that most of the information FICOM is refusing to disclose under s. 21(1) is information that was “supplied” to FICOM. The content and context of this information demonstrates that it did not originate with FICOM but was instead provided to FICOM by Coast Capital and other third parties.

[68] For s. 21(1)(b) to apply, the supplied information must also have been supplied “implicitly or explicitly, in confidence.” To establish the element of confidentiality, it must be shown that information was supplied “under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided.”⁶⁵ Some of the records contain express statements of confidentiality. Based on those express statements, I find the information in dispute in those records was supplied in confidence. VC and JG’s evidence regarding the nature of FICOM’s supervisory and regulatory relationship with Coast Capital persuades me that the balance of the supplied information was supplied with the implied understanding that it would be held in confidence.

[69] There are, however, a few instances, where I find that s. 21(1)(b) does not apply because the information was created by, or came from, FICOM staff, so it was not supplied to FICOM.⁶⁶ I also find there is some information that was not supplied because it is the negotiated terms of FICOM’s contract with a consultant.⁶⁷ This is consistent with previous orders that have also said that the terms of a contract generally reveal negotiated information, not information that is supplied by the contractor to the public body.⁶⁸ FICOM and Coast Capital say

⁶⁴ Applicant’s submission at paras.4, 31, 67-68 and 75-76.

⁶⁵ Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.

⁶⁶ For example: F18-74103, pp. 871-72, 1004-1005, 1592-1593; F17-73054 at p. 35; F17-70827 at pp. 864-865, 3091.

⁶⁷ File F17-70827 at pp. 2483-2484.

⁶⁸ See for example, Order 01-39, 2001 CanLII 21593 and Order F16-16, 2016 BCIPC 18.

nothing specific about any of this information, so I do not understand why they believe it is supplied information. Absent any persuasive explanation and evidence about this information, I find that it was not supplied pursuant to s. 21(1)(b).

Section 21(1)(c) harms

[70] The final step in the s. 21(1) test is to determine if disclosing the information, that meets the first two parts of the test, could reasonably be expected to cause one or more of the harms listed in s. 21(1)(c).

[71] The standard of proof for s. 21(1) and any other exception which uses the language “could reasonably be expected to harm” is a middle ground between that which is probable and that which is merely possible. The Supreme Court of Canada has said “The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived.”⁶⁹ To meet the standard, the party objecting to disclosure does not have to establish on the balance of probabilities that the harm will in fact occur but “something well beyond a mere possibility of harm must be shown.”⁷⁰

[72] The determination of whether the standard of proof has been met is contextual, and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”⁷¹ The evidence needs to establish “that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.”⁷²

Parties’ submissions on s. 21(1)(c)(i) and (iii)

[73] FICOM and Coast Capital both submit that disclosure of the disputed information could reasonably be expected to cause the harms listed in ss. 21(1)(c)(i) and (iii).

[74] FICOM’s evidence is provided by VC who says:

Based on my experience with FICOM and in the regulation of credit unions in British Columbia, I expect that if other credit unions or banks were to have access to this information, it would likely have a negative impact on Coast Capital’s

⁶⁹ *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 [Merck] at para. 204.

⁷⁰ *Ibid* at paras. 197 and 199.

⁷¹ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

⁷² *Merck*, *supra* note 69 at para. 219.

competitive position relative to other institutions. The integrity of BC's financial system (which is in the public interest) depends on maintaining competitiveness among the province's largest institutions, including Coast Capital.

...
The Confidential Supervisory Information discusses specific credit unions, including but not limited to Coast Capital, and conveys confidential financial information regarding these institutions as well as risk analysis information about the credit unions' ability to respond to Coast Capital's federal continuance. Based on my experience with FICOM and in the regulation of credit unions in British Columbia, I expect that if this information were to be released to [sic] the applicant to the public, it could easily be misunderstood, misconstrued, selectively disseminated or taken out of context in a way that would likely undermine public confidence and cause reputational damage to the individual credit unions that make up British Columbia's credit union system. This could in turn have negative consequences for the stability of these institutions.⁷³

[75] In support of its harm arguments, FICOM cites a preliminary decision in the applicant's judicial review proceedings: *Duhamel v. Financial Institutions Commission* [*Duhamel*].⁷⁴ FICOM also cites Order P-719 from the Ontario Information and Privacy Commissioner.⁷⁵

[76] Further, FICOM's harms submissions provide information about how the applicant operates an online forum and website that focuses on the governance of Coast Capital, he describes his website as "educational, informational, and critical," he maintains an email list of Coast Capital members, he submitted a 197-page case against Coast Capital becoming a federal credit union during FICOM's public consultation process for the continuance application and sent it to the boards of directors of 307 other Canadian credit unions.⁷⁶

[77] For its part, Coast Capital submits that the information in dispute "could reasonably be expected to result in Coast Capital's competitors having access to information about Coast Capital's confidential business, strategy, research and process of seeking Continuance that is non-public and which would be used in a manner that is harmful to the interests of Coast Capital or its members."⁷⁷ JG says:

The commercial sensitivity of the Records is particularly heightened in this case because Coast Capital is the first British Columbia credit union to seek continuance under the Bank Act and the first credit union in Canada to develop a business plan for national expansion as a federal credit union. Coast Capital has devoted significant time and resources to strategic planning, research, and preparation of the Records. These materials were not intended by Coast Capital to be shared or used by its competitors.

⁷³ VC's affidavit at paras. 61 and 63. FICOM's initial submissions at paras. 96-97.

⁷⁴ *Duhamel v. Financial Institutions Commission*, 2018 BCSC 601 [*Duhamel*].

⁷⁵ Order P-719, Ontario (Finance) (Re), 1994 CanLII 6641 (ON IPC).

⁷⁶ FICOM's Book of Authorities Tab 3: *Duhamel*, *supra* note 74 at para. 3.

⁷⁷ Coast Capital's initial submission at para. 56.

Moreover, Coast Capital's competitors could gain an undue competitive advantage from review of Coast Capital's application materials and strategy given that Coast Capital is the first British Columbia credit union to apply to continue federally pursuant to this process and the first credit union in Canada to develop a business plan for national expansion as a federal credit union.

Coast Capital also believes that the risks of misinterpretation, misrepresentation and redistribution inherent in disclosure of the Records are significant. Disclosure of the Records, particularly in partially redacted form, could lead members of the public to misinterpret or misrepresent Coast Capital's business plans, risks, and how Coast Capital conducts its business and makes strategic decisions. This is particularly the case given that many of the Records contemplate future action rather than provide details of steps that were actually taken.⁷⁸

[78] In addition, some of Coast Capital's submissions relate to what it calls its "Continuance Member Communications." JG says that these "consist of all information and materials related to employee and member engagement with respect to the Continuance."⁷⁹ JG says that these records contain confidential and competitively sensitive information regarding how Coast Capital developed and implemented its communications strategy, including all drafts of employee and member engagement materials that were supplied to FICOM. JG says that disclosure of even partially redacted Continuance Member Communications would "invite speculation, misinterpretation and potential mischaracterization of the nature of Coast Capital's employee and member engagement."⁸⁰

[79] Coast Capital says that the "serious risks of misinterpretation, misrepresentation and redistribution inherent in disclosure" are significant in this case because of the high likelihood that the applicant intends to distribute the records broadly. Coast Capital also points out that in *Duhamel*, the Court found that the applicant has "an admitted desire to broadly disseminate" the information.⁸¹

[80] The applicant does not make any submission about ss. 21(1)(c)(i) or (iii).

Parties' submissions on s. 21(1)(c)(ii)

[81] FICOM and Coast Capital also submit that s. 21(1)(c)(ii) applies because disclosing the information could reasonably be expected to result in similar

⁷⁸ JG's affidavit at para. 33.

⁷⁹ JG's affidavit at para. 24(g).

⁸⁰ JG's affidavit at para. 24(g).

⁸¹ *Duhamel*, *supra* at note 74 at para. 37. Coast Capital's initial submissions at para. 61.

information no longer being supplied to FICOM when it is in the public interest that similar information continue to be supplied.

[82] FICOM submits that disclosure will impede FICOM's ability to fulfill its regulatory role and mandate.⁸² VC says credit unions will withhold information from FICOM if they understand or perceive it may be publicly released. This would make it more difficult for FICOM to gather the information it needs to regulate effectively. He says:

This is especially the case since some of the information regulated credit unions provide to FICOM is produced voluntarily. In this regard, proactive risk-based supervision to ensure the safety and soundness of the credit union sector requires voluntary disclosure by credit unions to FICOM when they are facing hardships. Proactive supervision allows FICOM to initiate actions to work quickly with a credit union to recover from a liquidity or solvency stress without compromising public confidence in the credit union or the sector.

Indeed, at various times in the past, other regulators and credit unions have expressed reluctance to share with FICOM sensitive information needed for regulatory purposes due to concerns that FICOM will not be able to sufficiently guarantee the confidentiality of the information shared.

An order requiring FICOM to disclose the Confidential Supervisory Information at issue here will exacerbate those problems. To fulfill its mandate, FICOM needs other regulators and regulated entities to have confidence in our ability to protect the information we receive. FICOM's ability to regulate effectively depends on cooperative relationships and the voluntary sharing of information from our peers and regulated entities. It also requires FICOM staff to provide full and frank analysis and recommendations to the Commission when making policy and regulatory decisions.⁸³

[83] Coast Capital also says that disclosure of the records would deter Coast Capital and similar financial institutions from voluntarily providing FICOM with sensitive and confidential commercial or financial information when it is clearly in the public interest that such information continues to be supplied to FICOM. Coast Capital says that it engaged in a dialogue with FICOM about Coast Capital's staff and member communications and other matters relating to the proposed continuance. FICOM requested, and Coast Capital voluntarily provided, sensitive and proprietary information about its internal position, business strategy, finances and risk analysis. Coast Capital says it would not have been as

⁸² FICOM's initial submission at paras. 101-109.

⁸³ VC's affidavit at paras. 75-77.

inclusive in voluntarily providing the information that it supplied to FICOM had it not been confident that such information would be protected from disclosure.⁸⁴

[84] The applicant says that he agrees with FICOM that “if credit unions lose confidence in FICOM’s ability to keep their information confidential, they will withhold voluntary information, thereby hampering FICOM’s ability to regulate.”⁸⁵ However, he submits that does not apply here because the information at issue is not voluntarily provided. He submits that it is mandatory for a credit union to give this information to FICOM when seeking consent to apply for federal continuance.

Findings – harm

[85] For clarity, I have split the harms analysis and findings in this case into two parts. First, I address the information for which FICOM has successfully met the third part of the s. 21 test and established that s. 21(1)(c) applies. Next, I discuss why I find that s. 21(1)(c) does not apply to the remainder of the s. 21 information.

Information to which s. 21(1)(c) applies

[86] For the reasons that follow, I find that s. 21(1)(c)(iii) applies to some of the information in dispute under s. 21.

[87] FICOM and Coast Capital’s submissions about harm under s. 21(1)(c)(iii) are predicated on the information in dispute falling into the hands of other financial services providers who are in competition with Coast Capital. I accept their submissions and evidence that, given the applicant’s past practices, he is likely to broadly disseminate the information he receives from this access request. The applicant did not dispute this and his submissions emphasize how he believes that the public is entitled to see the information.

[88] Specifically, I find s. 21(1)(c)(iii) applies to the body of Coast Capital’s business case, analysis of Coast Capital’s financial and business situation and details about its assets, liabilities, risk assessments, financial plans and liquidity contingency management plans. It is plain on the face of the records that this is sensitive financial and business information that reveals Coast Capital’s vulnerabilities, strategy and fixed costs.

[89] I can easily see how this information would have value to financial service providers who compete with Coast Capital for banking customers. The information gives Coast Capital’s competitors information about the internal

⁸⁴ Coast Capital’s initial submissions at para. 63.

⁸⁵ Applicant’s submission at para. 71.

workings of Coast Capital's business without having to expend any effort, cost or exchange of goodwill to acquire the information. In my view, they would gain commercially valuable competitive information for free. I am satisfied that this would be an unwarranted and unfair advantage to businesses who compete with Coast Capital. Losing customers to other financial institutions would negatively impact Coast Capital financially.

[90] I also accept that other credit unions who want to continue federally, and compete against Coast Capital in that sphere, could derive a financial benefit from seeing what financial details and analysis Coast Capital had to provide in order to successfully obtain FICOM's Consent Decision. It is evident from the complexity of the financial information that much time and effort went into Coast Capital's analysis and application. With access to this information, other credit unions would reap a savings in labour and time when preparing their own financial analysis for a s. 15.2 application.

[91] I consider that the financial loss and gain from disclosure of the information would be "undue" in this case. This is consistent with previous OIPC orders that have said that the meaning of "undue" includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case.⁸⁶ Past orders have also said that if the disclosure would give a competitor valuable competitive information for free and allow them to make inroads into another's market share that would be undue gain to the one and undue loss to the other.⁸⁷

[92] In conclusion, I find that s. 21(1)(c)(iii) applies to most of the financial and commercial information that was supplied in confidence. Given that all three parts of the s. 21 test are met with respect to that information, FICOM is required to refuse to disclose it to the applicant.

Information to which s. 21(1)(c) does not apply

[93] However, for the reasons that follow I find that FICOM and Coast Capital have not established that the third part of the s. 21 test is met with respect to the remainder of the information in dispute. For clarity, in the discussion below I will refer to this information as the "remainder of the s. 21 information".

[94] The remainder of the s. 21 information is not like the information to which I find s. 21(1)(c)(iii) applies because it is not sensitive detail about Coast Capital's assets, liabilities, vulnerabilities and risk assessments, financial, business and

⁸⁶ Order 00-10, 2000 CanLII 11042 at pp. 17-18; Order F16-17, 2016 BCIPC 19, at para. 33.

⁸⁷ Order 00-10, 2000 CanLII 11042 at pp. 17-18; Order F07-06, 2007 CanLII 9597 (BC IPC) at para. 41; Order F09-22, 2009 CanLII 63564 (BC IPC) at para. 37; Order F15-65, 2015 BCIPC 72 at paras. 36-39.

liquidity contingency management plans. Instead, it is the following type of information:

- (a) Title pages, tables of contents, headings and footers that only reveal the topics or subjects they relate to in the broadest sense.
- (b) Information that has already been disclosed elsewhere in the records, for instance, information about Coast Capital's history and background as well as table headings and titles.⁸⁸ There is no explanation about why this information has been severed inconsistently.
- (c) Administrative and process information withheld from emails and letters. This information is about meetings, the exchange of documents, the timing of events that are long past (i.e., the special resolution vote), addressee and senders' names, dates of correspondence and the usual greetings and niceties.
- (d) Certified extracts from the resolutions of Coast Capital's Board of Directors.⁸⁹ The resolutions reveal the board decisions about the various regulatory steps necessary for federal continuance. These decisions are several years old, and are very generally worded. The fact that the board made those decisions is plain from the events that transpired (as revealed in the inquiry submissions and the already disclosed records). It is also evident from the context and content of the records as a whole that what was decided in these resolutions is no secret and would be known by Coast Capital's 500,000 plus members and the applicant
- (e) Two versions of a draft notice pursuant to the federal *Bank Act Disclosure on Continuance Regulations (Federal Credit Unions)*.⁹⁰ This is a notice that Coast Capital was legally required to make public prior to its members special resolution vote. The notice tells Coast Capital's members about changes to deposit insurance coverage if Coast Capital becomes a federal credit union. The *Regulation* stipulates that such notices must be published on the credit union's main webpage and in the *Canada Gazette*.⁹¹ FICOM and Coast Capital say nothing to explain any connection between disclosure of this factual information and a reasonable expectation of harm under s. 21(1)(c).

⁸⁸ File F18-74103, pp. 1017-18 and 2067-68, 2118, 2121; F17-70827 pp. 189-195 has been completely disclosed in file F18-74103.

⁸⁹ F17-70827 at pp. 354-356, 603, 1258-1260, 1346 and 1761.

⁹⁰ At F17-70827 at pp. 292-297 and 2007-2012.

⁹¹ The *Canada Gazette* is the official newspaper of the Government of Canada where public notices and statutory instruments as well as information about new and proposed statutes and regulations are published.

- (f) Information about Coast Capital's rules and the changes necessary to comply with regulations pertaining to federal credit unions.⁹² I note that much of this information appears openly elsewhere in the records and in the parties' submissions.⁹³
- (g) PowerPoint slides from Coast Capital's presentation to the Commission that contain only broad and general information about the s. 15.2 application.⁹⁴
- (h) Information, mostly in emails, about the regulatory and administrative processes followed by FICOM, the federal Office of the Superintendent of Financial Institutions and credit unions.

[95] FICOM and Coast Capital's evidence and submissions do not address the information listed at (a) – (h) with any specificity or explain how disclosing it could reasonably be expected to cause the s. 21(1)(c) harms they claim. A direct link between disclosure and harm is not apparent to me.

[96] In addition to (a) – (h), the remainder of the s. 21 information also includes what Coast Capital calls its "Continuance Member Communications".⁹⁵ Coast Capital does not actually identify or explain which specific records are its Continuance Member Communications. However, I believe this must mean the records that communicate information to Coast Capital's members and staff about federal continuance prior to the 2016 special resolution vote. There are records that contain general background information about federal continuance, its benefits and risks, deposit insurance, the special resolution voting process and the steps that Coast Capital has taken to pursue federal continuance. There are also pages that outline what was on Coast Capital's online microsite to inform Coast Capital members and answer questions about continuance. There are copies of the membership voting package/sales pitch material and the ballot, all of which I understand from the context and surrounding information were widely available to Coast Capital's members. There are also letter templates, scripts and PowerPoint slides apparently intended to educate Coast Capital staff about federal continuance, the special resolution voting process and what to say to Coast Capital's members about those matters.⁹⁶

[97] I cannot see what parts of these Continuance Member Communications contain confidential and commercially sensitive information, and Coast Capital and FICOM do not explain or provide any specifics. These records contain very

⁹² For example in file F17-70827 at pp. 1631-1731, 2049-2121 and 2960-89. This is information that FICOM says it is prepared to disclose at VC's affidavit, exhibit F.

⁹³ For instance, in the court decisions that Coast Capital included in its evidence.

⁹⁴ File F18-74103 at pp. 1047-1057.

⁹⁵ See paragraph 78 above for JG's description of this information.

⁹⁶ The PowerPoint slides are in File F17-70827 at pp. 200-238.

general factual information about federal continuance, its benefits and risks, deposit insurance, the special resolution voting process and the steps that Coast Capital took to pursue federal continuance.⁹⁷

[98] Further, I am not persuaded by the argument about how the information in dispute “could easily be misunderstood, misconstrued, selectively disseminated or taken out of context in a way that would likely undermine public confidence and cause reputational damage to the individual credit unions that make up British Columbia's credit union system.”⁹⁸ That an individual may misunderstand information is not a harm under s. 21 – or s. 17 – of FIPPA. The public includes individuals with varied backgrounds and knowledge, and it possible that someone might misunderstand information. If the possibility of misunderstanding were sufficient to establish a reasonable expectation of harm under FIPPA, then very little information could ever be disclosed.

[99] In *Merck Frosst Canada Ltd v Canada (Health)*, the Supreme Court of Canada rejected the potential for misinterpretation of information as a legitimate reason for refusing access. Cromwell J., speaking for the majority, said:

The courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party: ... If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed.⁹⁹

[100] Previous BC orders have also found that the argument that information may be taken out of context or misconstrued to be speculative and not persuasive. For instance, the current Commissioner dismissed that argument in Order F10-06 where he said:

In my view it is possible that any information disclosed under FIPPA could, at least in theory, be taken “out of context” by any member of the public. Were this a basis for withholding records, one could easily envision very little information being disclosed by public bodies which are, in many cases, concerned how information might be used and viewed by members of the public. Possible misuse or distortion of material released under FIPPA is

⁹⁷ Coast Capital did not say that harm will flow because these records are creatively unique or competitively valuable. It is not apparent that they are, as their format and content is very basic.

⁹⁸ FICOM's initial submissions at para. 97.

⁹⁹ *Merck supra* at note 69 at para. 224.

not a basis for claiming an exception under s. 21 or any other provision of the legislation for that matter.¹⁰⁰

[101] In addition, there is nothing inherent in the information listed in (a) - (h) or the Continuance Member Communications to suggest that information would be misunderstood, let alone trigger a loss of confidence in any particular credit union or the system as a whole, as the parties suggest. FICOM and Coast Capital's evidence and argument on this point are speculative, lacking in particulars and do not demonstrate a direct link between disclosure and a reasonable expectation of the harms in s. 21(1)(c).

[102] I have also considered the cases that the parties cite. It is not clear if the records that were the subject of the sealing order in *Duhamel* are all the same as the records in this inquiry. FICOM and Coast Capital do not clarify that. In *Duhamel*, Justice Butler issued a sealing order for what he said was confidential "technical information about financial positions, risk analysis and contingency plans."¹⁰¹ I have already determined that s. 21(1)(c)(iii) applies to that type of information in the records. The remainder of the s. 21 information, including the Continuance Member Communications information, is not about those matters. Further, I am not persuaded that *Duhamel* confirms that disclosure of the requested information would result in harm under s. 21(1)(c). The issues in *Duhamel* did not include s. 21(1) of FIPPA and Justice Butler made no findings about its application.

[103] Order P-719, which FICOM also referenced, dealt with a request to the Ontario Ministry of Finance for an annual examination report about a credit union. The Ministry refused to disclose the report under s. 17(1) of Ontario's *Freedom of Information and Protection of Privacy Act*, which is the equivalent of s. 21(1)(c) in FIPPA. The adjudicator found that s. 17(1) applied. FICOM does not adequately explain why it believes Order P-719 is applicable. The information in dispute in the present case is not in an annual examination report. Further, the adjudicator in Order P-719 said she had "detailed evidence to demonstrate how disclosure of the information could be used by the credit union's competitors to design competitive strategies to the detriment of this organization" as well as information outlining the negotiations between the credit union and its individual and commercial customers.¹⁰² That type of detailed evidence regarding the remainder of the s. 21 information is not present in this inquiry.

[104] In short, based on my review and understanding of the remainder of the s. 21 information, which includes the Continuance Member Communications, I do

¹⁰⁰ Order F10-06, 2010 BCIPC 9 (CanLII) at para. 129. See also Order F11- 35, 2011 BCIPC 44 (CanLII) at para. 6 and Order 22-1994, 1994 CanLL 2990 (BC IPC) at p. 18.

¹⁰¹ *Duhamel*, *supra* at note 74 at para. 32.

¹⁰² Order P-719, Ontario (Finance) (Re), 1994 CanLII 6641 (ON IPC) at p. 2.

not see how disclosure could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of a third party under s. 21(1)(c)(i) or result in undue financial loss or gain under s. 21(1)(c)(iii). FICOM and Coast Capital's submissions and evidence do not adequately explain. What they do say is brief, very sweeping and lacking in necessary explanatory detail and specific pages references so I can see what information they mean.

[105] I have also considered whether s. 21(1)(c)(ii) applies to the remainder of the s. 21 information. Both FICOM and Coast Capital submit that disclosure of the records would deter Coast Capital and similar financial institutions from voluntarily providing FICOM with information when it is clearly in the public interest that such information continues to be supplied to FICOM. FICOM is clearly empowered by statute to compel production of the information it needs to fulfill its regulatory mandate.¹⁰³ I understand FICOM's evidence to be that when a credit union is facing financial problems, if it believes it can confidentially disclose that fact to FICOM, it will do so voluntarily. Thus, FICOM can intervene at an earlier stage.¹⁰⁴ However, that is not the situation involving the s. 15.2 application records at issue here. Coast Capital and FICOM do not actually specify the information that Coast Capital "voluntarily" provided. Based on my review, all of the information was treated by Coast Capital and FICOM as being obligatory in order for Coast Capital to achieve its goal of getting FICOM to consent to the s. 15.2 application.

[106] Previous OIPC orders have established that s. 21(1)(c)(ii) does not apply where there is a statutory or contractual compulsion for a third party to provide similar information (or the prospect of compulsion exists) or where there is a financial or other incentive for doing so.¹⁰⁵ Coast Capital was evidently motivated by self-interest as well as statutory and regulatory requirements to supply information to FICOM as part of the s. 15.2 application. I am not persuaded by what the parties say that it would be different for any other credit union subject to FICOM's regulatory oversight or approval processes. Therefore, I find that s. 21(1)(c)(ii) does not apply to the remainder of the s. 21 information.

[107] For the above reasons, I find that FICOM and Coast Capital have not established that ss. 21(1)(c)(i), (ii) or (iii) apply to the remainder of the s. 21 information. Given that they have not met the third part of the s. 21 test for that information, they are not authorized to refuse to disclose it under s. 21(1). FICOM also withheld some of that information under s. 17(1), so I will consider it below.

¹⁰³ See Part 7, Division 1 of the FIA, for instance.

¹⁰⁴ VC's affidavit.

¹⁰⁵ See for example Order 03-05, [2003] BCIPCD No. 5 at paras. 15-17.

Disclosure harmful to financial or economic interests - s. 17(1)

[108] With only a few instances, the information FICOM is withholding under s. 17 was also withheld under s. 21(1). I will not consider s. 17 where I have already decided s. 21(1) applies.

[109] Section 17(1) says:

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) through (f)]

[110] To rely on s. 17(1) a public body must establish that disclosure of the information 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. Subsections 17(1)(a) through (f) describe specific types of information whose disclosure could reasonably be expected to cause harm under s. 17(1). FICOM has not said that these subsections apply, so I will focus on the harm described in the opening words of s. 17(1).

[111] Section 17 uses the “reasonable expectation of harm” language, so the standard of proof is the same as for s. 21.¹⁰⁶

Parties’ submissions - s. 17

[112] FICOM submits that disclosing the information it is refusing to disclose under s. 17(1) “could cause harm to the stability of the British Columbia credit union system, FICOM's ability to fulfill its regulatory and supervisory mandate, and/or to Coast Capital as an institution.”¹⁰⁷

[113] The fact that FICOM considers the information to be “confidential supervisory information,” is central to its arguments about s. 17. It describes that type of information as follows:

Supervisory information is a term used to describe information pertaining to regulated entities that is collected and created by financial institution regulators (i.e., “supervisors”) for regulatory purposes in the context of regulatory examinations and reviews. Supervisory

¹⁰⁶ See above at paras. 71-72.

¹⁰⁷ FICOM's initial submissions at para. 48.

information is kept confidential by regulators and is only shared in very specific contexts, such as pursuant to information-sharing arrangements between regulators.¹⁰⁸

[114] FICOM provides evidence about how effective supervision of financial institutions requires absolute candor and transparency and for that reason financial regulators keep information confidential.¹⁰⁹ VC says FICOM shares its approach to protecting the confidentiality of supervisory information with the Canadian federal Superintendent of Financial Institutions, the American Federal Reserve System and international banking regulation community.¹¹⁰ FICOM provides a speech of the Canadian federal Superintendent of Financial Institutions where he says the following about the importance of confidentiality:

First, it would allow us to move a troubled institution through our stages of intervention - a process which aims to improve the soundness of an institution - without having the perverse effect of undermining public confidence in the institution and destabilizing it.

Second, this confidentiality would encourage institutions to be open with us about their issues, knowing that if those issues caused us to downgrade our opinion of the institution, that opinion would not be disclosed.

...

It is because any comment that we might make on a specific institution would immediately be parsed for what it could reveal.

Everything we said would be closely examined for what it might signal about our confidential knowledge: what we chose to say, or chose not to say, how our comments contrasted with what we had said about other institutions, how they contrasted with what we had said about the same institution previously, and so on.¹¹¹

[115] VC says that the confidential supervisory Information in this case falls into one or more of the following categories:

Category 1: Commercially- and competitively-sensitive supervisory information whose content is proprietary to Coast Capital, such as Coast Capital's confidential business strategy information, financial information, and risk analysis information;

¹⁰⁸ FICOM initial submissions at para. 30. VC's affidavit at paras. 26-35.

¹⁰⁹ VC's affidavit at paras. 26-35.

¹¹⁰ He also points to the *Cooperative Credit Associations Act*, SC 1991, c 48 and the *Bank Act*, SC 191, c 46 as Canadian federal laws that protect supervisory information from disclosure in court proceedings.

¹¹¹ VC's affidavit at para. 27.

Category 2. Confidential supervisory information that contains financial and risk analysis information regarding BC credit unions including but not limited to Coast Capital; and

Category 3: Confidential supervisory information that contains sensitive information and risk analysis information regarding the BC credit union system and its regulation by FICOM.¹¹²

[116] FICOM submits that any harm suffered by an individual credit union could harm the entire BC credit union system. FICOM provides evidence about how BC credit unions are connected and interdependent. Specifically, they are all shareholders of Central 1, contribute to the mandatory liquidity pool held at Central 1 and use its payment clearing services. They are also connected by Stabilization Central Credit Union, which is designated as the credit union stabilization authority under the FIA.¹¹³ FICOM also says that a failure of a BC credit union would be backstopped by deposit insurance provided by the Credit Union Deposit Insurance Corporation, which is administered by FICOM. FICOM says that failure by a credit union “would require payout by the insurance programme, and may require the program to acquire debt in order to fund the payout where the fund is impaired. In turn, government may be required to financially guarantee those debts if the public body is unable to pay out on its promised insurance to depositors.”¹¹⁴

[117] FICOM says:

Release of the Confidential Supervisory Information could cause harm to the British Columbia credit union system as a whole. Since British Columbia credit unions are interdependent, any harm suffered by individual institutions as a result of disclosure could impact the entire system. This in turn would have an impact on the financial or economic interests of the government or its ability to manage the economy of the province.

Loss of confidence in a single credit union could result in contagion to the reputation of the provincial credit union system as a whole and result in depositors moving their deposits outside of not only a credit union but the entire provincial credit union system.

...

Harm resulting from the disclosure of information about Central 1 or Stab Central would likely affect the rest of the British Columbia credit union system. If the Confidential Supervisory Information regarding these

¹¹² VC's affidavit at paras 41.

¹¹³ Stabilization Central Credit Union responds to FICOM's stabilization service requests and works proactively with credit unions facing governance, operational, or financial challenges to ensure the stability of the BC credit union system.

¹¹⁴ FICOM's initial submissions at para. 74.

central credit unions or the system as a whole were to be released to the petitioner or to the public, it could easily be misunderstood, misconstrued, selectively disseminated or taken out of context in a way that could undermine public confidence in the named institutions and cause reputational damage. This could have negative consequences for the stability of these institutions, and in turn for the larger British Columbia credit union system in which they play a central role.¹¹⁵

[118] Coast Capital submits that the continued confidentiality of the records “is essential to maintain the public confidence, reputation and stability of Coast Capital, other British Columbia credit unions, and the British Columbia credit union system as a whole.”¹¹⁶

[119] The applicant did not make any submission about the application of s. 17(1) to the records. His submission does not dispute the other parties’ submissions about how he is likely to publicly share the information he obtains from his access requests.

Findings - s. 17(1)

[120] As previously mentioned, I found that s. 21(1) applies to much of the information that FICOM withheld under s. 17(1). For that reason, I did not consider whether s. 17(1) also applied. The reasons that follow are about the small amount of information that I did consider under s. 17(1).

[121] The information left to consider under s. 17(1) is not the type of information that VC describes in his three categories of confidential supervisory information (above in paragraph 115). It does not reveal information about business strategy or financial/risk analysis of Coast Capital, other credit unions or the BC credit union system. Rather, it is the following type of information:

- (a) General information about how the regulatory and administrative processes work and the steps in that regard taken by FICOM, the federal Office of the Superintendent of Financial Institutions and credit unions.¹¹⁷
- (b) Document titles/headings, tables of contents and acronym definitions, headers and footers, signature blocks, document dates, page numbers and general non-specific terms like “assets” or “net income.”¹¹⁸

¹¹⁵ FICOM’s initial submissions at paras 66-67 and 73.

¹¹⁶ Coast Capital’s initial submissions at paras. 60, 61 and 68.

¹¹⁷ For example, F18-74103 at pp. 476 and 572-573; F17-70827 at pp. 805, 980-981, 1210-1216 and 3010.

¹¹⁸ For example, F17-70827 at pp. 42-46.

- (c) Factual information about Coast Capital's history and composition, including but not limited to the names of its departments, other companies in its group, its public community fund-raising endeavours and the public kudos it has received, the names and terms of its board members and where its branches are located.¹¹⁹ In addition to being very general, some of this information is clearly publicly known.
- (d) Background facts in issues notes prepared by FICOM staff.¹²⁰
- (e) A draft notice pursuant to the federal *Bank Act Disclosure on Continuance Regulations (Federal Credit Unions)*.¹²¹
- (f) Certified extracts of the resolutions of Coast Capital's board.¹²²
- (g) General factual and educational information about federal continuance in Coast Capital's communication materials to its members and staff prior to the special resolution vote.¹²³ This includes a script for Coast Capital's staff to follow when communicating with Coast Capital's membership about federal continuance and deposit insurance.¹²⁴
- (h) Information about FICOM's contract with a consultant who was retained to analyze and make recommendations about certain aspects of Coast Capital's federal continuance.¹²⁵ The information withheld under s. 17(1) includes the dollar amount of the contract. The information is in a service contract template and checklist. Some of the information has already been disclosed in the records, specifically, the contractor's identity, the nature of the work he did and the title and parts of his report.

[122] For reasons that I have explained above when discussing s. 21(1), I am not persuaded by the argument that if the information is misunderstood that would be harm under s. 17.

¹¹⁹ F17-70827 at pp. 13-38; F17-70827 at pp. 805 and 1031-1043.

¹²⁰ F17-70827 at pp. 623-624.

¹²¹ F17-70827 at pp. 292-297. This is one of the two notices that I found could not be withheld under s. 21 at paragraph 94 above.

¹²² F17-70827 at pp. 354-356, 603, 1258-1260, 1346 and 1761. These are the same resolutions that I found could not be withheld under s. 21 at paragraph 94 above.

¹²³ F17-70827 at pp. 1732-1737, 1766-1767.

¹²⁴ F17-70827 at pp. 359-361, 1887-1889.

¹²⁵ F17-70827 at pp. 2481-2484.

[123] In addition, the evidence and submissions are very broad and lacking in particulars and they do not adequately explain the direct connection between disclosing the specific information in (a) – (h) and a reasonable expectation of harm under s. 17(1). For instance, there is nothing obvious in the information listed in (a) – (h) to suggest that it might trigger a loss of confidence in any particular credit union or the system as a whole.

[124] Given the absence of persuasive evidence or explanation, I am not satisfied that disclosing the information in (a) – (h) could reasonably be expected to harm the financial or economic interests of FICOM or the government or harm the government's ability to manage the economy. Therefore, FICOM may not refuse to disclose that information under s. 17(1).

Disclosure harmful to third party personal privacy - s. 22

[125] Section 22(1) of FIPPA says that a public body must refuse to disclose personal information if disclosure would be an unreasonable invasion of a third party's personal privacy.¹²⁶ Numerous orders have considered the application of s. 22, and I will apply those same principles here.¹²⁷

[126] Only "personal information" may be withheld under s. 22(1). Therefore, the first step in the s. 22 analysis is to determine if the information in dispute is personal information. FIPPA defines "personal information" as recorded information about an identifiable individual other than contact information. It defines "contact information" as information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.¹²⁸

[127] As previously mentioned, there are only four pages at issue under s. 22(1).¹²⁹ They are records that reveal how Coast Capital's board of directors voted on two separate resolutions. These pages are completely withheld under s. 22(1). FICOM submits that it has properly withheld this information pursuant to s. 22(1), but it does not elaborate. The applicant argues that how a director votes is business, rather than personal, information.¹³⁰

¹²⁶ Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

¹²⁷ For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.

¹²⁸ See Schedule 1 of FIPPA for these definitions.

¹²⁹ They are in file F17-70827 at pages 196-197 and 1342-1343. They were also completely withheld under s. 21(1), but I find above that s. 21(1) does not apply.

¹³⁰ Applicant's April 4, 2019 email to OIPC registrar, subsequently forwarded to FICOM's solicitor.

[128] I find that each director's name, email address, photo and how they voted is about that identifiable individual and is their personal information. The balance of the information on these pages (date of vote, name of resolution, etc.) is not personal information because it is not about individuals; therefore, s. 22(1) does not apply.

[129] The next two steps in the analysis require deciding if s. 22(4) and 22(3) apply. If the personal information is one of the types listed in s. 22(4), then disclosure is not an unreasonable invasion of third party personal privacy. If any of the categories of information in s. 22(3) apply, then disclosure is presumed by be an unreasonable invasion of third party personal privacy. In this case, I find that ss. 22(4) and 22(3) do not apply to the personal information in dispute.

[130] In the final step of the analysis, I must consider all the relevant circumstances, including those listed in s. 22(2). I find that none of the circumstances listed in s. 22(2) are relevant. However, I find that the following circumstances are relevant to consider:

- (a) The directors' email addresses (i.e., @gmail or @shaw) appear to be personal rather than corporate addresses.
- (b) The photos of the directors are obviously work-related publicity photos designed to engage with the public in a lighthearted way.
- (c) With the exception of the email addresses, the personal information is directly related to the directors' professional duties with Coast Capital.
- (d) It is apparent from what took place after the directors' votes that Coast Capital's members, including the applicant, know the resolutions passed.
- (e) How each individual director voted is a decision they made in a professional capacity.
- (f) There no indication in the records that how the individual directors voted was supposed to remain confidential.

[131] Considering all of these relevant circumstances, I conclude that it would not be an unreasonable invasion of the directors' personal privacy to disclose the personal information on these four pages – with the sole exception of the personal email addresses. Therefore, FICOM is only required and authorized to refuse to disclose the email addresses under s. 22(1).

Highlighting

[132] I have highlighted in yellow the information in dispute in the records that I find FICOM is not authorized or required to refuse to disclose under ss. 13(1), 14, 17(1), 21(1) and 22(1). A copy of those highlighted pages have been sent to FICOM along with this order.

CONCLUSION

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

1. I confirm FICOM's decision to refuse to disclose information to the applicant under s. 14 of FIPPA.
2. Subject to paragraph 3 below, I confirm, in part, FICOM's decision to refuse to disclose information to the applicant under ss. 13(1), 17(1), 21(1) and 22(1) of FIPPA.
3. FICOM is not authorized or required under ss. 13(1), 17(1), 21(1) and 22(1) of FIPPA to refuse to disclose the information highlighted on the pages of the records that have been sent to FICOM with this order.
4. FICOM must give the applicant access to the highlighted information described in paragraph 3 immediately above. FICOM must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

[134] Pursuant to s. 59 of FIPPA, FICOM is required to comply with this order by December 16, 2019.

November 1, 2019

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File Numbers: F17-70827
F17-73054
F18-74103