Order F15-12

Ministry of Justice

Hamish Flanagan
Adjudicator

March 18, 2015

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Summary: The applicant requested records from the Ministry of Justice relating to a workplace investigation involving him that resulted in his employment being terminated. The Ministry disclosed some records and withheld others, citing ss. 13, 14, 15, and 22 of FIPPA. The adjudicator ordered disclosure of some information withheld under ss. 14 and 22, and all of the information withheld under s. 15(1)(c). The remaining information was required to be withheld under s. 22 or authorized to be withheld under ss. 13 or 15(1)(l).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14, 15(1)(c), 15(1)(l), 22.

Authorities Considered: B.C.: Order F14-47, 2014 BCIPC 51 (CanLII); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC); Order 02-08, 2002 CanLII 42433 (BC IPC); Order F11-29, 2011 BCIPC 35 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F07-15, 2007 CanLII 35476 (BC IPC).

Cases Considered: *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII); *F.H. v. McDougall*, 2008 SCC 53 (CanLII); *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)* 2012 BCSC 875 (CanLII); *Keefer*

Laundry Ltd. v. Pellerin Milnor Corp., 2006 BCSC 1180 (CanLII); *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* 2005 BCCA 4 (CanLII); *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII); *Hamalainen v. Sippola*, 1991 CanLII 440 (BCCA); *College of Physicians of B.C. v. British Columbia,* 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association, 2013 BCSC 2025* (CanLII)*; Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA); *John Doe v. Ministry of Finance* 2014 SCC 36 (CanLII); *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

INTRODUCTION

[1] The applicant requested records from the Ministry of Justice ("Ministry") relating to a workplace investigation he was involved in which resulted in his employment being terminated.

[2] The Ministry disclosed some records to him and withheld others, citing ss. 13, 14, 15, and 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Mediation resulted in disclosure of some additional records, but the Ministry continued to withhold records under the above sections. The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") conduct an inquiry.

ISSUES

[3] The issues in this inquiry are whether:

1. disclosure of personal information would be an unreasonable invasion of personal privacy of a third party under s. 22(1) of FIPPA;
2. the Ministry is authorized to withhold information because it would reveal advice or recommendations developed by or for a public body under s. 13 of FIPPA;
3. the Ministry is authorized to withhold information to protect solicitor-client privilege under s. 14 of FIPPA;
4. the Ministry is authorized to withhold information because disclosure could reasonably be expected to harm the effectiveness of investigative techniques and procedures used in law enforcement under s. 15(1)(c); and
5. the Ministry is authorized to withhold information because disclosure could reasonably be expected to harm the security of any property or system under s. 15(1)(l) of FIPPA.

Preliminary issue - Records created after the date of applicant's request for records

[4] The applicant's request for records is dated August 12, 2013. Some of the records containing withheld information were created after the date of the applicant's request and therefore are outside the scope of his request.[1] However, I have considered the application of FIPPA to these records for several reasons. First, these records form an integral part of the investigation that was the subject matter of the applicant's request and I have no doubt he has an interest in accessing them. In addition, considering these records as part of this inquiry helps to achieve finality for the parties and avoid possibly needing a further inquiry. Finally, I am satisfied that there is no prejudice to either party in this approach, given the parties had the opportunity to address how FIPPA applies to these records during this inquiry process, and the Ministry did not object to the records being considered as part of this inquiry.

DISCUSSION

[5] **Background**—The applicant was a unionized employee of the Ministry. He was suspended by the Ministry pending an investigation into his and others' possible breaches of the standards of conduct for provincial employees. The applicant's suspension was subsequently rescinded. Later in the investigation he was again suspended pending investigation, then suspended pending a recommendation for termination of his employment. His employment was eventually terminated.

[6] Through his union, the applicant filed several grievances arising from the investigation, including grieving his suspensions and termination. At the date of submissions for this inquiry a grievance hearing was still to be held. The Ministry has disclosed many of the records in issue to the union to enable it to prepare for the grievance hearing, on the condition it not disclose full copies of the records to the applicant. The records disclosed to the union include full transcripts of interviews conducted during the investigation.

[7] **Records at issue**—The records at issue arise from the workplace investigation into the conduct of the applicant and other Ministry employees that resulted in the applicant's employment being terminated. The records comprise:

- handwritten notes and transcripts of interviews with the applicant's co-workers,
- summaries of interviews of the applicant and his co-workers,
- draft and final investigation reports; and

[1] Records at pp. 80-81, 125-126, all but the earliest dated email on p.127, pp. 158-189 and 191-197.

- emails and related attachments sent between BC Government employees relating to the investigation.

[8] I will first consider the application of s. 22 of FIPPA to the withheld information.

[9] **Section 22**—Section 22 of FIPPA requires public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22(4) lists circumstances where disclosure is not unreasonable. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, public bodies must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy. I note that under s. 57(2) of FIPPA, the applicant bears the burden of proving that disclosure of the records would not be an unreasonable invasion of third party personal privacy.

[10] The Ministry has withheld some of the information at issue under s. 22. The information is in emails and related attachments, handwritten notes and transcripts of interviews with co-workers of the applicant, summaries of interviews of the applicant and his co-workers, and draft and final investigation reports. The Ministry states there is a presumption that disclosure of this information would be an unreasonable invasion of third party personal privacy because it relates to the employment or occupational history of Ministry employees (other than the applicant) pursuant to s. 22(3)(d). It also submits that s. 22(2)(f) supports withholding the information because the information was supplied in confidence. It states that ss. 22(2)(a) and (c) are not relevant because of the pre-existing disclosure of information to the union. The Ministry says this prior disclosure means that disclosure to the applicant will neither promote public scrutiny of the Ministry (s. 22(2)(a)), nor affect the applicant's rights in any way (s. 22(2)(c)).

[11] The applicant does not directly address s. 22, but he says that he already knows the names of the staff interviewed as part of the investigation conducted by the Ministry.

Personal Information

[12] Section 22 of FIPPA only applies to personal information of third parties. FIPPA defines personal information as "recorded information about an

identifiable individual other than contact information”.[2] Some of the information withheld under s. 22 comprises cell phone numbers in the footer of an email signature containing work contact information,[3] and email addresses at pages 80-81of the records. This is information to enable an individual to be contacted at a place of business, so it is contact information not personal information.

[13] The remaining information withheld under s. 22 is about the applicant, other Ministry employees under investigation and BC Government employees involved in conducting the investigation. While some of this information does not expressly name particular employees, individuals would be identifiable to the applicant and others given the context of the information. I therefore find that this information is personal information.

Section 22(4)

[14] Subsection 22(4) of FIPPA specifies circumstances where disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy. In this case, neither of the parties suggests that s. 22(4) applies. Further, based on my review of the materials, I find that none of the circumstances in s. 22(4) apply to the withheld information.

Section 22(3)

[15] Subsection 22(3) provides the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party’s personal privacy. It states in part:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,

[16] The Ministry submits that s. 22(3)(d) applies to much of the withheld information because it forms part of an investigation into workplace behaviour. It says the records contain witness statements and information that reveals investigators’ observations and findings.

[17] The issue of whether s. 22(3)(d) applies to witness statements and other evidence gathered during workplace investigations has been addressed in

[2] Schedule 1 of FIPPA 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”.
[3] Cell phone numbers withheld on pp. 133,148-150.

numerous orders. Order 01-53, for example, stated that personal information created in the course of a workplace investigation that consists of "evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions" falls under s. 22(3)(d).[4] The withheld personal information in this case is in emails and related attachments authored by BC Government employees, handwritten notes of interviews with third parties, interview transcripts, interview summaries and draft and final investigation reports created during the investigation of the applicant and other Ministry employees. Some of the information relates to other Ministry employees that were also subject to a workplace investigation.

[18] I find that s. 22(3)(d) applies to some of the withheld information, namely information that discloses evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions, and information about Ministry employees other than the applicant that were also subject to a workplace investigation. It clearly falls under s. 22(3)(d) because the information forms part of a workplace investigation, so it is about employment history. Disclosure of that information is presumed to be an unreasonable invasion of the personal privacy of third parties.

[19] I also find that the s. 22(3)(d) presumption applies to employee usernames on page 144 of the records, although they were withheld under s. 15(1)(l) rather than s. 22. That is because it would reveal the names of third parties under investigation, thus disclosing information about their employment history.

[20] The other personal information, for example, emails between BC Government employees as part of the workplace investigation, are not subject to the s. 22(3)(d) presumption because the information does not disclose the employment or occupational history of any third parties.

[21] I find that no other presumptions apply.

Section 22(2)

[22] Section 22(2) requires that all relevant circumstances, including those specified in s. 22(2), be considered in determining whether personal information can be disclosed without unreasonably invading a third party's personal privacy. This also means it is possible that the presumption created under s. 22(3)(d) can be rebutted. Section 22 (2) states in part:

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

[4] Order 01-53, 2001 CanLII 21607 at para. 32.

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
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> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (f) the personal information has been supplied in confidence

[23] The Ministry says that ss. 22(2)(a) and (c) are not factors because it has already made a full disclosure of the withheld investigation records to the applicant's union for the purposes of the applicant's grievance hearing. It says the information was supplied to the union on the condition that it agree to only share redacted versions of records (such as investigation interviews) with the applicant.

[24] I do not believe s. 22(2)(a) supports disclosure. I accept that scrutiny of the Ministry's investigation is already occurring through the grievance process in which the union representing the applicant has been provided access to the information in issue by the Ministry. Also, given the records are focussed on the investigation of employee conduct of particular individuals that did not directly affect the public, I am not convinced they would disclose anything about the public body's activities that would materially contribute to or further public scrutiny of the Ministry.[5]

[25] In relation to s. 22(2)(c), previous orders have stated that the following test must be met for it to be a factor:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[6]

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[5] For a similar finding see Order 02-44, 2002 CanLII 42478 (BC IPC) and Order F14-43, 2014 BCIPC 46 (BC IPC).

[6] For example, see Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.

[26] I find that the Ministry's supply of the information to the applicant' union, which is representing the applicant in the grievance process, means that the applicant does not personally need disclosure of the information in order to prepare for or to ensure a fair hearing of his grievances. Therefore s. 22(2)(c) is not a factor in favour of disclosure.

Supplied in Confidence – s. 22(2)(f)

[27] Section 22(2)(f) states that whether personal information was supplied in confidence is a factor relevant to a determination of whether s. 22 applies. It is clear that maintaining the confidentiality of the identity of witnesses and the content of their statements and interviews was extremely important during the investigation. For example, some witnesses were interviewed away from the applicant's job site to ensure their participation in the investigation remained confidential. Despite there being no explicit reference to confidentiality in some of the records, I have no doubt that the information supplied by third parties in the withheld records was supplied in confidence.

Other relevant factors

[28] *Information Already Known to Applicant*—Pre-existing knowledge of withheld information can be a factor in determining whether disclosing information will unreasonably invade third party personal privacy.[7] The applicant states that he already knows the identity of third party witnesses. Without explicitly saying so, I assume the applicant is suggesting that this favours disclosure of this information. The applicant does not provide any explanation of the extent of his knowledge, and therefore what information should be disclosed to him as a result. Even assuming the applicant does know the identity of some third party witnesses, I do not accept that this is a factor in favour of disclosure of even the identity of third party witnesses, because such a disclosure would confirm the third parties identity when it is clear that the Ministry needed to keep this information confidential to effectively conduct its investigation. I do not consider the knowledge the applicant asserts is a factor in favour of disclosing the withheld information.

[29] *Applicant's own personal information*—Some of the withheld information is the applicant's own personal information including information collected by interviewing the applicant, so this is a factor weighing in favour of disclosure.

[30] *Sensitivity of information*—As noted earlier, there are different types of personal information in the records. Some personal information is about other Ministry employees who are being investigated. Some personal information is about the activities of the BC Government employees conducting the

[7] See for example Order F14-47, 2014 BCIPC 51 at paras 37-39.

investigation and reveals no information about witnesses or those under investigation. The latter information is less sensitive than the information about those being investigated.

[31] **Section 22 Summary**—Disclosure of some of the withheld information is presumed to be an unreasonable invasion of third party personal privacy under s. 22(3)(d) of FIPPA because it is personal information that relates to third parties' employment histories.

[32] I find the s. 22(3)(d) presumption has not been rebutted. The confidential nature of the information supports the presumption and no other factors sufficient to rebut the presumption exist.

[33] For the personal information that is not subject to any presumption, including email messages and parts of messages between BC Government employees that are about the general administration of the investigation, I find it would not be an unreasonable invasion of personal privacy to disclose this information. Disclosure of this personal information provides the applicant with some insight into how the workplace investigation of his conduct proceeded, and does not reveal any sensitive information about third parties.[8]

[34] Further, s. 4(2) of FIPPA provides that the applicant has the right to access information, if his personal information can reasonably be severed from a third party's personal information. Small amounts of the applicant's personal information, which is highlighted in a copy of the records accompanying the Ministry's copy of this order,[9] can be severed from the records and disclosed, subject to the application of the exceptions to disclosure which I discuss below. The remaining withheld information of the applicant is inextricably intertwined with the personal information of the third parties, and cannot reasonably be severed such that the applicant's personal information can be disclosed.

Summary of the record under s. 22(5)

[35] Section 22(5) requires a public body to provide an applicant with a summary of their personal information if it cannot be disclosed under s. 22, except in specified circumstances. One of the exceptions is if "the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information".

[36] In my view, the Ministry could not prepare a meaningful summary of the withheld information about the applicant supplied in confidence that cannot be

[8] Information on pp. 93, 126, 127, 129, 130, 133, 140, 158, 159, 166, 168, 170-175, 177, 183-185, 189, 192-198 and 212.
[9] Information on pp. 93, 130, 133, 140, 158, 164, 166, 167, 175, 193, 195, 198, 206, 207, 210-212.

disclosed without enabling a connection to be made between the information and an identifiable third party. Accordingly, I find that the exception in s. 22(5)(a) applies and the Ministry is not required to provide the applicant with a s. 22(5) summary.

[37] I will next consider the application of s. 13 to the information in dispute.

[38] **Advice or recommendations— s. 13**—The Ministry is withholding information including draft letters and portions of reports under s. 13(1).[10] This provision states:

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

[39] The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first stage is to determine whether the disclosure of the information "would reveal advice or recommendations developed by or for a public body or a minister" in accordance with s. 13(1). If it does, it is necessary to consider whether the information at issue falls within any of the categories of information listed in s. 13(2) of FIPPA, as a public body must not refuse to disclose information under s. 13(1) if a provision in s. 13(2) applies.

[40] **The Purpose and Scope of s. 13(1)**—The purpose of s. 13(1) is to allow a public body full and frank discussion of advice or recommendations on a proposed course of action, by preventing harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny. The principle underlying this exception has been the subject of many orders, including Order 01-15 where former Commissioner Loukidelis said:

> This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.

[41] The British Columbia Court of Appeal stated in *College of Physicians of B.C. v. British Columbia* that "advice" is not necessarily limited to words offered as a recommendation about future action. As Levine J.A. states in *College of Physicians* "advice" includes "expert opinion on matters of fact on which a public body must make a decision for future action."[11]

[10] Based on my review of the records the Ministry has applied s. 13 to information on pp. 110-111, 167, 187-188 and 212. This differs from the the page numbers listed in the Ministry's submission.

[11] 2002 BCCA 665 (CanLII) at para. 113.

[42] Previous orders have also found that a public body is authorized to refuse access to information that would allow an individual to draw accurate inferences about advice or recommendations.[12] This can include policy issues, possible options for changes to the policy and considerations for these various options, including discussing implications and possible impacts of the options.[13] Further, in *John Doe v. Ministry of Finance*[14] the Supreme Court of Canada determined that the word "advice" in s. 13(1) of the Ontario FIPPA includes policy options, whether or not the advice is communicated to anyone.

[43] The affidavit evidence of the BC Government's Senior Labour Relations Specialist[15] is that the letters at pages 110-111 were drafts of letters that she recommended the Ministry send to the applicant. I accept that the letters fall within the scope of s. 13(1). Some information on pages 167 and 212 falls within s. 13(1) because it comprises the recommendations from a report and expert opinion on matters of fact on which a public body must make a decision for future action. Information at pages 187-188 comprises options and recommendations within the scope of s. 13(1). There is no evidence in the parties submissions or from my review of the records that s. 13(2) applies to any of the s. 13(1) information, so it can be withheld by the Ministry.

[44] **Does solicitor-client privilege apply?**—Section 14 states:

> **Legal advice**
>
> 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[45] The Ministry has applied s. 14 to some of the information to which I have already found ss. 13 and 22 apply. Therefore, I will only consider the application of s. 14 to the remaining information in dispute, which is as follows:

1. Portions of a Ministry report titled Labour Relations Investigation Report ("Report") and portions of the drafts of the Report.

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[12] This was also at the heart of the concern in the recent decision in *Insurance Corporation of British Columbia v. Automotive Retailers Association, 2013 BCSC 2025 (CanLII)* – see paras. 52 and 66.

[13] See Order F12-02, 2012 BCIPC 2 (CanLII); Order F10-15, 2010 BCIPC 24 (CanLII) at para. 23; Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 102-127; Order F06-16, 2006 CanLII 25576 (BC IPC) at para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); and *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA).

[14] 2014 SCC 36 (CanLII).

[15] At para 20.

2. Various communications between a Labour Relations investigator in the BC Government Public Service Agency and Ministry staff in the course of their investigation.[16]

[46] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. In this case, the Ministry argues that litigation privilege applies.

[47] Litigation privilege protects records where the dominant purpose of creating the record was to prepare for, or conduct, litigation under way or in reasonable prospect at the time of the creation of the records.[17]

[48] The test for litigation privilege, as described in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, is:

> Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:
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> 1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
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> 2. that the dominant purpose of creating the document was to prepare for that litigation.
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> …
> The focus of the enquiry is on the time and purpose for which the document was created…[18]

[49] The first element of the test for litigation privilege is that litigation was ongoing or reasonably contemplated at the time the document was created. This was discussed by the British Columbia Court of Appeal in *Hamalainen v. Sippola* [*Hamalainen*] as follows:

> In my view, litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet.[19]

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[16] I note the Ministry's submission lists p. 149 as subject to s. 14 but p. 149 of the records does not indicate any information has been withheld under s. 14.

[17] Numerous previous orders have affirmed this test. See for example Order 02-08, 2002 CanLII 42433 (BC IPC).

[18] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 (CanLII) at paras. 96 to 99 citing *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* (2005), 2005 BCCA 4 (CanLII) at paras. 43 to 44 et. al.; also see *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII) at para. 55.

[19] 1991 CanLII 440 (BCCA) at p. 261.

[50] The Ministry submits that it reasonably concluded that the applicant would likely file a grievance at the time he was suspended pending investigation, which occurred at the start of the investigation. The Ministry believes there was a reasonable prospect of litigation when it created the records at issue because they were created after the applicant was suspended and therefore in a position to grieve the suspension.

[51] The Ministry's evidence to support the reasonableness of its belief that litigation was in reasonable prospect during this time period is an assertion of that belief in an affidavit and the disputed records themselves.

[52] Most of the records withheld under s. 14 were created after the applicant filed his first grievance. This is significant because previous orders have determined that at the point in time a grievance is filed, "litigation" has commenced for the purposes of litigation privilege.[20] Therefore, there is no question that litigation was in reasonable contemplation once the applicant filed his first grievance because litigation was underway.

[53] Further, I find that litigation was reasonably contemplated by the time all of the records in issue withheld under s. 14 were created, including the few remaining records created before the applicant filed a grievance. My review of the records establishes that by the date the Ministry created the earliest record over which s. 14 is claimed, its investigation was sufficiently progressed that it was clear it was not going to conclude without some significant sanction, and dismissal was a very real possibility. Given the Ministry knew at the time of the creation of the withheld records that the investigation was likely not going to conclude without further sanctioning of the applicant, I accept that the Ministry could reasonably anticipate the applicant would likely file a grievance. I therefore accept that when the records withheld under s. 14 were created, the Ministry reasonably anticipated litigation.

[54] The second element of the test for litigation privilege is that the dominant purpose of creating the document in question is to prepare for the litigation. This element is not necessarily met just because there is a reasonable prospect of litigation. As the court states in *Hamalainen*:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant

[20] Order F11-29, 2011 BCIPC 35 (CanLII) at para. 13-14.

> purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.[21]

[55] The Supreme Court of Canada in *Blank v. Canada said*:

> …litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.[22]

[56] *Keefer* states what a party asserting privilege needs to establish to confirm that litigation is the "dominant purpose":

> To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it…[23]

[57] The Ministry says that the records to which they have applied s.14 were created for the dominant purpose of dealing with the grievances.

[58] Having reviewed all of the records, in my view none were created for the dominant purpose of preparing for litigating the grievances. All of the records pre-date the applicant being informed of the final decision to terminate his employment. Though the prospect of litigation certainly existed when the records were created, there is no reference to grievances in the records. In my view, the dominant purpose of the documents was to advance the investigation and inform and recommend to senior management what sanction to impose on the applicant, and to prepare to action that recommendation. While these records would also form the basis for the Ministry to defend its action in a grievance hearing, that was not the dominant purpose for which the records were created.

[59] In particular, the email records which the Ministry says are subject to s. 14 are about the investigation, its progress towards a final decision on what action to take as a result of the investigation findings and the communication of investigation findings recommending further action. Most of the records were created in the context of preparing for a recommendation to dismiss the applicant. I therefore find that the Ministry has not proven that litigation privilege exists over the records, so s. 14 does not apply.

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[21] *Hamalainen v. Sippola*, 1991 CanLII 440 (BCCA).
[22] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII) at para. 60.
[23] *Keefer Laundry Ltd. v. Pellerin Milnor* Corp, 2006 BCSC 1180 (CanLII) at para. 98.

[60] **Section 15**—The Ministry relies on s. 15(1)(c) to withhold the brand name of a forensic software program it used in its investigation. It also submits that s. 15(1)(l) applies to employee user names and a file path in the records. I have already found that the employee usernames must be withheld under s. 22, so will only consider the application of s. 15(1)(l) to the file path that has been withheld under s. 15(1)(l) at page 144 of the records.[24]

[61] The relevant portions of s. 15(1) of FIPPA for this inquiry read as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> …
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> …
>
> (l) harm the security of any property or system

[62] The standard of proof applicable to harms-based exceptions like s. 15 is whether disclosure of the information could reasonably be expected to cause the specific harm.[25] Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[26] In Order F07-15, former Commissioner Loukidelis outlined the evidentiary requirements to establish a reasonable expectation of harm:

> …there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm… Referring to language used by the Supreme Court of Canada in an access to information case, I have said 'there must be a clear and direct connection between disclosure of specific information and the harm that is alleged'.[27]

[63] This approach to harms-based exceptions, which are found in federal and provincial access to information statutes across Canada, was applied by the Supreme Court of Canada in two recent decisions.[28] In those decisions the Court described the exception as requiring a reasonable expectation of probable

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[24] The Ministry's submissions also lists usernames appearing on pp. 145 and 149 of the records but no such records or severing under s. 15(1)(l) appear on these pages.

[25] Order F13-07, 2013 BCIPC 8 (CanLII).

[26] Order 00-10, 2000 CanLII 11042 (BC IPC) at p.10.

[27] Order F07-15, 2007 CanLII 35476 (BC IPC) at para. 17, referring to *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII).

[28] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31(CanLII) and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII) ("Merck Frosst").

harm from disclosure of the information.[29] As the Court noted, the wording of a provision requiring a "reasonable expectation of harm" tries to mark out a middle ground between that which is probable and that which is merely possible.[30] An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[31] The inquiry 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."[32]

[64] In *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),*[33] Bracken, J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.

Harm the effectiveness of investigative techniques and procedures currently used— s. 15(1)(c)

[65] The Ministry disclosed that it used forensic software in its investigation, but it wants to withhold the proprietary name of the software it used.

[66] The Ministry argues that disclosing the name of the specific software falls within s. 15(1)(c) because if individuals knew that government investigators used the software they would be able to find out the software's capabilities and then use that information to avoid detection. This opportunity would harm the effectiveness of the law enforcement technique of using forensic software.

[67] I find the Ministry's submission does not meet the threshold of establishing a reasonable expectation of probable harm. The fact that the Ministry uses forensic software is not unexpected given the widespread use of email in the workplace. In addition, some detail about how the forensic software was used in the investigation is already revealed in the records disclosed. Further, the Ministry does not explain in any detail how knowledge of the high level functionality of the software that may be available if the name of the software

[29] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst.*
[30] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst.*
[31] Ontario (Community Safety and Correctional Services) *v.* Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst* at paras. 197 and 199.
[32] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 40.
[33] 2012 BCSC 875 (CanLII), at para. 43. Bracken J. also refers to Merck Frosst (supra) in support.

were known, could be used to avoid detection by the software. I note the Ministry does not provide any evidence of a government employee under investigation ever having made any attempt to employ the strategy above to avoid detection by forensic software or how it could be achieved. Therefore, the name of the forensic software cannot be withheld under s. 15(1)(c).

Harm the security of property— s. 15(1)(l)

[68] Section 15(1)(l) allows the Ministry to withhold information where disclosure would harm the security of any property or system. The Ministry applied s. 15(1)(l) to a file path that operated as a hyperlink in an email to a secure transfer location where files were stored by government security investigation staff for access by Ministry investigators. I find that there is a reasonable expectation of probable harm from disclosure of this file path. Disclosing it could harm the security of the secure file transfer system by disclosing information about where files are stored, therefore making it more vulnerable to a security breach.

CONCLUSION

[69] For the reasons given above, under s. 58 of FIPPA, I order that the Ministry is:

(a) Required to refuse to disclose under s. 22 of FIPPA the third party usernames at page 144 of the records and the information it withheld under s. 22, except that it must disclose:
  a. the information that is not personal information on pages 80-81, 133 and 148-150 of the records;
  b. The information that it is not an unreasonable invasion of personal privacy to disclose highlighted at pages 93, 126, 127, 129, 130, 133, 140, 158, 159, 166, 168, 170-175, 177, 183-185, 189, 192-198 and 212 in the copy of the records accompanying the Ministry's copy of this Order;
  c. The information that is the severable personal information of the applicant highlighted at pages 93, 130, 133, 140, 158, 164, 166, 167, 175, 193, 195, 198, 206, 207, and 210-212 in the copy of the records accompanying the Ministry's copy of this Order;

(b) authorized to withhold the information withheld under s. 13 of FIPPA at pages 110-111, 167, 187-188 and 212 of the records;

(c) is not authorized to refuse to disclose information under s. 14 of FIPPA;

(d) is not authorized to refuse to disclose information under s. 15(1)(c) of FIPPA; and

(e) is authorized to refuse to disclose information under s. 15(1)(l) of FIPPA that discloses the secure file location at page 144 of the Order.

[70] I require the Ministry to give the applicant access to the information required to be disclosed by May 1, 2015. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 18, 2015

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

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