Office of the Information & Privacy Commissioner for British Columbia

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Order F15-59

MINISTRY OF JOBS, TOURISM AND SKILLS TRAINING

Caitlin Lemiski
Adjudicator

October 21, 2015

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Summary: The applicant requested records used to develop communications material to support the economic impacts of the Times of India Film Awards. The Ministry withheld some of the requested information from responsive emails on the basis that several exceptions to disclosure under FIPPA applied: Cabinet confidences (s. 12), advice and recommendations (s. 13), harm to the business interests of a third party (s. 21), and unreasonable invasion of third party personal privacy (s. 22). The adjudicator determined that the Ministry is required to withhold some information under ss. 12 and 22, and authorized to withhold other information under s. 13. The Ministry is not required to withhold information under s. 21.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 12(1), 13, 21, 22 and 12(5); Committees of the Executive Council Regulation, B.C. Reg. 229/2005.*

Authorities Considered: B.C.: Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21 (QL); Order 01-02, 2001 CanLII 21556 (BC IPC); Order 01-15, 2001 CanLII 21569 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order 02-28, 2002 CanLII 42459 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 06-16, 2006 CanLII 25576 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order F08-11, 2008 CanLII 30213 (BC IPC); Order F09-26, 2009 CanLII 66959 (BC IPC); Order F10-15, 2010 CanLII 77326 (BC IPC); Order F10-23, 2014 BCIPC 55 (CanLII); Order F12-06, 2012 BCIPC 9 (CanLII); Order 12-08, 2012 BCIPC 12 (CanLII); Order F13-09, 2013 BCIPC 10 (CanLII); Order 13-24, 2013 BCIPC 31 (CanLII); Order F14-04, 2014 BCIPC 4 (CanLII); Order F14-44, 2014 BCIPC 47 (CanLII); Order F14-56, 2014 BCIPC 60 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Order 15-04, 2015 BCIPC 4 (CanLII); Order 15-25, 2015 BCIPC 27 (CanLII); Order F15-47 2015 BCIPC 50 (CanLII); Order F15-48 2015 BCIPC 51 (CanLII).

Cases Considered: *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII); *John Doe v. Ontario (Finance),* 2014 SCC 36 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*), 2014 SCC 31.

INTRODUCTION

[1] This inquiry involves a request to the Ministry of Jobs, Tourism and Skills Training ("Ministry") for records used to develop communications material about the economic impacts of the Times of India Film Awards ("Awards"). The Ministry identified responsive records and provided them to the applicant. The Ministry withheld some information in the responsive records under s. 13 (policy advice or recommendations), s. 21 (disclosure harmful to business interests of a third party) and s. 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").[1]

[2] The applicant was not satisfied with the Ministry's response, and he requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). Mediation did not resolve the issues in dispute, and the matter proceeded to inquiry. The Ministry and the applicant each made submissions at the inquiry. The Times Group also made a submission because some of the severed information is about their suppliers and subcontractors.

[3] After the Notice of Inquiry was issued to the parties, the Ministry released more information to the applicant. The Ministry continued to withhold some information under ss. 13, 21 and 22. In addition, the Ministry decided to withhold two lines from an email under s. 12 (Cabinet and local public body confidences).[2] In this case, as s. 12 is a mandatory exception to access under FIPPA, and the applicant did not object to the Ministry's late reliance on it, I have considered whether it applies.

ISSUES

[4] The issues in this inquiry are:

1. Is the Ministry required by s. 12(1) to refuse to disclose information because disclosure would reveal Cabinet confidences?

[1] Order F15-48 2015 BCIPC 51 (CanLII), and Order F15-47 2015 BCIPC 50 (CanLII) also relate to an applicant's request for records related to the Times of India Film Awards.
[2] Public body's submission at paras.1.05 and 3.01.

2. Is the Ministry authorized by s. 13(1) to refuse to disclose information because disclosure would reveal advice and recommendations developed by or for a public body or minister?
3. Is the Ministry required by s. 21(1) to refuse to disclose information because disclosure would be harmful to a third party's business interests?
4. Is the Ministry required to withhold information under s. 22(1) of FIPPA because disclosure would be an unreasonable invasion of third party personal privacy?

[5] The Ministry has the burden of proof, under s. 57(1) of FIPPA, to establish that s. 13 authorizes it, and that s. 12 and s. 21 require it, to refuse access to the requested information. Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information contained in the requested records would not unreasonably invade third party personal privacy under s. 22 of FIPPA.

DISCUSSION

[6] **Background —** The Awards was a 2013 Vancouver event produced by Bennett, Coleman and Company Limited, also known as the Times Group. The Times Group publishes several newspapers, including the Times of India. The Times Group also organizes large cultural events, including the Awards. The provincial government contracted with the Times Group to produce the Awards.[3] The applicant's request is for records used to support the government's communications material regarding the economic impact of the Awards.

[7] **Records in Dispute —** There are ten pages of records in dispute. They include eight pages of emails and a two page chart that is attached to one of the disputed emails.

[8] The information severed from the chart includes the names of suppliers and subcontractors and an estimate of the number of people employed by each one in connection with the Awards.[4] The Ministry applied s. 21(1) to withhold supplier and subcontractor names, and it applied s. 13(1) and s. 21(1) to withhold how many people were employed.

[9] The information the Ministry has severed from the emails includes a draft communications statement, parts of discussions between government staff members about the economic impacts of the Awards, information about

[3] The Ministry's reply submission, at para. 5, confirms that an agreement between the Times Group and the Province of BC was in place in relation to the Awards.
[4] Affidavit of the Executive Director of Strategic Initiatives with the Tourism and Small Business Division of the Ministry of Jobs, Tourism, and Skills Training at para. 14.

a government employee's leave, and the personal email addresses of a government employee. The Ministry withheld this information on the basis that either s. 13(1) or s. 22(1) apply. With respect to two lines of one of the emails in dispute, the Ministry relies on ss. 12(1) and 13.

[10] I will begin by considering whether s. 12(1) applies.

[11] **Cabinet Confidences (s. 12) —** Section 12(1) states:

> **12**(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[12] In this case, the Ministry withheld two lines from an email under s. 12 on the basis that the information refers to advice in a submission to Treasury Board. The Ministry submits that disclosing this information would reveal the substance of Treasury Board deliberations.[5]

[13] The Supreme Court of Canada has affirmed the purposes of s. 12 and has stated that "[t]hose charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny."[6]

[14] In *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*,[7] the BC Court of Appeal held that the substance of deliberations "refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision."[8] The Court also held that "…the class of things set out after "including" in s. 12(1) extends the meaning of "substance of deliberations" and as a consequence the provision must be read as widely protecting the confidence of Cabinet communications."[9]

[15] The issue is whether disclosure of the withheld information – alone or in connection with other available information – would directly reveal, or allow the

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[5] Public body's initial submission at para. 4.32. The applicant and the Times Group did not make submissions about the applicability of s. 12 to the severed information.
[6] *Babcock v. Canada (Attorney General),* [2002] S.C.J. No. 58, 2002 SCC 57, (at para. 18) as quoted in Order 02-38, 2002 CanLII 42472 (BC IPC).
[7] *Aquasource Ltd. v. British Columbia* (*Freedom of Information and Protection of Privacy Commissioner*), 1998 CanLII 6444 (BC CA).
[8] *Aquasource* at para. 39.
[9] *Aquasource* at para. 41.

applicant to draw accurate inferences about, the substance of Cabinet deliberations. Previous orders have said that in some cases it will be clear from the records at issue that disclosing them would reveal the substance of Cabinet deliberations, while in other cases there may be inferential evidence or other surrounding circumstances that confirm that disclosing information would "reveal" the substance of Cabinet deliberations, therefore the information must be withheld under s. 12(1).[10]

[16] **Analysis of s. 12 —**Section 12(5) states that the Lieutenant Governor in Council, by regulation, may designate a committee of the Executive Council for the purposes of s. 12(1). I find that Treasury Board is a committee of the Executive Council and is so designated.

[17] Previous orders have established that information that was submitted to Cabinet (including one of its committees) will not automatically receive protection from disclosure under s. 12(1) without at least some inferential evidence that disclosure could, directly or by inference, reveal the substance of the deliberations of Cabinet or of one of its committees.[11]

[18] In this case, the Ministry's sworn evidence is that the information is from a Treasury Board submission. The Ministry's Executive Director of Strategic Initiatives with the Tourism and Small Business Division ("Executive Director") deposes that the information severed under s. 12 is from a submission to Treasury Board.[12] The Ministry says that this information consists of advice to Treasury Board, the details of which it has submitted to the OIPC *in camera*.[13]

[19] Based on the Ministry's evidence and on my own review of the record, I find that the information severed under s. 12 is from a Treasury Board submission that was submitted to Cabinet. I am further satisfied that disclosing this information would reveal the substance of Cabinet deliberations. It is evident from my review of the Treasury Board submission that it contains information which Cabinet considered before making a decision to support the Awards.

Section 12(2)(c)

[20] Section 12(2)(c) lists exceptions to s. 12(1). It is as follows:

> (2) Subsection (1) does not apply to

[10] In Order F10-23, 2010 BCIPC 34 at para 16; Order F09-26, 2009, CanLII 66965 at para. 23.
[11] See Order No. 48-1995, [1995] B.C.I.P.C.D. No. 21 as quoted in Order 01-02, 2001 CanLII 21556 (BC IPC), at para. 10.
[12] Public body's initial submission at para. 4.32 and the affidavit of the Executive Director of Strategic Initiatives with the Tourism and Small Business Division of the Ministry of Jobs, Tourism, and Skills Training at paras. 17 and 18.
[13] Public body's initial submission at para. 4.32.

> …
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> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
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> (i) the decision has been made public,
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> (ii) the decision has been implemented, or
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> (iii) 5 or more years have passed since the decision was made or considered.

[21] In this case, it is evident from the Ministry's submissions that its decision to participate in the Awards was made public, and the Awards have already been held. Therefore, in determining whether s. 12(2)(c) applies I must consider whether the purpose of the withheld information was to present background explanations or analysis to Treasury Board. I have followed the approach set out by former Commissioner Flaherty in Order No. 48-1995. He stated:

> …"Background explanations" include, at least, everything factual that Cabinet used to make a decision. "Analysis" includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet. It may not include advice, recommendations, or policy considerations. These kinds of things could reveal the substance of deliberations (as I have construed it above) in the way in which I believe the Legislature contemplated it. Records prepared for submission to Cabinet should not be presumed to automatically reveal the substance of deliberations and must be considered for release to an applicant under section 12(2)(c).[14]

[22] On appeal of that Order, the Court in *Aquasource* affirmed the former Commissioner's interpretation:

> …The two provisions cannot be read as watertight compartments and the Commissioner was correct in harmonizing them. He accepted the government's submission that the exception relates to the purpose for which the information is given: if it is to provide background or analysis and is not interwoven with any of the items listed in s. 12(1), the information can be disclosed. …[15]

[23] In this case, I find that the severed information is clearly advice to Treasury Board. It is not background explanations or analysis. Therefore, I am satisfied that s. 12(2)(c) does not apply. The Ministry is required to continue to withhold the information under s. 12(1).

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[14] Order No. 48-1995 [1995] B.C.I.P.C.D. No. 21, at p. 13.
[15] *Aquasource* at para. 50.

[24] I will next consider whether the Ministry is authorized to withhold information under s. 13.

[25] **Advice or recommendations (s. 13) —** Section 13(1) states that 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. Many orders have consistently held that the purpose of s. 13(1) is to protect a public body's internal decision-making process by allowing frank discussions of advice and recommendations.[16]

[26] In addressing Ontario's equivalent to s. 13(1) in *John Doe v. Ontario (Finance) [John Doe],* the Supreme Court of Canada said:

> …The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed.[17]

[27] Previous orders have found that s. 13(1) applies when disclosure of the information would reveal advice or recommendations, including when it would allow accurate inferences about the advice or recommendations.[18] In addition, the courts have provided guidance regarding the meaning of the word "advice". In *John Doe*, the Supreme Court of Canada said that "advice" includes policy options, whether or not the advice is communicated to anyone.[19] The BC Court of Appeal in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* said that "advice" for the purposes of s. 13 includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinions on matters of fact on which a public body must make a decision for future action.[20]

[28] There are two stages for determining whether s. 13(1) applies. The first stage is to determine whether disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, it becomes necessary to move to the second stage, which is to determine whether the information to which s. 13(1) applies falls within any of the categories listed in

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[16] Order 01-15 2001 CanLII 21569 (BC IPC), at para. 22; Order F15-25 2015 BCIPC 27 (CanLII) at para. 16.
[17] *John Doe v. Ontario (Finance),* 2014 SCC 36 (CanLII), at para. 45.
[18] Order F15-25 2015 BCIPC 27 (CanLII) at para. 17; Order F14-44 2014 BCIPC 47 (CanLII) at para. 29, citing Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38; Order F06-16, 2006 CanLII 25576 (BCIPC).
[19] *John Doe v. Ontario (Finance),* at para. 50.
[20] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), at para. 111 - as cited in Order F13-24 2013 BCIPC 31 (CanLII) at para. 13; also Order F15-25 at para. 18.

s. 13(2). If s. 13(2) applies, the effect is that even if the information would reveal advice or recommendations developed by or for a public body, the public body must not withhold that information.

[29] The Ministry submits that:

> …the information severed from the Records under s. 13 is the type of information that section was designed to protect, namely, internal confidential communications that were conveyed during the decision making process and were meant to convey advice and/or recommendations developed by or for the Minister and/or the Ministry.[21]

[30] The applicant submits that s. 13(1) does not apply to any of the information in dispute.

Analysis

[31] I find that most of the information the Ministry severed under s. 13(1) is advice and recommendations of Ministry employees or of employees of the Times Group to the Ministry. The information that I find reveals advice or recommendations is contained within email exchanges about the economic benefits of the Awards. For example, one of the disputed emails includes a proposed news release from the Ministry's Communications Director to the Minister.[22] In other instances, disclosing the information withheld would allow someone to make accurate inferences about advice or recommendations relating to the economic benefits of the Awards.[23] I therefore find that s. 13(1) applies to this information.

[32] There is some information the Ministry cannot withhold under s. 13(1) because it is not advice or recommendations. This information comprises facts about how much total economic activity the Awards generated, as well as estimates from the Times Group's subcontractors and suppliers about the number of people directly and indirectly employed as a result of the Awards.

[33] The Ministry characterizes estimates of how many people were employed as a result of the Awards as "advice", but I do not agree with this characterization. The Ministry does not elaborate on why it believes the estimates are advice, and it is not apparent to me from the estimates themselves how they could be construed as advice. For example, the estimates are not, in my view, an expert opinion that requires any special skill or judgement on

[21] Public body's initial submission at para. 4.11. The Ministry does not set out its rationale for applying s. 13(1) to the disputed records on a line-by-line or page-by page basis.
[22] Page 6 of the disputed records.
[23] For example, at p. 1 of the disputed records.

matters of fact on which a public body must make a decision for future action,[24] and the estimates do not contain policy options, which are a form of advice.[25] In conclusion, these estimates do not qualify as advice or recommendations and the Ministry is not authorized to withhold this information under s. 13(1).

[34] Any analysis and policy options about the facts and estimates are advice, however, and the Ministry is authorized to withhold this information under s. 13(1).

Section 13(2)

[35] The applicant submits that s. 13(2)(a) applies to the s. 13(1) information because it is factual information. The applicant also cites s. 13(2)(i), which excludes a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body from the scope of s. 13(1). The applicant also refers to s. 13(2)(m), which excludes from the scope of s. 13(1) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy.[26] The applicant does not give reasons or provide evidence to support why he believes these subsections apply.[27]

[36] The Ministry submits ss. 13(2)(a), (i) and (m) do not apply to any of the information severed under s. 13(1).[28]

[37] I find that any information that is advice or recommendations under s. 13(1) is not "factual material", therefore s. 13(2)(a) does not apply to that information.[29] In addition, based on my review, I find that none of the advice and recommendations is a feasibility or technical study, (including a cost estimate), nor is it information that was cited publicly by the Ministry as the basis for making a decision or formulating a policy.[30] Therefore, I find that ss. 13(2)(a), (i) and (m) do not apply to any of the s. 13(1) information, so it may be withheld under s. 13(1).

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[24] This was the situation in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII).

[25] In *John Doe*, the Supreme Court of Canada determined that Ontario's equivalent to s. 13(1) included policy options, whether they were communicated to anyone or not.

[26] Applicant's submission at paras. 12 and 13.

[27] Applicant's submission at paras. 12 and 13.

[28] Public body's initial submission at para. 4.16 and reply submission at para. 8.

[29] I have already found that facts and estimates related to total economic activity and employment generated by the Awards is not advice or recommendations under s. 13(1), therefore I do not need to consider whether s. 13(2)(a) applies to this information.

[30] The Ministry's evidence is that the proposed news release was not made public. Affidavit of the Executive Director of Strategic Initiatives with the Tourism and Small Business Division of the Ministry of Jobs, Tourism, and Skills Training at para. 16.

Exercise of discretion

[38] The applicant submits that the Ministry did not consider the purposes of FIPPA when exercising its discretion to apply s. 13(1).[31] The Ministry submits it considered the purposes of FIPPA and other factors relevant to making a determination to apply s. 13(1).[32]

[39] In Order 02-38, then Commissioner Loukidelis stated "…the Act does not contemplate my substituting the decision I might have reached for the head's decision. I can require a public body's head to consider the exercise of discretion where that has not been done, but I will not myself exercise that discretion."[33] In this case, I am satisfied based on the evidence before me that the Ministry considered whether to exercise its discretion before applying s. 13(1).

[40] **Reasonable expectation of harm to a third party (s. 21)—**Section 21(1) requires public bodies to withhold information if disclosing it could reasonably be expected to harm a third party's business interests. The Ministry relied on s. 21 to withhold (from the chart at pages three and four of the records) the names of subcontractors and suppliers involved with the Awards as well as information about how many people were directly and indirectly employed.

[41] Section 21(1) is as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

[31] I also note that the applicant references a BC government policy and procedures Manual related to evaluating whether to apply harms-based exceptions under FIPPA, (at para. 17 of the applicant's submission); however as s. 13 is not a harms-based exception, I have not considered this aspect of the applicant's argument further. In Order 02-38, then Commissioner Loukidelis rejected a "back-door" application of any harms-test when determining whether a public body appropriately exercised discretion to apply s. 13 (at para. 146).

[32] Public body's submission at para. 4.18.

[33] Order 02-28, 2002 CanLII 42459 (BC IPC) at para. 147.

(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, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[42] All three parts of s. 21(1) must be met in order for the section to apply. I will now consider each part of s. 21(1) in turn.

[43] **Commercial, Financial, or Technical information —** Previous orders have determined that "commercial information" relates to commerce or to the buying of services, including a list of suppliers.[34] In this case, the information the Ministry severed under s. 21 from the disputed records is the contents of two of the columns from the chart that disclose how many people were directly or indirectly employed by different suppliers and subcontractors connected with the Awards. The Ministry also severed some of the suppliers' and subcontractors' names and the services they provided under s. 21. The Ministry submits that the information is commercial information.[35] The applicant and Times Group did not make submissions on this point. I find that the information the Ministry severed under s. 21 is commercial information of or about a third party.

[44] **Was the information supplied? —** Section 21(1)(b) requires that the information that falls within the categories of information enumerated in s. 21(1)(a) must also be supplied implicitly or explicitly in confidence. To determine whether the requirement in s. 21(1)(b) is met, I must first decide if the information was supplied, and if it was, then I must decide if it was supplied in confidence.[36]

[45] Neither the Times Group nor the applicant made submissions about whether the Times Group supplied information to the Ministry in confidence.

[46] In this case, the Ministry's Executive Director deposes that she asked for and received the chart from the Times Group."[37] Information in an email from the Times Group to the Executive Director (already disclosed to the applicant) is

[34] See Order F14-58, 2014 BCIPC 62 (CanLII); at para. 16 citing Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at paras. 62 and 63.
[35] Public body's initial submission at para. 4.41.
[36] The meaning of "supplied" has been established in many orders. See for example, Order F14-04, 2014 BCIPC 4 (CanLII) and Order 03-02, 2003 CanLII 49166 (BC IPC).
[37] Affidavit of the Ministry's Executive Director of Strategic Initiatives with the Tourism and Small Business Division at para. 6.

consistent with this evidence.[38] I therefore find that the information severed under s. 21 was supplied.

[47] As I have determined the information severed under s. 21 was supplied, I will now determine whether it was supplied, explicitly or implicitly in confidence. The Ministry submits that the Times Group provided the chart explicitly in confidence.[39]

[48] Order 01-36 sets out examples and factors associated with information that is supplied in confidence:

> An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.[40]

[49] In this case, the email containing the chart includes the following statement: "[t]he information in this e-mail and any attachments is confidential and may be legally privileged. It is intended solely for the addressee or addressees. …"[41] The header information on the email shows that it was sent from a Times Group employee to only the Executive Director and two other Times Group employees.[42] Based on this evidence, and absent any other evidence that is was not provided explicitly in confidence, I find that the chart was supplied in confidence.

[50] **Harm to third party interests —** I will next consider whether disclosure of the information in the chart that I find the Times Group supplied in confidence could reasonably be expected to cause one of the outcomes enumerated in s. 21(1)(c).

Standard of proof and evidentiary burden for s. 21(1)(c)

[51] The Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, has determined that the standard of proof and the evidence required to meet that standard for harms-based exceptions such as s. 21 is as follows:

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[38] Page 1 of the disputed records in this inquiry.
[39] Public body's submission at para. 4.46.
[40] Order 01-36 at paras. 24 and 26 as quoted in Order 15-04, 2015 BCIPC 4 (CanLII) at para. 24.
[41] Page 1 of the records. This information has already been disclosed to the applicant.
[42] The distribution information for this email has already been disclosed to the applicant.

> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course 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": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.[43]

[52] In summary, the Ministry must prove that there is a reasonable expectation of probable harm to a third party's business interests if the disputed information is disclosed. The Ministry must provide evidence "well beyond" or "considerably above" a mere possibility of harm to reach that middle ground between that which is probable and that which is merely possible.

[53] The Ministry submits that disclosing the information severed from the chart could reasonably be expected to harm the Times Group in the following ways:

> ...The Ministry concluded that releasing the names of vendors [suppliers and subcontractors] would be valuable information for the [Times Group's] competitors and/or other jurisdictions to have. They would know whether the vendor is a small, mid-size or large business. This would lead to a competitive advantage for the Third Party's competitors in seeking similar contracts in the future. Competitors and other jurisdictions could also contact the vendors and make inquiries in order to get a sense as to the size (in terms of dollars) of the contracts and how much the Third Party had spent in British Columbia. This, again, would lead to a competitive advantage for the [Times Group's] competitors in seeking similar contracts in the future. Also, knowing the identity and nature of the vendor could lead other host jurisdictions of future award shows to determine that comparable vendors should be hired by the [Times Group] under a new contract. The Ministry concluded that this could reasonably be expected to undermine the Third Party's negotiating position with other jurisdictions.[44]

[54] The Times Group submits that how it selects suppliers and contractors is a trade secret and that disclosing information severed from the chart "would cause our negotiation position to be diluted substantially and make our key

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[43] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*), 2014 SCC 31 at para. 54.
[44] Public body's initial submission at para. 4.52.

business information public."[45] The Times Group also submits that its competitors will gain an undue advantage if the information in the chart is disclosed because they could use it when organizing a similar event.[46]

[55] The applicant submits that there could be no harm to the Times Group from disclosing the disputed information because the Awards have already been held and he submits there are no plans to hold another similar event.[47]

Analysis for s. 21(1)(c)

[56] In regards to harm under s. 21(1)(c)(i) (harm significantly the competitive position or interfere significantly with the negotiating position of the third party), the evidence presented by the Times Group and by the Ministry is speculative and does not demonstrate a clear and direct connection between disclosing the disputed information and this alleged harm. For example, the Ministry and the Times Group have asserted that disclosing the disputed information could reasonably be expected to harm the Times Group's negotiating position, but they have provided no evidence in support. In addition, the disputed information does not reveal any information about how the Times Group selects its suppliers or contractors; therefore I am not persuaded by the Times Group's claim that disclosing this information would harm its negotiating position in that regard. In summary, I find the Ministry has not provided evidence that is "well beyond" or "considerably above" a mere possibility of harm.

[57] In addition, I have no argument or evidence before me that either of the harms described in s. 21(1)(c)(ii) or s. 21(1)(c)(iv) would result if the disputed information were disclosed.

[58] In regards to s. 21(1)(c)(iii), the parties did not provide evidence supporting their arguments that disclosure of the information would result in financial loss or gain, let alone information that would allow me to determine whether any such gains or losses would be undue. The Ministry submits that the Times Group is "actively working" on its next Awards-type event, but the Ministry does not say what the timing of that event is, or whether the Times Group plans to hold it in Canada.[48] For its part, the Times Group says nothing in its submissions about planning a future similar event. Neither the Ministry nor the Times Group provided any evidence that any other party is organizing an Awards-type event (in Canada or elsewhere), either. This evidence does not support a conclusion that disclosing the severed information would result in any undue financial loss or gain.

[45] Submission of the Times Group at paras. 3 and 4.
[46] Submission of the Times Group at para. 5.
[47] Applicant's submission at para. 30.
[48] Public body's reply submission at para. 7.

[59] For the above reasons, I find that, even though the disputed information was supplied in confidence as required by s. 21(1)(b), disclosure could not reasonably be expected to result in any of the harms in s. 21(1)(c). The Ministry is therefore not required by s. 21 to withhold any of the disputed information it has severed under that section.

[60] **Unreasonable invasion of personal privacy (s. 22)** — Section 22(1) requires public bodies to withhold information that would constitute an unreasonable invasion of personal privacy. In this case, the Ministry relied on s. 22 to withhold the personal email address of a Ministry employee and information about another Ministry employee's leave.[49]

[61] The approach to s. 22 has been established in previous orders.[50] The first step is to determine whether any of the disputed information is "personal information." Schedule 1 of FIPPA states that personal information "means recorded information about an identifiable individual other than contact information."[51] Schedule 1 of FIPPA states that contact information means "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." From what I can see the email address is a personal email address and there is no evidence suggesting that the personal email address in dispute was to enable an individual at a place of business to be contacted. For this reason, I find that it is "personal information".

[62] The second step in a s. 22 analysis is to determine whether the personal information falls into any of the categories in s. 22(4), which set out specific circumstances when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The applicant cites all the factors in s. 22(4) as being relevant but does not elaborate on how these sub clauses might apply to the information in dispute in this case.[52] The Ministry submits that none of the factors listed in s. 22(4) apply in this case. The Times Group did not make any submissions in regards to s. 22. The applicant cited OIPC orders referring to s. 22(4) but did not make submissions regarding how s. 22(4) applies or does not apply in this case.[53] I find that none of the factors in s. 22(4) apply.

[63] The third step in a s. 22 analysis is to consider whether any of the presumptions listed in s. 22(3) of FIPPA apply to personal information that does not fall within s. 22(4). Section 22(3) sets out circumstances where a disclosure

[49] Pages 2 and 9 of the disputed records and the public body's initial submission at para. 4.61.
[50] See for example, Order F13-09, 2013 BCIPC 10 (CanLII) at para. 18 and Order F12-08, 2012 BCIPC 12 (CanLII) at para. 12.
[51] Schedule 1 of FIPPA.
[52] Paras. 34 and 36 of the applicant's submission. The applicant does not elaborate on how these sub clauses might apply to the information in dispute in this case.
[53] Public body's submission at para. 4.65.

of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. None of the parties argued that s. 22(3) applies in this case.

[64] I find that none of the presumptions in s. 22(3) apply to the personal email address the Ministry has severed. However, I find that s. 22(3)(d) creates a presumption against disclosing information about an employee's leave because it relates to their employment history.[54] The presumption can be rebutted if, after considering all relevant circumstances (including those listed in s. 22(2)), it is determined that disclosing the personal information would not be an unreasonable invasion of a third party's personal privacy.

[65] The fourth step in a s. 22 analysis is to consider all relevant circumstances, including those listed in s. 22(2), to determine if disclosure would be an unreasonable invasion of a third party's personal privacy.[55] The applicant did not make any submissions regarding s. 22(2). In this case, the Ministry submits that ss. 22(2)(a) and (c) favour withholding the information about the employee's leave. They provide as follows:

> 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,

[66] The Ministry submits that disclosing information about an employee's leave in this case is not relevant to a fair determination of the applicant's rights and that it is not desirable for the purposes of subjecting the activities of the government or a public body to public scrutiny.

[67] In this case, based on the type of information being withheld (a personal email address and employee leave information) and the circumstances in which they are being withheld, I find that s. 22(2)(a) and s. 22(2)(c) do not apply. For example, there is no suggestion in any of the parties' submissions or in the records that disclosing this employee's personal email address or the other employee's leave information is desirable for subjecting the activities of the Ministry to public scrutiny. In this case, the fact the employee was using their

[54] Page 9 of the disputed records.
[55] The applicant did not make any submissions regarding s. 22(2).

personal email address is already known and the full name of the employee has already been disclosed, therefore it is not apparent to me how disclosing the email address is desirable for the purpose of contributing to public scrutiny.[56]

[68] I find that none of the other factors in s. 22(2), or any other circumstances, rebut the presumption in s. 22(3)(d) with respect to the information about an employee's leave. In addition, I find that no factors favour disclosure of the personal email address. I find that the Ministry is required to continue to withhold the information it has severed under s. 22. I note my findings are consistent with Orders F13-09 and F14-56, which found that s. 22 requires a public body to withhold personal email addresses and employee leave information.[57]

CONCLUSION

[69] I have determined that s. 12(1) and s. 22 require the Ministry to continue to withhold the information it severed under those exceptions. The evidence establishes that disclosure of this information would reveal the substance of Cabinet's deliberations and would be an unreasonable invasion of a third party's personal privacy.

[70] I have also determined that the Ministry is authorized to withhold advice and recommendations under s. 13(1), but that s. 13(1) does not apply to facts and estimates about the financial and employment impacts of the Awards. I find that s. 13(2) does not apply to any of the s. 13(1) information.

[71] I have also determined that the Ministry is not required by s. 21 to withhold information supplied in confidence because the Ministry has not demonstrated that disclosing this information could reasonably be expected to harm a third party's business interests.

ORDER

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

1. The Ministry must refuse to disclose to the applicant information severed under ss. 12 and 22 of FIPPA.

2. Subject to paragraph 3 below, the Ministry may refuse to disclose to the applicant information under s. 13 of FIPPA.

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[56] Page 5 of the disputed records.

[57] See Order F13-09, 2013 BCIPC 10 (CanLII) at para. 30 (regarding personal email addresses) and Order F14-56, 2014 BCIPC 60 (CanLII) at para. 50 (regarding information about an employee's leave).

3. The Ministry must disclose the information highlighted in yellow in the records which accompany the Ministry's copy of this Order.

4. The Ministry must not refuse to disclose to the applicant information severed under s. 21 of FIPPA.

5. The Ministry must disclose the information highlighted in yellow and all the information it has severed under s. 21 before December 3, 2015 pursuant to s. 59 of FIPPA. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

October 21, 2015

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-55204