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Order F17-32

MINISTRY OF JUSTICE

Caitlin Lemiski
Adjudicator

June 6, 2017

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Summary: The applicant requested records about a proposed Ministry policy regarding damage to the reputation of employees during legal proceedings. The Ministry disclosed some information, but it withheld other information on the basis that it was exempt from disclosure under s. 12 (cabinet confidences), s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege) and s. 22 (disclosure harmful to personal privacy) of FIPPA. The adjudicator confirmed the Ministry's decision to withhold information from the records under ss. 13 and 14. Given that finding, there was no need to also consider ss. 12 and 22.

Authorities Considered: BC.: Order 327-1999, 1999 CanLII 4131 (BC IPC); Order F14-34 2014 BCIPC 37 (CanLII); Order F17-13 BCIPC 14 (CanLII); Order F16-40, 2016 BCIPC 44 (CanLII); Order F16-38, 2016 BCIPC 42 (CanLII); Order F16-20, 2016 BCIPC 22 (CanLII); Order F16-09, 2016 BCIPC 11 (CanLII); Order F14-57, 2014 BCIPC No. 61 (CanLII); Order F16-30, 2016 BCIPC 33 (CanLII); Order F16-11, 2016 BCIPC 13 (CanLII); Order F16-43, 2016 BCIPC 47 (CanLII); Order 03-28, 2003 CanLII 49207 (BC IPC); Order F16-12 2016 BCIPC 14 (CanLII); Order F17-23 2017 BCIPC 24 (CanLII); Order F17-05 2017 BCIPC 6 (CanLII); Order F14-44 2014 BCIPC 47 (CanLII).

Cases Considered: *Alberta John Doe v. Ontario (Finance),* 2014 SCC 36 (CanLII)*; 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 (CanLII); *R. v. B.,* 1995 CanLII 2007 (BC SC); *R. v. Campbell,* 1999 CanLII 676 (SCC).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 12, 13(1), 14, 22(1).

INTRODUCTION

[1] The applicant requested records about how the Ministry of Justice (Ministry) deals with the risk of damage to the reputations of employees of the Province during litigation involving the Province. The Ministry provided the applicant with responsive records but withheld information in those records under s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege), and s. 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1]

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to refuse access to the requested records. Investigation and mediation did not resolve the matter and the applicant requested it proceed to inquiry. Before the start of the inquiry, the OIPC allowed the Ministry to add s. 12 (cabinet confidences) as a basis for withholding information it had already redacted under ss. 13 and 14.[2]

ISSUES

[3] The issues in this inquiry are as follows:

1. Is the Ministry authorized to refuse to disclose the information at issue under ss. 13 and 14 of FIPPA?

2. Is the Ministry required to refuse to disclose the information at issue under ss. 12 and 22 of FIPPA?

[4] Under s. 57(1) of FIPPA, the Ministry has the burden of proof to establish that ss. 12, 13 and 14 authorize it to withhold the requested information. However, s. 57(2) of FIPPA places the burden on the applicant to establish that disclosure of personal information would not be an unreasonable invasion of third party personal privacy under s. 22 of FIPPA.

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[1] Some information was originally withheld under s. 3 of FIPPA but s. 3 is no longer in dispute, therefore I have not considered it. (Ministry's submission at para. 9. The applicant did not take the position that s. 3 was in dispute and he did not make submissions about s. 3. At the "Issues" section of the applicant's submission at para. 27.)

[2] At pp. 29-60 of the second release of records. (The Ministry had a first release and a second release of records responsive to this request. The first release of records consists of email messages. The second release of records consists of attachments of the emails in the first release of records, and one copy of the policy, with comments, that does not correspond to an email message in the first release of records. (Page 97 of the second release is an email message with no attachment, and it is an exact duplicate of p. 73 of the first release.)

DISCUSSION

Background

[5] The applicant is a former employee of the Province who requested information relating to a policy that his former supervisor told him would be implemented.[3] This policy would apply when the Province is considering making admissions in a legal proceeding regarding the conduct of a public service employee and the admissions could lead to a conclusion that the employee has acted improperly.[4]

[6] The Ministry submits it has not yet finalized the policy, which it refers to throughout its submissions as a draft.[5] However, it acknowledges it has used the policy "as guidance where potential admission of public servant liability is involved."[6]

Information in Dispute

[7] The information in dispute is contained in emails and the attachments to those emails.[7] There are 275 pages of records in dispute. The emails and attachments are about the policy, a draft regulation, and other information related to the policy.[8]

[8] I will begin my analysis with s. 13. The information I have considered under s. 13 I will hereinafter refer to as the "s. 13 information."

Policy Advice or Recommendations – s. 13(1)

[9] Section 13(1) of FIPPA authorizes a public body to refuse to disclose policy advice or recommendations developed by or for a public body. Section 13(2) enumerates certain types of information that may not be withheld under s. 13(1).[9]

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[3] Applicant's submission at para. 2.
[4] Ministry's submission at para. 18.
[5] Ministry's submission at para. 20.
[6] Ibid.
[7] There is one exception: a copy of the draft policy, at pp. 98-100 of the Ministry's second release of records to the applicant, is not attached to an email elsewhere.
[8] The Ministry has not told the applicant what the draft regulation is, but it has advised the applicant that it was finalized and brought into force in 2012.
[9] Section 13(3) states that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. Section 13(3) has no application in this inquiry.

Section 13(1) states:

> 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.

[10] The Supreme Court of Canada stated in *John Doe v. Ontario (Finance),*[10] that the purpose of withholding advice or recommendations from applicants in response to access requests "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[11] In addition, the BC Court of Appeal has stated that s. 13 "recognizes that some degree of deliberative secrecy fosters the decision-making process."[12]

[11] Previous orders have stated that s. 13(1) applies to information that would directly reveal advice or recommendations if disclosed, as well as information that would enable an individual to draw accurate inferences about advice or recommendations.[13] The BC Court of Appeal has held 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."[14]

[12] The process for determining whether s. 13(1) applies to information has two stages. 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 would, it is then necessary to consider if the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).

Analysis and conclusion on section 13(1)

[13] The information withheld under s. 13 consists of emails between Legal Services Branch (LSB) lawyers and other LSB staff (non-lawyers) about the development of the policy (*i.e.*, reasons for creating it, what it should say, and the status of it).[15] Some of these emails contain copies of media articles and related

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[10] 2014 SCC 36 (CanLII).
[11] *John Doe v. Ontario (Finance),* supra at para. 43. This decision was with respect to Ontario's legislative equivalent to s. 13(1) of BC's FIPPA. Also see Order F16-38, 2016 BCIPC 42 (CanLII), at para. 42.
[12] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), at para. 105.
[13] Order F16-11, 2016 BCIPC 13 (CanLII) at para. 21. Order F14-57, 2014 BCIPC No. 61 (CanLII) at para. 14.
[14] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII), at para. 113. Also see Order F17-23 2017 BCIPC 24 (CanLII) at paras. 11-14.
[15] Most of the information in dispute was withheld under s. 13 and s. 14. The information I have considered under s. 13 relates to the development of the policy and related matters, and the information I have considered under s. 14 relates to legal advice regarding the content of the policy and how it might apply in different litigation situations.

discussions between LSB staff. A few of these discussions are copied to an employee of Government Communications & Public Engagement, the Province's central communications agency.[16] The Ministry has also withheld part of an email that one Ministry employee sent to another for the purpose of providing information to assist in drafting a minister's letter.[17] Where the s. 13 information is contained within email attachments, the attachments are all either copies of various versions of the policy or documents related to it.

[14] The Ministry submits that the information it withheld falls squarely within the purpose of s. 13(1) in that disclosing it either directly reveals, or enables accurate inferences about, advice or recommendations related to "drafts, suggested revisions and comments on the [policy] as part of the deliberative process…."[18]

[15] The applicant submits that the Ministry cannot shield the policy from disclosure by characterizing it as a draft when the Ministry has conceded that it has used the policy as guidance.[19] The Ministry submitted affidavit evidence of an LSB lawyer (Lawyer) that the policy has not been finalized and that work on the policy is ongoing. Based on the LSB Lawyer's sworn evidence, I find that the policy is a draft.[20] I am not persuaded by the applicant's argument that applying some principles of a draft policy or using it as a guideline to make a decision transforms a draft policy into a finalized policy.

[16] I find that disclosure of the information withheld under s. 13 would either explicitly reveal advice or recommendations or it would enable an individual to draw accurate inferences about the advice or recommendations. After reviewing the records, it is clear to me that disclosing the emails containing discussions about the policy would clearly reveal the advice and recommendations the Ministry received.

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[16] At pp. 2, 6, 7 and 60 of the first release. There are two GCPE employees in the records. Some emails are copied to one of them and some emails are copied to the other one.
[17] At p. 166 of the first release.
[18] Ministry's submissions at paras. 28 and 29.
[19] Applicant's submission at para. 43. The applicant also compares the wording of the policy to the type of information that must be disclosed under s. 70 of FIPPA, which requires public bodies to disclose certain information without a request. Section 70 was not listed as an issue in the Fact Report. My review of the s. 13 information leads me to conclude that it does not include anything that would fall within the scope of information subject to s. 70 of FIPPA. Therefore I have not considered this issue further. I further note that I have considered the applicant's argument at paras. 39 and 46 of his submission that the s. 13 information does not relate to the business of the Ministry and therefore may not be withheld under s. 13. However, I have not considered that argument further on the basis that the disputed information, including the policy, clearly relates to the business of the Ministry because the policy is meant to apply in circumstances where LSB is considering making admissions during litigation regarding conduct of a public service employee and the Ministry represents the Province in litigation proceedings.
[20] LSB Lawyer's affidavit at paras. 6 and 7.

[17] I also find that disclosing the drafts of the policy and documents related to them would enable an individual to draw accurate inferences about the advice or recommendations the Ministry received about the policy. Previous orders have established that s. 13(1) does not apply to records simply because they are drafts.[21] However, in this case, I find that disclosing these specific drafts would enable an individual to identify differences between the drafts and draw accurate inferences about what advice or recommendations were received and given as staff worked on the policy. Further, as I understand it, these drafts reflect policy work that is still underway. In my view, disclosure of the drafts in this case would hamper the full and frank discussion necessary to the Ministry's deliberative process and policy making by introducing an element of concern about public scrutiny. Therefore, I find that s. 13(1) applies to these drafts.

[18] In addition, I find that disclosure of media articles embedded within some of the email strings in dispute would allow the applicant to accurately infer advice and recommendations Ministry staff made in relation to them. I also find that s. 13(1) applies to the part of an email that one Ministry employee sent to another for the purpose of providing information to assist in drafting a minister's letter, because it is advice about what needs to be considered.

[19] As I have determined that s. 13(1) applies to the information, I will now go on to consider whether any of that information must be disclosed under s. 13(2).

Analysis and conclusion of section 13(2)

[20] The second part of the s. 13 analysis involves reviewing whether any of the s. 13(1) information falls within any of the s. 13(2) categories. If it does, the Ministry is not authorized to withhold the information under s. 13(1).

[21] The Ministry submits that s. 13(2) does not apply to the information it withheld under s. 13(1).[22] The applicant relies on s. 13(2)(a) and s. 13(2)(l) in support of his position that s. 13(1) does not apply.[23]

[22] The relevant portions of s. 13(2) are as follows:

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

[21] Order F14-44 2014 BCIPC 47 (CanLII) at para. 32; Order F17-13 2017 BCIPC 14 (CanLII) at para. 24.
[22] Ministry's submission at para. 30.
[23] Applicant's submission at para. 35.

> (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body, …

[23] "Factual material" has been interpreted as discrete factual material that is not included for the purposes of providing advice or recommendations or background material. It does not include factual information that is an integral component of the advice or recommendations. Nor is it the factual information selected by an expert who uses their judgement to include that factual information for the purpose of providing the explanations necessary to a public body's deliberative process.[24]

[24] In this case, I find that none of the information withheld under s. 13 is "factual material" because the facts are not discrete from the rest of the information. Rather the facts are an integral component of the advice or recommendations that are being put forward by Ministry employees about decisions related to the policy and the minister's letter.

[25] In addition to s. 13(2)(a), the applicant submits that s. 13(2)(l) applies to the policy (which appears both as email attachments and embedded in email strings), because the Ministry has acknowledged using it.[25] Section 13(2)(l) excludes from s. 13(1) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body.

[26] The applicant has not provided any persuasive evidence, and it is not apparent to me, that the policy is a plan or proposal. Even if the policy were a plan or proposal for a new program or activity, I find that it has not been approved or rejected by the Ministry, as it is still in draft form. For these reasons, I reject the applicant's argument that s. 13(2)(l) applies to the policy.

[27] In summary, the Ministry has established that it is authorized to refuse to disclose the s. 13 information to the applicant.

[28] I will next consider s. 14. The information I have considered under s. 14 I will hereinafter refer to as the "s. 14 information." I have already determined that the Ministry is authorized to withhold some of those records under s. 13, so I will not consider those records in my s. 14 analysis.

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[24] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 91-94. See also: Order F16-43 2016 BCIPC 47 (CanLII) at paras. 25-26 and Order F16-30 2016 BCIPC 33 (CanLII) at paras. 30-31.

[25] Applicant's submission at para. 45.

Legal Advice – s. 14

[29] Section 14 provides that a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.[26]

[30] Legal advice privilege serves to promote full and frank communications between a lawyer and his or her client by protecting confidential communications that are related to the seeking or giving of legal advice.[27]

[31] The test for whether legal advice privilege applies is well-established and is as follows:

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

2. the communication must be confidential;

3. the communication must be between a client (or agent) and a legal adviser; and

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[32] If these four criteria are satisfied then the communications (and papers relating to them) are privileged.[28]

The parties' submissions

[33] The LSB Lawyer deposes that she provides legal advice to the Province.[29] The Lawyer says that she has worked on the policy both in her capacity as a lawyer, and as a supervisor of LSB policy analysts in LSB's Strategic Knowledge Management Group.[30] She deposes that the information the Ministry withheld under s. 14 are confidential emails between LSB lawyers that relate to the seeking, formulating or provision of legal advice regarding the policy.[31] She concludes by saying that, to the best of her knowledge, "the Section 14

[26] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, at para. 26.
[27] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, at para. 30, as referred to in Order F16-40 2016 BCIPC 44 (CanLII), at para. 19.
[28] *R. v. B.,* 1995 CanLII 2007 (BC SC) at para. 22, cited in, e.g., Order F16-20, 2016 BCIPC 22 (CanLII) at para. 20.
[29] LSB Lawyer's affidavit at para. 4.
[30] LSB Lawyer's affidavit at para. 5.
[31] LSB Lawyer's affidavit at para. 9.

Information has not been shared with anyone outside of the Government of British Columbia."[32]

[34] The applicant disputes that the Ministry has properly applied s. 14.[33]

Analysis and conclusion on section 14

[35] I find that the s. 14 information falls into one of two categories:

A. Emails amongst LSB lawyers; and

B. Emails between LSB lawyers and the Assistant Deputy Attorney General (ADAG) or the Deputy Attorney General (DAG).[34]

I will now address whether each type of communication meets the test for legal advice privilege below.

A. Emails amongst LSB lawyers

[36] The Supreme Court of Canada has held that solicitor client privilege may arise when in-house government lawyers provide legal advice to their client, a government agency, if all of the required elements necessary to establish the privilege are met.[35] It is evident from the Ministry's evidence and the content of the records that the s. 14 information consists of LSB lawyers communicating in their capacity as the Ministry's solicitors.

[37] Much of the s. 14 information is contained in emails and attachments amongst LSB lawyers. For example, several LSB lawyers received a copy of the policy and were asked to review it and provide legal advice regarding the content of the policy and how it might apply in different litigation situations.[36] I am satisfied that the emails and attachments to those emails sent and received amongst LSB lawyers are confidential because they were only sent between LSB lawyers. It is evident that these emails and the documents that are attached to them are directly related to the LSB lawyers' provision of legal advice to their client.[37]

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[32] LSB Lawyer's affidavit at para. 13.
[33] Applicant's submission at para. 54.
[34] To note, some of the records were withheld under both ss. 13 and 14. I have already determined that the Ministry is authorized to withhold some of those records under s. 13, so I will not consider those records in my s. 14 analysis.
[35] *R. v. Campbell,* 1999 CanLII 676 (SCC), para. 49.
[36] One email the Ministry withheld under s. 14 is a list of attachments sent from one LSB lawyer to another that the LSB lawyer sending the email identified as responsive to the applicant's request.
[37] Senior Adjudicator Barker reached a similar conclusion in In Order F16-09, 2016 BCIPC 11 (CanLII), at paras. 18-19.

[38] This is also true of copies of the regulation the Ministry withheld. They were attached to an email between LSB lawyers discussing revisions to the draft regulation.

[39] I find that all of the necessary elements of the test for solicitor client privilege are met, and I therefore find that legal advice privilege applies to these emails and email attachments.[38]

B. Emails between LSB lawyers and the ADAG or the DAG

[40] Some of the emails in dispute are between LSB lawyers as the legal advisors and the ADAG or the DAG as the client. For example, there is one email string that consists of legal questions posed by the ADAG to an LSB lawyer, and the LSB lawyer's reply.[39] Another email string consists of another LSB lawyer's legal opinion to the DAG.[40]

[41] I am satisfied that all of the emails and attachments are confidential communications between a lawyer and client for the purpose of seeking, formulating, or giving legal advice. The Ministry has established that they are protected by legal advice privilege.[41]

Waiver

[42] Legal advice privilege protects confidential communications between a solicitor and client that are directly related to the seeking, formulating, or giving of legal advice. When a client knowingly shares a privileged communication with people who are not directly within the circle of interest in respect of that communication, it is no longer confidential and the privilege will normally be said to have been waived.[42]

[43] The applicant submits that the policy is no longer confidential because it has been applied in situations involving public service employees who are not truly the client, and the public service employees to whom the policy has been applied are not a party with a common interest to the client: "in other words, there is not necessarily a community of interest between the two sufficient to maintain confidentiality…"[43] I take this to mean the applicant is arguing the Ministry has

[38] Information in emails and email attachments amongst LSB lawyers to which I have found s. 14 applies is at pp. 25-50, 56-59, 63-68, 71, 73, 76-77, 80, 87-97, 100-102, (104 disclosed to the applicant), 105-109, 111-118, 129, 138, and 143 of the first release of records, and pp. 8-9, 26-60, 73-74, 77, 83-85, 89-91 and 94-97 of the second release of records.
[39] Pages 51-55 of the first release.
[40] Pages 161-164 of the first release.
[41] Information in emails and email attachments between LSB lawyers and the ADAG or the DAG to which I have found s. 14 applies is at pp. 51-55, 75, 78-79, 145-164, 171-178, 181-182 of the first release, and pp. 64-72 of the second release.
[42] Order F17-23 2017 BCIPC 24 (CanLII) beginning at para. 52.
[43] Applicant's submission at para. 54.

waived privilege over the policy. The applicant adds that, presumably, a copy of the policy could be provided to anyone who used it or to whom it was applied.[44]

[44] The Ministry submits that the fact that the draft policy has been used does not constitute a waiver over the legal advice obtained in creating the policy.[45] The Ministry notes that the s. 14 information is privileged even after the policy is finalized.[46]

[45] I find that there has been no waiver of privileged information in this case. I accept the Ministry's affidavit evidence that the information that I have found is protected by legal advice privilege has not been shared with anyone outside of the Government of British Columbia.[47] Further, the applicant has provided no evidence that the Ministry shared that information with anyone who was not directly involved in seeking and receiving the legal advice, and I can see from the records that the s. 14 information was not sent to anyone outside of the Ministry. The applicant's speculation that someone affected by the policy may have a right to receive legal advice related to the policy does not persuade me that the Ministry has waived privilege.

[46] In conclusion, I find that the Ministry has established that it is authorized to refuse to disclose this information under s. 14.

Sections 12 and 22 not considered

[47] Given that I have determined that the Ministry is authorized to withhold all of the information at issue under either ss. 13 or 14, I do not need to consider ss. 12 and 22.

Severance – s. 4(2)

[48] The Notice of Inquiry document sent to both parties did not identify s. 4(2) of FIPPA as an issue; however, both parties made submissions about it.[48] Section 4(2) of FIPPA states that, where it is reasonable to sever excepted information from a record, an applicant has the right of access to the remainder.

[49] The applicant submits that the Ministry has withheld information that might, on its face, be reasonably severable.[49] In reply, the Ministry submits that where it has withheld the entirety of a record, it is authorized (in the case of s. 13 and s. 14) or required (in the case of s. 12 and s. 22) to do so.[50]

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[44] Ibid.
[45] Ministry's reply submission at para. 7.
[46] Ibid.
[47] LSB Lawyer's affidavit at para. 13.
[48] The applicant's submission at paras. 28-33 and the Ministry's reply submission at paras. 1-3.
[49] Applicant's submission at para. 30.
[50] Ministry's reply submission at para. 1.

[50] As I have determined that the s. 14 information, including the emails and documents attached to them, are privileged communications, this is not a case where it would be reasonable for the Ministry to sever information from part of a record and then disclose the remainder.[51] In regards to the information to which I have determined s. 13(1) applies, I have also determined that it cannot be reasonably severed in accordance with s. 4(2) because doing so would result in the applicant receiving information that is meaningless, misleading, or unintelligible.[52]

CONCLUSION

[51] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse to disclose information to the applicant under ss. 13 and 14 of FIPPA.

June 6, 2017

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

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[51] Former Commissioner Loukidelis reached a similar conclusion in Order 03-28 2003 CanLII 49207 (BC IPC), at para. 21.
[52] See Order F16-12, 2016 BCIPC 14 (CanLII) at paras. 37-39 and Order F17-05 2017 BCIPC 6 (CanLII) at para. 77.