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Order F17-23

MINISTRY OF ENERGY AND MINES

Carol Whittome
Adjudicator

May 8, 2017

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Summary: An applicant requested records related to the Ministry's participation in a federal review panel concerning the applicant's proposed mining project. The Ministry provided the responsive records but withheld some information pursuant to ss. 13 (policy advice or recommendations), 14 (solicitor client privilege), 15(1)(l) (harm to security of a system), 17 (harm to economic interests), 21 (harm to third party business interests) and 22 (harm to personal privacy). The adjudicator held that the Ministry was required to refuse to disclose all of the information in the records withheld under ss. 21 and 22 and was authorized to refuse to disclose most of the information in the records withheld under ss. 13, 14, 15(1)(l) and 17. The adjudicator ordered the Ministry to provide a small amount of information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14, 15(1)(l), 17, 21 and 22.

Authorities Considered: B.C.: Order F14-57, 2014 BCIPC No. 61 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 03-25, 2003 CanLII 49204 (BC IPC); Order F05-27, CanLII 30677 (BC IPC); Order 00-08, 2000 CanLII 9491 (BC IPC); Order F13-01, 2013 BCIPC 13 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII); Order F16-26, 2016 BCIPC 28 (CanLII); Order F07-11, 2007 CanLII 30396 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-12, 2014 BCIPC 15 (CanLII); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F15-03, 2015 BCIPC 3 (CanLII); Investigation Report F11-03; Investigation Report F11-01; Investigation Report F10-02; Investigation Report F06-02; Investigation Report F06-01.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322; *R. v. B.*, 1995 CanLII 2007 (BC SC); *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565; *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII); *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.); *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (CanLII); *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875; *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41.

INTRODUCTION

[1] The applicant requested that the Ministry of Energy and Mines (Ministry) disclose records relating to a mining project for the period of January 1, 2010 to July 31, 2013. The Ministry released some records but withheld other records and information pursuant to ss. 12, 13, 14, 16, 17, 18, 21 and 22 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information. During mediation, the Ministry reconsidered its original severing decisions and released additional information to the applicant. Mediation failed to resolve all the issues in dispute and they proceeded to inquiry.

[3] During the inquiry process, the Ministry again reconsidered its severing decisions and withdrew its reliance on ss. 12, 16 and 18. It also released additional information to the applicant. However, it continued to withhold information under ss. 13, 14, 15(1)(l), 17, 21 and 22.

ISSUES

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

1. Whether the Ministry is authorized to refuse to disclose the information at issue under ss. 13, 14, 15(1)(l) and 17 of FIPPA; and

2. Whether the Ministry is required to refuse to disclose the information at issue under ss. 21 and 22 of FIPPA.

[4] Section 57 of FIPPA governs the burden of proof in an inquiry. The Ministry has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 13, 14, 15(1)(l), 17 and 21. However, the applicant has the burden of proving that disclosure of any personal

information in the requested records would not be an unreasonable invasion of third party personal privacy under s. 22.

DISCUSSION

Records

[5] The records consist of emails, memorandums, reports, drafts and other correspondence responsive to the request.

Background

[6] The applicant is Taseko Mines Limited, a mining company (Taseko or the applicant). The request for information concerns the Ministry's participation in a federal review panel and input it provided about Taseko's application to amend its provincial certificate.[1]

[7] In January 2010, the province issued Taseko an Environmental Assessment Certificate (EAC) under the British Columbia *Environment Assessment Act*. The EAC was related to Taseko's Prosperity Gold-Copper Project.[2]

[8] In July 2010, a federal panel established under the *Canadian Environmental Assessment Act* (CEAA panel) decided that it could not grant Taseko federal authorization to proceed with the Prosperity Gold-Copper Project due to "concerns about the significant adverse environmental effects."[3] Taseko redesigned the project (now called the New Prosperity Project) to address the concerns raised during the federal review process. The New Prosperity Project was required to go through the federal review process anew.[4]

[9] An amendment to the provincial EAC was also required. With the Ministry's assistance, the Environmental Assessment Office coordinated a provincial review of the Environmental Impact Statement for the New Prosperity Project.[5] That provincial review process had not concluded at the time of submissions to this inquiry.

[10] In February 2014, the federal CEAA panel decided that the New Prosperity Project could not proceed due to the likely "significant adverse environment effects."[6]

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[1] Applicant submissions, para. 8.
[2] Executive Project Director Affidavit, para. 3.
[3] Manager, Environmental Geoscience and Permitting Affidavit, para. 4; Executive Project Director Affidavit, para. 4.
[4] Executive Project Director Affidavit, para. 4.
[5] Executive Project Director Affidavit, paras. 4 and 8.
[6] Executive Project Director Affidavit, para. 7.

Section 13 – Advice or Recommendations

[11] Section 13 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, subject to certain exceptions. Section 13 states, in part, as follows:

> 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.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,…

[12] The Supreme Court of Canada has stated that the purpose of exempting advice or recommendations from disclosure "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[7] Similarly, the BC Court of Appeal has stated that s. 13 "recognizes that some degree of deliberative secrecy fosters the decision-making process."[8]

[13] Previous orders and court decisions have found that s. 13(1) applies to information that directly reveals advice or recommendations, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.[9] In addition, the BC Court of Appeal has held that the word "advice" should be interpreted to include "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact."[10]

[14] In determining whether s. 13 applies, the first consideration is whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister." If it would, the second consideration is whether the information is excluded from s. 13(1) because it falls within a category listed in s. 13(2). If it does fall into one of the categories, the public body must not refuse to disclose the information under s. 13(1).

Analysis and Conclusion on Section 13(1)

[15] The records at issue are emails exchanged between provincial ministries and attachments to those emails, as well as briefing notes, meeting agendas and

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[7] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), para. 43.
[8] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 105.
[9] For example, Order F14-57, 2014 BCIPC No. 61 (CanLII), para. 14 and *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII), para. 52.
[10] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 113.

meeting summaries. The emails were exchanged by members of the provincial working group reviewing the New Prosperity Project, consisting of staff from the Ministry of Energy and Mines, Ministry of Environment, Ministry of Forest, Lands and Natural Resource Operations, the Environmental Assessment Office, and legal counsel from the Legal Services Branch of the Ministry of Justice.[11]

[16] The Ministry submits that all of the withheld information pertains either directly to advice or recommendations, including material regarding potential or suggested courses of action, or that it contains facts which, if disclosed, would permit an individual to draw accurate inferences about the advice or recommendations.[12] The Ministry says that the information in dispute is "related to decisions made by the Ministry as to whether and how the Environmental Assessment Office (EAO) should participate in the ongoing Panel review."[13] In other words, according to the Ministry, the decision at issue was about how the Ministry should participate in the federal CEAA panel process and the advice and recommendations all relate to this decision.

[17] The applicant submits that it is "very difficult, if not impossible, to conceive of any circumstances in which the information at issue could reasonably be considered policy advice or recommendations." The applicant explains that this is because the information at issue "relates principally to the Ministry's technical inputs into a federal review panel process, which is itself a publicly transparent and open process."[14]

[18] After reviewing the records, along with the evidence and the parties' submissions, I find that the majority of the information involves advice and recommendations regarding the Ministry's participation in the federal CEAA panel process. Therefore, I conclude that the majority of the information withheld under s. 13 directly reveals advice or recommendations or contains information that would enable an individual to draw accurate inferences about advice or recommendations related to the federal submission process.

[19] The few instances where information withheld under s. 13 is not advice and recommendations consists of information that refers to the intention to seek advice or recommendations, but it does not reveal, or allow one to infer, advice or recommendations developed by or for a public body or a minister. Therefore, this information fails the first part of the test and the Ministry is not authorized to

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[11] Manager, Environmental Geoscience and Permitting Affidavit, para. 6; Executive Project Director Affidavit, para. 9.
[12] Ministry submissions, paras. 4.07 – 4.11, citing various Orders, including Order 02-38, 2002 CanLII 42472 (BC IPC), para. 131; Order 03-25, 2003 CanLII 49204 (BC IPC), para. 21; Order F05-27, CanLII 30677 (BC IPC), para. 14; Order 00-08, 2000 CanLII 9491 (BC IPC), para. 22; Order F13-01, 2013 BCIPC 13 (CanLII).
[13] Ministry response submissions, para. 3.
[14] Applicant submissions, para. 9.

withhold it on the basis of s. 13.[15] Since this information is also withheld under s. 14, I will consider it in the s. 14 analysis, below. There is also some information that has been withheld under ss. 13 and 14 that I find below is clearly legal advice, so I have not considered the application of s. 13 to it.[16]

[20] Further, I have considered the applicant's submissions and the jurisprudence it cites regarding the following issues: "heads up" communications, directions or instructions to staff, meeting agendas, speculative assertions, questions revealing no advice or information, and issues without context.[17] The applicant says that these are examples of the type of information that previous orders have held are not advice and recommendations. In reviewing the records, I find that none of the information here falls into any of these categories. The information does, in fact, reveal policy advice and recommendations.[18]

[21] In summary, I find that the Ministry has met the first part of the test with respect to the majority of the withheld information. I will go on, below, to consider whether any of that information must be disclosed under s. 13(2).

Analysis and Conclusion on Section 13(2)

[22] The second part of the analysis involves reviewing the information that I concluded would reveal advice or recommendations to determine if it falls within any of the s. 13(2) categories. If it does, it may not be withheld under s. 13(1).

[23] The Ministry submits that none of the s. 13(2) exemptions apply. Specifically, it states that any factual information that has been withheld was assembled from other sources and is "integral to the analysis and views expressed in the records" and, as such, it is not subject to the "factual material" exemption in s. 13(2)(a).[19]

[24] The applicant submits that the "factual material" exception in s. 13(2)(a) applies. The applicant asserts that the Ministry's interpretation of "factual material" would "effectively eviscerate" the section, that the exclusion of "assembled" information is "effectively an exception to an exception..." and that

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[15] Records: Part 19, p. 41; Part 27, pp. 107.
[16] Records: Part 20, pp. 175 – 178, 220 – 222, 225 – 226, Part 21, pp. 13 – 17, 30 – 35; Part 22, 19 – 20.
[17] Applicant submissions, paras. 25 – 31, citing various orders.
[18] I note that at para. 28 of its submissions, the applicant refers to para. 14 of the Executive Project Director Affidavit, which states that the communication was from Ms. Executive Project Director to representatives of the various ministries involved in the review and described "my understanding of the federal environmental assessment panel final procedures." The applicant submits that the Executive Project Director, a provincial employee, is "not in a position to advise federal agencies about their own panel." The Ministry notes, in para. 7 of its response, that the Executive Project Director's communications were not to the federal agencies, but rather to the provincial ministries involved in the submission process.
[19] Ministry submissions, para. 4.16.

the definition should be "construed narrowly so as not to unduly narrow the purpose and intent of FIPPA."[20] It adds that the "ambit of 'assembled' information in the context of section 13(1) protection was not intended to be so wide as to encompass any gathering of facts…."[21]

[25] After reviewing the withheld information, I find that the information withheld under s. 13 is not "factual material" but rather constitutes advice or recommendations.[22] There is a small amount of material that could be described as containing factual information; however, the BC Supreme Court has stated that the "structure and wording of s. 13 mandate an interpretation whereby 'factual material' is distinct from factual 'information'" and that s. 13(2)(a) is a "narrow exemption from what is included in s. 13(1)."[23]

[26] I find that, in these circumstances, the facts withheld from the records are not "factual material" under s. 13(2)(a).[24] This is because the factual information at issue in this case is not separate and independent from the advice and recommendations. Rather, they are facts that are intermingled with, and are an integral part of, the analysis and recommendations that are properly withheld under s. 13. They relay the factual matters the individuals considered relevant for assessing and analyzing the situation, forming their opinions, and providing explanations that were necessary for the Ministry's deliberative process.

[27] This determination is consistent with court decisions that have narrowly interpreted the "factual material" exemption in s. 13(2)(a).[25] I have also considered the remaining s. 13(2) categories and find that none of apply to the information at issue in this inquiry.

Discretion to Disclose

[28] Section 13 contains the word "may" and is thus a discretionary exception. The Ministry, therefore, has the discretion to choose to disclose information that can be withheld under s. 13.

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[20] Applicant submissions, para. 22.
[21] Applicant submissions, para. 22.
[22] Records, Part 20, pp. 84 – 85, where the statement preceding the withheld material states "Advice and Recommended Response"; Records, Part 138, p. 139, where the statement preceding the withheld material states "At this time there are four options."
[23] *Provincial Health Services Authority v. British Columbia (Information and Privacy* Commissioner, 2013 BCSC 2322 (CanLII), para 91.
[24] Records: Part 22, pp. 13 – 17; Part 24, pp. 19 – 20.
[25] See, for example, *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII), para. 52; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 for further discussion about "factual material."

[29] The applicant submits that the Ministry failed to properly exercise its discretion in applying s. 13 to the disputed information for the following three reasons:

1. It is not credible that the Ministry could claim to have given full, proper itemized consideration to the extensive amount of information it withheld under s. 13(1));

2. The Ministry has failed to outline if and how it considered the public's interest in accessing the information; and

3. The limitations to the application of s. 13(1) must surely apply to at least some of the substantial amount of withheld information.[26]

[30] The applicant cites Order 02-38, where former Commissioner Loukidelis set out the following factors a public body should consider when exercising its discretion:

- the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;

- the wording of the discretionary exception and the interests which the section attempts to balance;

- whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;

- the historical practice of the public body with respect to the release of similar types of documents;

- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;

- whether the disclosure of the information will increase public confidence in the operation of the public body;

- the age of the record;

- whether there is a sympathetic or compelling need to release materials;

- whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and

[26] Applicant submissions, paras. 10, 13, 15 and 16, citing various orders.

- when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.[27]

[31] The Ministry submits that it contemplated the above factors when exercising its discretion in withholding information.[28] Further, it submits that the applicant has failed to acknowledge the clear public interest that is served by s. 13, which it describes as "preserving an effective and neutral public service capable of producing full, free and frank advice."[29]

[32] After reviewing the materials before me, I conclude that the Ministry has exercised its discretion appropriately. Indeed, from my review of the records, it is clear that the Ministry could have withheld further information under s. 13 but decided to disclose the information. In other words, there is evidence that the Ministry considered whether the individual's request could be satisfied by "severing the record and by providing the applicant with as much information as is reasonably practicable." For the above noted reasons, I find that the Ministry exercised its discretion appropriately in the circumstances.

Summary on Section 13

[33] In summary, I find that the Ministry can withhold the majority of the information it withheld pursuant to s. 13(1).[30] As well, I find that the evidence before me establishes that Ministry has exercised its discretion appropriately in these circumstances. I have also determined that some of the withheld information cannot be withheld under s. 13(1), but I will consider this information under s. 14, as the Ministry withheld it under both sections of FIPPA.

Section 14 – Solicitor Client Privilege

Section 14 of FIPPA states:

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

[34] Section 14 encompasses both legal advice privilege (seeking and obtaining legal advice) and litigation privilege (materials created or obtained for existing or contemplated litigation).[31] In this case, the Ministry withheld information on the basis that it is subject to legal advice privilege.[32]

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[27] Order 02-38, 2002 CanLII 42472 (BC IPC), para. 149.
[28] Ministry submissions, para. 4.78; Ministry response submissions, para. 2.
[29] Ministry response submissions, para. 2, citing *John Doe v. Ontario (Finance)*, 2014 SCC 36.
[30] Records: Part 17, p. 19; Part 19, pp. 150, 152; Part 20, pp. 71 – 72, 84 – 85, 172, 179, 223; Part 21, pp. 13 – 17; 139; Part 22, pp. 19, 20, 43, 44, 138; Part 26, p. 160; Part 27, 118.
[31] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.
[32] Ministry submissions, para. 4.22.

[35] The test for legal advice privilege has been articulated as follows:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established.
>
> Those conditions may be put as follows:
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> 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.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[33]

[36] The above criteria have consistently been applied in OIPC orders, and I will take the same approach here.[34]

Parties' Positions on Section 14

[37] The Ministry submits that all of the information withheld under s. 14 would either directly reveal or permit accurate inferences about information that is privileged. It further states that some of the withheld information "refers to the fact that legal advice was sought on a given issue" and that this is protected under s. 14.[35]

[38] The applicant submits that the Ministry has over-extended the intended scope of solicitor client privilege and notes that the Ministry was not a party to the hearing process, but rather was "simply providing technical information and comments in respect of the federal decision-making process."[36] The applicant also submits that a "for your information" communication is not subject to solicitor client privilege, and that privilege is limited to communications that occur between specific parties, namely the client (or their agent) and a legal advisor.[37]

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[33] *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22.
[34] See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.
[35] Ministry submissions, para. 4.33.
[36] Applicant submissions, para. 34.
[37] Applicant submissions, para. 38.

Analysis and Conclusion on Section 14

[39] All of the information withheld under s. 14 can be placed in one of three categories of communication: 1) communication between the Ministry and legal counsel; 2) employee communications which refer to legal advice already obtained from legal counsel; and 3) employee communications about legal advice that will be sought from legal counsel on a particular matter.

1) Communications between the Ministry and legal counsel

[40] These communications are between the Ministry and government legal counsel. The Supreme Court of Canada has held that solicitor-client privilege arises when in-house government lawyers provide legal advice to their client, a government agency.[38] This is what occurred in this situation, and I find that the Ministry and government legal counsel have an established solicitor client relationship.

[41] After reviewing the withheld information, I readily conclude that almost all of the documents exchanged directly between the Ministry and lawyers are subject to solicitor client privilege. It is clear from the records that these are all confidential communications between the Ministry as a client and its legal counsel, and that the communications directly relate to seeking, formulating or giving of legal advice. While there are also a few instances where the communication does not directly reveal the legal advice sought or obtained, disclosure would allow accurate inferences about such matters. Therefore, this information is privileged as well.[39]

[42] However, there is one email withheld under s. 14 that is between the Ministry and legal counsel that is not related to seeking or obtaining legal advice. Therefore, the Ministry cannot withhold this record under s. 14.[40] The Ministry has also withheld this email pursuant to s. 22 and I will consider it again in that section.

2) Employee communications that refer to legal advice obtained

[43] I am also satisfied that the employee communications referring to specific legal advice that legal counsel gave to the Ministry are subject to solicitor client privilege. Although some of the communication is not directly between legal counsel and the Ministry, but rather is communication between two government

[38] *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, para. 49. I note that the Supreme Court of Canada also stated that not everything done by a government lawyer attracts solicitor-client privilege, as a government lawyer may also have work duties outside of providing legal advice. However, if the four-part test is met then the communications are privileged.
[39] Records: Part 20, pp. 175 – 178, 220 – 222, 225 – 226, 227 – 228; Part 21, pp. 13 – 17, 30 – 35, 77; Part 22, pp. 19 – 20, 40, 48 – 51; Part 26, pp. 147, 237; Part 27, pp. 13 – 14, 205; Part 28, p. 1 – 2.
[40] Records: Part 28, p. 3.

employees, disclosing the information would reveal the legal advice that arose from confidential communications between the Ministry and legal counsel.

[44] The courts have stated that privilege will extend to include communications between employees discussing legal advice their employer received from its legal counsel.[41] In other words, legal advice remains privileged when it is discussed and shared internally by the client.[42] In my view, that is what has occurred in this particular situation. Therefore, I find that the communications exchanged between government employees discussing that legal advice are privileged and the Ministry is authorized to withhold that information pursuant to s. 14.[43]

[45] However, there is some information in a discussion document that I find is not related to the seeking, formulating or giving of legal advice.[44] It is a small amount of information summarizing what the Ministry's legal counsel told the Ministry about her conversation with the CEAA panel's lawyer. The Ministry's lawyer is relaying what the federal lawyer has advised the Ministry to do regarding participating in the CEAA panel. It is clear that the Ministry's lawyer is not providing this information as legal advice or analysis to the Ministry. Further, there is nothing to suggest that what the federal CEAA panel's lawyer said was legal advice that was being proffered to the Ministry. Therefore, the Ministry is not authorized to withhold this information pursuant to s. 14.[45]

3) Employee communications about the need to seek legal advice

[46] The balance of the information withheld under s. 14 consists of communications between government employees only.[46] It is not communications between the Ministry and its lawyers or communications between employees discussing advice that has already been obtained by legal counsel. Rather, it is information that would reveal the Ministry's intention to seek legal advice on a particular matter.

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[41] *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII), para. 12, citing *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (Ont. S.C.J.).
[42] See, for example, Order F10-20, 2010 BCIPC 31 (CanLII), para. 16.
[43] Records: Part 18, p. 168; Part 22, p. 39.
[44] It is not clear from the submissions or the records who received a copy of the discussion document but, from the context, it appears to have been disseminated to members of the provincial working group. Therefore, I have classified it as discussion employees are having about information that the Ministry received from its legal counsel, and not a document that was only shared between the Ministry and its legal counsel.
[45] Records: Part 21, pp. 138 and 139.
[46] I have already determined that some information withheld from records falling into this category may be withheld pursuant to ss. 13 and 22, so I will not consider whether this information can be withheld pursuant to s. 14: Records: Part 20, pp. 71 – 72, 172; Part 28, p. 3.

[47] My understanding of the Ministry's position is that privilege attaches to such communications.[47] In support of this assertion, the Ministry refers to following paragraph in Order F16-26:

> Some of the communications are not between the Ministry and its lawyer, but refer to such communications, revealing the fact that legal advice was sought as well as the substance of the legal advice provided by the Ministry's lawyer. I find that this information also falls within the terms of s. 14. Previous orders have found that internal discussions about legal advice are protected by solicitor client privilege because they are related to the seeking, formulating or giving of the legal advice.[48] [Emphasis in the Ministry's submissions]

[48] That case is readily distinguished from the present case, as the information in Order F16-26 was about legal advice that had actually been given. In the present case, the information is about an intention to seek legal advice in the future. Order F16-26 does not stand for principle asserted by the Ministry.

[49] In my view, the Ministry employees' communications about the intent or need to seek legal advice at some point in the future does not suffice on its own to establish that there was any confidential communication between the Ministry and its legal advisor. In order to establish that privilege applies to a communication, there must be evidence that disclosure of that communication would reveal actual confidential communication between legal counsel and the client.

[50] There is such evidence in this case. Specifically, the context of these particular records makes it is clear that the Ministry eventually did seek and receive legal advice regarding the particular issues previously discussed between government employees. After reviewing the records and considering the information withheld under s. 14, I am persuaded that the information is about the formulating of legal advice and disclosure would reveal confidential communications between legal counsel and their client.

[51] The last condition for applying solicitor client privilege is that the communication must be directly related to the seeking, formulating, or giving of legal advice. Again, this can include factual information requested by and provided to legal counsel from the client, providing it is for the purpose of obtaining legal advice. I find that the records and affidavit evidence are sufficient to establish that the information withheld about the intention to seek legal advice, even where only factual information is communicated, is directly related to the seeking, formulating, or giving of legal advice.[49]

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[47] Ministry submissions, para. 4.33.
[48] Order F16-26, 2016 BCIPC 28 (CanLII), para. 32.
[49] Records: Part 17, p. 16; Part 18, pp. 72, 75, 118; Part 19, pp. 40, 41, 55, 83, 179, 182; Part 20, p. 118; Part 21, pp. 65, 134, 136; Part 22, pp. 46, 63; Part 25, p. 149; Part 27, pp. 107, 109; Part 28, pp. 138, 140.

Waiver

[52] The purpose of legal advice privilege is to protect confidential communications between a client and solicitor pertaining to legal advice. Therefore, voluntary disclosure by the privilege holder to others may waive the privilege, as this disclosure is inconsistent with the confidentiality requirement. In other words, there is no need to protect privileged material when the client shares it with people who have no common interest with him or her.

[53] Waiver of privilege is ordinarily established where it is shown that the privilege holder knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.[50] Privilege can only be waived by the client, and the party asserting that waiver has occurred bears the onus of proving it.[51]

[54] The applicant does not specifically argue that waiver occurred with some of the privileged communication. However, it appears to be making this argument when it says that the Ministry's evidence suggests that the withheld records have been shared with "an extremely wide-reaching category of people to begin with."[52] Further, the applicant submits that one Ministry affiant deposed that some of the withheld information was subsequently shared with federal representatives at a meeting. He says that the Ministry's description of the meeting "does not make it clear that all of these parties are subject to privilege …."[53]

[55] From these submissions, I understand the applicant to be arguing that if the information withheld under s. 14 is privileged, the Ministry has waived the privilege by sharing the legal advice (or the intention to seek legal advice) with parties employed by the BC government but who work outside of the Ministry, as well as with parties outside of the BC government.

[56] Common interest privilege is an exception to the general rules of waiver, and it allows parties with interests in common to share privileged communications without waiving their privilege.[54] There is no question in my mind that the employees of other provincial government ministries in the provincial working group had a common interest with the Ministry and that their group communications about legal advice were confidential. This is a situation where

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[50] *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC), para. 6; I note that courts use the words "expressly" and "explicitly" interchangeable with the word "voluntarily".
[51] Order F16-28, 2016 BCIPC 30 (CanLII), para. 41, citing *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 (CanLII), para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII), para. 40.
[52] Applicant submissions, para. 39.
[53] Applicant submissions, para. 40; Manager, Environmental Geoscience and Permitting affidavit, para. 12 and Executive Project Director affidavit, paras. 17 and 21, referring to Records: Part 19, p. 55.
[54] *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, 2011 ABQB 339 (CanLII), para. 23.

government employees working on the same project are discussing and sharing the legal advice which directly relates to achieving the shared goals of the project they are working on. Further, it does not appear that the information was circulated more widely than was necessary to coordinate or manage the provincial working group.[55] Therefore, I find that all of the government employees working with the provincial working group had a common interest with the Ministry, and therefore no waiver occurred.[56]

[57] I turn finally to a document summarizing what took place at a meeting that included federal representatives. I am satisfied that a statement in that document about legal advice is not a reference to something that the Ministry actually said at the meeting. In my view, based on its context, this remark about legal advice is an editorial comment made by the person preparing the summary. I find that it is more likely than not that the comment about legal advice to be sought is not something that was said at the meeting with the federal representatives. Therefore, there was no waiver of privilege over the remark about legal advice.

[58] Given the importance of the solicitor client privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.[57] In my view, there is no such evidence in this case, and I therefore find that the applicant has not met its burden to prove that there was a voluntary intention to waive privilege.

Summary on Section 14

[59] In summary, I find that the Ministry is authorized to withhold the majority of information in dispute pursuant to s. 14. I have found that there are two exceptions to this where the Ministry is not authorized to withhold the information under s. 14.[58]

Section 15(1)(l) – Harm to Security of a System

[60] The Ministry is relying on s. 15(1)(l) to withhold a small amount of information. The relevant parts of s. 15 state:

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …

[55] Manager, Environmental Geoscience and Permitting Affidavit, para. 6; Executive Project Director Affidavit, para. 9.
[56] See, for example, Order F10-20, 2010 BCIPC 31 (CanLII), para. 16.
[57] Order F16-28, 2016 BCIPC 30 (CanLII), para. 44, citing *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII), para. 40.
[58] Records: Part 21, pp. 138 and 139; Records: Part 28, p. 3.

> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[61] The standard of proof for exceptions that use the language "could reasonably be expected to harm": is set out by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, which said the following:

> 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… 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 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[59]

[62] Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[60] 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'.[61]

[63] Further, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, Bracken, J. confirmed that 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.[62]

[64] I will apply the above approach to determine if the Ministry has met its burden in applying s. 15(1)(l) to the severed information.

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[59] 2014 SCC 31, para. 54.
[60] Order 00-10, 2000 CanLII 11042 (BC IPC), p. 10.
[61] Order F14-12, 2014 BCIPC 15 (CanLII), para. 15.
[62] 2012 BCSC 875, para. 43.

Parties' Positions on Section 15(1)(l)

[65] The information severed under s. 15(1)(l) consists of information that can be separated into three categories: references to the drive names and paths of LAN storage systems where specific documents are saved; a reference to a secure system URL; and toll-free teleconference phone numbers and the ID numbers necessary to obtain access to teleconferences.[63]

[66] The Ministry submits that the disclosure of the disputed information could "assist in an attack" on the computer and communications systems.[64] A Security Architect deposes the following evidence about the computer systems:

- access to any or all of the information would make it easier for any hacker to compromise the systems and, accordingly, any personal or other sensitive information contained on those systems;

- hackers could use the information for the purpose of initiating social engineering attacks or targeted attacks, as well as accessing the information through hacking into the system directly or through the various security layers;

- the government invests considerable resources in trying to secure the systems but it is "important to recognize that no computer system is one hundred percent secure" and there will "inevitably be new vulnerabilities…" and therefore providing security requires constant diligence; and

- attempts to compromise the systems occur regularly.[65]

[67] The Security Architect provides detailed information about how attacks could be made generally, how attacks could be made easier with access to the specific information in dispute and the value of the information to hackers that could be accessed through an attack.[66] The Security Architect also deposes that:

> It is a fundamental and widely-accepted principle of system security that the less system information an attacker has about a system, the harder it will be for him to attack or otherwise compromise the security of a system.
>
> In my experience, any sophisticated organization keeps information similar in nature to the Information [in dispute] confidential for security purposes. That is because if a hacker were to have access to such

[63] Most of this information relates to government computer systems and a small amount relates to a third party contractor's computer system: Ministry submissions, para. 4.60.
[64] Ministry submissions, para. 4.46.
[65] Security Architect Affidavit, paras. 3, 6, 7, 8 and 29.
[66] Security Architect Affidavit, paras. 11 – 26.

> information, they would be able to narrow the potential methods to hack into the system, thus increase their chances of successfully attacking that system.[67]

[68] An affidavit from the Executive Project Director at the Ministry of Environment focuses on the harm to the communications system should the information be disclosed. The Executive Project Director deposes that she has been advised by an individual in the Conferencing Services department that: "There is a possibility of someone randomly calling into an in-progress call based on information available through calendars that are posted on the Open Government website, especially if the meeting is called 'monthly meeting', 'bi weekly meeting' or 'weekly meeting.'"[68]

[69] The Ministry submits that disclosure of this information would allow someone to call the toll-free teleconference phone number, enter the ID and thereby get access to confidential government teleconference calls.[69] The Ministry also refers to several OIPC Investigation Reports that have emphasized that public bodies must exercise due diligence in protecting the security of the personal information in their custody and control.[70]

[70] The Applicant states that it is "not in a position to make detailed submissions" with respect to s. 15(1)(l) but submits that it "objects to the withholding of [this] information… to the extent that the Ministry has applied these sections in a way that is overbroad."[71]

Analysis and Conclusion on Section 15(1)(l)

[71] I find that the LAN references and the URL reference are related to a computer system, and that the conference call phone and ID numbers are related to a communications system. Therefore, the only remaining issue is whether disclosure of such information could reasonably be expected to harm the security of the computer and/or communications systems.

[72] In my view, the Security Architect's affidavit provides sufficient evidence to conclude that disclosure of the information could reasonably be expected to result in harm to the computer systems. I find that the evidence provided outlines a clear and direct connection between disclosure of the specific information and the harm that is alleged.

[73] I also have sufficient evidence before me to conclude that the disclosure of the conference call ID numbers could reasonably result in the harm asserted.

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[67] Security Architect Affidavit, paras. 23 and 24.
[68] Executive Project Director Affidavit, para. 22.
[69] Ministry submissions, para. 4.49.
[70] Investigation Report F11-03; Investigation Report F11-01; Investigation Report F10-02; Investigation Report F06-02; Investigation Report F06-01.
[71] Applicant submissions, para. 41.

This is consistent with previous orders that have found that teleconference ID numbers can be withheld under s. 15(1)(l).[72]

[74] However, based on the submissions, evidence and the records themselves, I am unable to find that disclosure of the toll-free teleconference telephone numbers could reasonably be expected to result in the harm contemplated. This is because the Ministry has already disclosed the local (*i.e.*, not toll-free) phone numbers for accessing the teleconferences. The Ministry did not explain how disclosing the toll-free numbers could reasonably be expected to result in the alleged harm. If disclosure of a phone number would result in harm, then presumably the Ministry would have also withheld the local number. The Ministry has also applied s. 17 to the toll-free conference phone numbers, so I will consider them again when I consider the other information withheld pursuant to s. 17.

[75] Therefore, with the above-noted exception of the toll-free conference numbers, I find that the Ministry is authorized to withhold the disputed information pursuant to s. 15(1)(l).[73]

Section 17 – Harm to Financial or Economic Interest

[76] Section 17 allows a public body to withhold information on the basis that disclosing it would harm the public body's financial or economic interests. Section 17(1) states:

> 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: …

[77] Subsections (a) – (f) provide specific examples of the kind of information that, if disclosed, could reasonably be expected to cause harm to the financial or economic interests of a public body. None of those specific examples are relevant in this case. However, the legislation uses the word "including", which means that the examples in (a) – (f) are just that – examples. Disclosing information that does not fit into the enumerated examples can still constitute harm under s. 17(1).[74]

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[72] See, for example, Order F15-32, 2015 BCIPC 35 (CanLII).
[73] Records: Part 17, pp. 23, 46, 141; Part 18, pp. 70, 79, 83, 117, 165, 170, 171, 173, 178, 191; Part 20, p. 118; Part 21, pp. 42, 133; Part 26, p. 148; Part 27, pp. 15, 101; Part 28, pp. 136, 228, 232.
[74] Order F16-38, 2016 BCIPC 42 (CanLII), para. 100.

[78] The standard of proof for s. 17 is the same as that for s. 15, considered above. The public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[75]

Analysis and Conclusion on Section 17

[79] The Ministry is withholding the toll-free teleconference phone numbers under s. 17. In asserting that financial harm would occur should the information be disclosed, the Ministry provides affidavit evidence about the financial costs associated with participating in teleconference calls generally. The affiant evidence also states that the moderator can change their moderator and participant PIN codes at any time and that the "moderator can also practice additional security measures to avoid anyone from randomly or unintentionally joining the call by doing roll call and locking the audio conference."[76]

[80] The Applicant does not make any submissions regarding s. 17 but notes that it objects to the information being withheld if the Ministry has applied these sections too broadly.[77]

[81] As noted above, in asserting that financial harm would occur should the information be disclosed, the Ministry relies on affidavit evidence about the financial costs associated with extra connections to conference calls. For example, the affiant deposes that the costs vary depending on the type of conference call, but the typical cost is $0.04 per minute for every person who actually participates in the call.[78]

[82] There is also evidence before me that the public body employee who is moderating the conference call has a variety of measures he or she can implement in order to prevent unauthorized individuals from joining the conference call. It is also difficult to see how an unauthorized individual could gain access to the conference call without the appropriate conference ID number, which I have determined can be withheld under s. 15(1)(l).

[83] Although the Ministry provides affidavit information regarding how much it costs to *participate* in a conference call, it did not provide any evidence regarding the cost of calling but not actually managing to join the call (because the caller does not have the required ID number). In other words, there is no evidence that calling the teleconference number – but not managing to successfully logon or participate – would result in any financial charge.

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[75] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII), para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.
[76] Executive Project Director affidavit, para. 22.
[77] Applicant submissions, para. 41.
[78] Executive Project Director affidavit, para. 22.

[84] I therefore find that the harm asserted with disclosing the toll-free conference numbers is speculative and there is not sufficient evidence before me to persuade me that disclosing the toll-free teleconference phone numbers could reasonably result in financial harm to the Ministry. Therefore, the Ministry is not authorized to withhold this information under s. 17.[79]

[85] The Ministry has also applied s. 17 to travel information related to booking flights, hotel rooms and car rentals, such as agency file numbers, check in confirmation numbers, customer numbers, corporate ID numbers and reservation numbers. In another instance, the Ministry has applied s. 17 to information related to an invoice. However, the Ministry's submissions and evidence on s. 17 do not address any of this particular information. Rather, they focus on disclosure of the teleconference ID numbers, which I have already determined can be withheld pursuant to s. 15(1)(l).

[86] I have no evidence or submissions from either party with regards to the travel information or the invoice information withheld under s. 17. It is not apparent to me from the records how any harm, much less harm to the financial or economic interests of the Ministry, could occur through the disclosure of this particular information. Therefore, I find that the Ministry is not authorized to withhold this information under s. 17.[80]

[87] I will consider the invoice information again under s. 22 below because it contains individuals' names and one record contains a named individual's cell phone number.

Section 21 – Harm to Third Party Business Interests

[88] Section 21 requires public bodies to withhold information the disclosure of which would harm the business interests of a third party, which in this case is a third party contractor. Section 21 states:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (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

[79] Records: Part 18, pp. 70, 165, 170, 171, 178, 191; Part 20, p. 118; Part 21, pp. 42, 133; Part 26, p. 148.
[80] Records: Part 19, pp. 99 – 104, 106 – 108; Part 20, p. 8; Part 22, pp. 26, 59.

> (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,
> >
> > (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.

[89] The principles of s. 21 are well established.[81] In order to properly withhold information under s. 21, in this case the Ministry must establish the following three elements:

1. Disclosure would reveal the type of information in s. 21(1)(a) that the Ministry alleges;

2. The information was supplied, explicitly or implicitly, in confidence, pursuant to s. 21(1)(b); and

3. Disclosure of the information could reasonably be expected to cause the type of harm in s. 21(1)(c) that the Ministry alleges would occur.

Parties' Positions on Section 21

[90] The third party in this case is providing the Ministry with goods and services, which the Ministry is able to see on the third party's collaboration and shared document site. The information withheld under s. 21 consists of usernames and passwords that allow the Ministry to access the site. The Ministry submits that the information is commercial information that was supplied implicitly in confidence, and it has consistently treated this type of information as confidential.[82]

[91] The Ministry further submits that disclosure of the disputed information will result in undue financial loss or gain to a person or organization. It does not

[81] See, for example, the recent decision in Order 17-01, 2017 BCIPC 01 (CanLII).
[82] Ministry submissions, paras. 4.56, 4.57, 4.61.

elaborate on this submission. It also submits that disclosure will result in third parties no longer providing similar information to the Ministry when it is in the public interest for public bodies to obtain this type of information in order to effectively communicate and share information with a third party.[83]

[92] The Applicant does not make submissions with regards to the application of s. 21 but states that it objects to the Ministry withholding this information if it has applied the section too broadly.

Analysis and Conclusion on Section 21

1) Commercial information – s. 21(1)(a)(ii)

[93] "Commercial information" has been defined in previous orders as information relating to commerce, or the buying, selling, exchange or providing of goods and services.[84] As well, although the information must be "of or about" a third party, the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[85]

[94] I have no trouble finding that the information in dispute is commercial information under s. 21. The usernames and passwords required to access the site are information that the Ministry receives from the third party as part of their commercial exchange so the Ministry can access the work that the third party did for the Ministry. In my view, this falls squarely within the definition of "commercial information".

2) Supplied in confidence – s. 21(1)(b)

[95] For s. 21(1)(b) to apply, 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 the public body. The second step is to determine whether the information was supplied "implicitly or explicitly in confidence."

[96] It appears that the usernames and passwords were provided to the Ministry to allow it to access the third party's collaboration and shared document site. There is no evidence or argument that the information in dispute was not supplied to the Ministry. In conclusion, I find that the supply element has been met.

[97] To establish confidentiality, a party must show that the information was supplied under an objectively reasonable expectation of confidentiality, by the

[83] Ministry submissions, paras. 4.62 – 4.65.
[84] Order 01-36, 2001 CanLII 21590 (BC IPC), para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC), para. 62.
[85] *Ibid*.

supplier of the information, at the time the information was provided.[86] All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality, including whether the information was:

1. Communicated to the public body on the basis that it was confidential and that it was to be kept confidential;

2. Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;

3. Not otherwise disclosed or available from sources to which the public has access; and

4. Prepared for a purpose which would not entail disclosure.[87]

[98] The Ministry did not provide any affidavit evidence from the third party regarding the confidentiality of the information. However, the Ministry's submissions assert that it has consistently treated such information as having been confidentially supplied. Considering the withheld information is usernames and passwords, and the context in which such information is used or occurs, I have concluded that this information was prepared for a purpose which would not entail disclosure to anyone except the Ministry. It does not appear to have been otherwise disclosed, and there is nothing to suggest that it is available from publicly available sources.

[99] From a common sense perspective, it is difficult to think of a situation where usernames and passwords to a secure site would not be supplied in confidence. Rather, this information was specifically supplied in order to give the Ministry access to documents the third party was working on and to otherwise communicate with the third party. For the above reasons, I find that this information was implicitly supplied in confidence.

3) Reasonable expectation of harm – s. 21(1)(c)(ii) and (iii)

[100] The Ministry submits that the third party "advised the Ministry that it believes that the release of the information would meet the harms test in s. 21 of the Act."[88] However, the Ministry does not provide any affidavit or other evidence beyond this assertion. I, therefore, have not given the third party's hearsay opinion any weight.

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[86] Order 01-36, 2001 CanLII 21590 (BC IPC), para. 23.
[87] Order 01-36, 2001 CanLII 21590 (BC IPC), para. 26.
[88] Ministry submissions, para. 4.62.

[101] As noted above, the Ministry submits that it is in the public interest for a public body to obtain this type of information, as it allows it to more effectively communicate and share information with a third party. As I noted above, common sense dictates that disclosing usernames and passwords to otherwise secure sites would result in harm. For example, an individual could easily locate the website and gain access to documents, some of which are likely confidential or highly sensitive, or which contain third party personal information. I find that there is a reasonable expectation that the third party would no longer supply confidential usernames and passwords to public bodies if this information was disclosed.

[102] In summary, I find that the information at issue is commercial information that was supplied by a third party to the Ministry in confidence, and that there is a reasonable expectation of harm should the information be disclosed. Therefore, the Ministry is authorized to withhold this information pursuant to s. 21.[89]

Section 22 – Unreasonable Invasion of Personal Privacy

[103] Section 22(1) of FIPPA requires public bodies to review any personal information contained in the requested records and determine whether disclosing it would result in an unreasonable invasion of that individual's privacy.

[104] The approach to applying s. 22(1) is well established. The adjudicator in Order F15-03 succinctly set it out as follows:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. 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, the public body 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.[90]

[105] The kind of information withheld under s. 22(1) consists mainly of government employee's personal plans (such as vacations) or events (such as a death in the family). There also are a few instances where an individual expresses his or her personal opinion regarding specific work-related matters, and where individuals' names and personal email addresses are withheld but their comments have been disclosed. These latter individuals are not government

[89] Records: Part 17, pp. 15, 22, 48.
[90] Order F15-03, 2015 BCIPC 3 (CanLII), para. 58

employees and have communicated with the government about their concerns with the New Prosperity Project.

[106] There is some information that was withheld under s. 17 and not under s. 22. However, this information identifies third parties who do not appear to be government employees. Although the Ministry did not withhold the names under s. 22, it is a mandatory exception and I find that it applies in these circumstances. Therefore, I will consider this information along with the other personal information withheld under s. 22.

Parties' Positions on Section 22

[107] The Ministry submits that it considered all of the factors in s. 22(2), (3) and (4) and determined that there were no factors that weighed in favour of disclosure. It submits that disclosing the information would be an unreasonable invasion of privacy and it was therefore required by the legislation to withhold it.

[108] The Applicant does not make any submissions regarding s. 22, again stating that it objects to the information being withheld if the Ministry has applied these sections too broadly.[91]

Analysis and Conclusion on Section 22

Personal Information

[109] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. Contact information is defined 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."[92]

[110] I find that all of the information withheld under s. 22 is personal information as contemplated by FIPPA, as it is all information about identifiable individuals and none of it is contact information.

Section 22(4) – presumptions in favour of disclosure

[111] Neither of the parties made any submissions on s. 22(4). I have reviewed the factors in s. 22(4) and the records and I have determined that none of these factors are relevant in this situation.

[91] Applicant submissions, para. 41.
[92] See Schedule 1 of FIPPA.

Section 22(3) – presumptions in favour of withholding

[112] The Ministry submits that none of the s. 22(3) factors apply.[93] Again, I have reviewed the factors in s. 22(3) and the records and I find that none of these factors are relevant in this situation.

Section 22(2) – all of the relevant circumstances

[113] Section 22(2) requires the public body to consider all of the relevant circumstances in each situation when determining whether disclosure would be an unreasonable invasion of privacy. The Ministry submits that it considered s. 22(2)(a) and determined that disclosure of the information would not be desirable for the purpose of subjecting the activities of the Ministry to public scrutiny.[94] It further states that it determined that no other s. 22(2) factors apply.[95]

[114] I agree with the public body that s. 22(2)(a) has no application in this case. I have reviewed the records and the other factors in s. 22(2), as well as considered whether there are any other circumstances to take into account that are not enumerated in s. 22(2), and I find that none of these factors are relevant in this situation.

[115] In summary, I have determined that there are no factors that weigh in favour of disclosure, and there are no factors that would favour withholding the information. I find that, on balance, disclosing it would be an unreasonable invasion of the individuals' privacy. Therefore, the Ministry is required to withhold all of the information it withheld under s. 22.[96]

CONCLUSION

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

1. Required to refuse to disclose the information in the records withheld under ss. 21 and 22;

2. Authorized to refuse to disclose most of the information in the records withheld under ss. 13, 14, 15(1)(l) and 17, subject to paragraph 3, below; and

[93] Ministry submissions, para. 4.73.
[94] Ministry submissions, paras. 4.74 – 4.76.
[95] Ministry submissions, para. 4.77.
[96] Records: Part 17, pp. 8, 11, 16, 49, 54, 138; Part 18, pp. 51, 59; Part 19, p. 159; Part 20, pp. 91, 150, 160, 170, 208, 236; Part 21, p. 12; Part 22, pp. 11, 18, 35, 41, 58, 59 (individuals' names), 123, 130 – 131; 133 – 134; Part 25, p. 1; Part 27, pp. 104, 115 – 117; Part 28, pp. 3, 4, 7, 10, 13, 16, 19, 66, 141, 157, 227, 233, 234.

3. Required to give the applicant access to the information I have highlighted in the excerpted pages of the records that will be sent to the Ministry along with this decision, by June 20, 2017 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.

May 8, 2017

ORIGINAL SIGNED BY

Carol Whittome, Adjudicator

OIPC File No.: F14-59938