Order F20-29

COLLEGE OF PHYSICIANS AND SURGEONS OF BC

Lisa Siew
Adjudicator

June 22, 2020

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Summary: An applicant requested access to records about himself from the College of Physicians and Surgeons of BC (College). The College withheld information under ss. 13 (advice or recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. For some of the records, the College applied one or more exceptions to the same information. The adjudicator determined the College was required to withhold some information under ss. 13 and 14, but ordered it to disclose the rest of the disputed information since ss. 13, 14 and 22 did not apply. The adjudicator also found that s. 22(5) was not applicable since a third party did not confidentially supply any information about the applicant. However, the adjudicator ordered the College to reconsider its decision to withhold information under s. 13(1) because there was insufficient explanation and evidence that the College exercised its discretion on proper grounds and considered all relevant factors.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 13(3), 14, 22(1), 22(2), 22(3), 22(4) and 22(5).

INTRODUCTION

[1] An applicant requested the College of Physicians and Surgeons of British Columbia (the College) provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records about himself. The applicant requested all correspondence the College "has received or indulged in about" the applicant from October 2016 to November 2017.[1] The College provided the applicant with some of the requested records in their entirety, but it withheld information in the rest of the records under ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of third party personal privacy) of FIPPA.

[1] Access request dated November 9, 2017.

[2] The applicant disagreed with the College's decision and requested a review by the Office of the Information and Privacy Commissioner (OIPC). During mediation, the College amended its response and added ss. 13 (advice or recommendations) or 14 to some of the withheld information and substituted s. 13 for information previously withheld under s. 14.[2] Mediation failed to resolve the issues in dispute and the applicant requested an inquiry.

ISSUES

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

1. Is the College authorized to withhold the information in dispute under ss. 14 or 13(1)?

2. Is the College required to withhold the information in dispute under s. 22(1)?

[4] Under s. 57(1), the burden is on the College to prove the applicant has no right of access to all or part of the records in dispute under ss. 13(1) and 14.

[5] Where access to personal information about a third party has been refused under s. 22(1), section 57(2) places the burden on the applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy. However, a public body has the initial burden of proving that the information at issue is personal information under s. 22(1).[3]

DISCUSSION

Background

[6] The College regulates the practice of medicine in the province. All physicians who practise medicine in the province must be registrants of the College. A foreign-trained physician may apply to the College for placement on the temporary register, subject to any conditions required by the College's registration committee.

[7] The applicant is a foreign physician who was involved in a lengthy and extensive dispute with the College over the removal of his name from the College's temporary register. The applicant alleges, among other things, that the College engaged in discriminatory behaviour against him and was responsible for a "campaign of misinformation" about him.[4] The dispute began in 1990 and made

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[2] College's submission at para. 5: the College added s. 14 to the info already withheld under s. 22 on page 26 of the records and replaced s. 14 with s. 13 on page 85. It also added s. 13 to the information already withheld under s. 14 on pages 51, 58 and 67 of the records.
[3] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.
[4] Applicant's submission at para. 27.

its way through various proceedings before ending unsatisfactorily for the applicant in 2005.[5]

[8] A few years after those events, the applicant made several different requests to the College for records related to the dispute and the applicant's dealings with the College. The applicant began his requests in 2008 to 2011 and then continued in 2016 and 2017.[6] At some point, the applicant retained a representative to obtain records on his behalf from the College.[7]

[9] Throughout 2015, the applicant's representative wrote to the College and other individuals and organizations about the dispute, complaining about the College's conduct towards the applicant. In May 2016, the representative requested the College provide access to all correspondence about his client. The representative believed the College was corresponding "with different bodies and individuals about [his] client."[8]

[10] Thereafter, the representative and the College exchanged numerous emails about the May 2016 access request, including a request for the applicant's written consent authorizing the representative to act on his behalf. In October 2016, the College provided the representative with partial access to the requested records.

[11] Throughout 2017, the representative wrote to various individuals and organizations complaining about the College. The representative copied the College on those communications. In October 2017, the representative requested the College provide a copy of any annual reports that mention the applicant's name.

[12] On November 8, 2017, the College responded and informed the representative that the applicant was only mentioned in the 2005 annual report and that the applicant was already given a copy of this record. The next day, the representative made the access request that is at issue in this inquiry. The representative requested the College provide access to all correspondence about the applicant from October 2016 to November 2017.

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[5] Some of the facts regarding the parties' disagreement are outlined in Order F11-10, 2011 BCIPC 13 and Decision F11-04, 2011 BCIPC 40.

[6] Some of those access requests are discussed in Decision F11-04, 2011 BCIPC 40 with the latest request in 2011. I can also see from reviewing the responsive records for this inquiry that other requests were made in 2016 and in 2017.

[7] It is also unclear from the materials before me as to when the representative began requesting records on the applicant's behalf.

[8] Email dated May 20, 2016 from the advocate to the College's then Registrar/CEO.

Records in dispute

[13] There were 119 pages of responsive records and the information at issue appears on approximately 22 of those pages. Some pages have been withheld in their entirety and others were disclosed with some information redacted.

[14] The College provided all the responsive records for my review. The records in dispute consist of a variety of emails involving College employees, the College's Chief Legal Counsel or external counsel.

[15] During the inquiry, and at my request, the applicant was provided with a copy of an index of records that briefly described the information at issue. The College did not provide this index to the applicant before the applicant provided his inquiry submission. The applicant was given an opportunity to make further submissions, in light of the index, but he declined to do so.

Solicitor client privilege – s. 14

[16] The College applied s. 14 to most of the information in the disputed records; therefore, I will consider that exemption first. For some of the records, the Ministry also applied s. 13(1) or s. 22(1) to the same information withheld under s. 14. I will only consider those other exemptions if I find s. 14 does not apply.

[17] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[9] The College claims legal advice privilege over the information withheld under s. 14.

[18] Legal advice privilege applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.[10] The courts and previous OIPC orders accept the following criteria for determining whether legal advice privilege applies:

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

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[9] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26

[10] *College* at paras. 26-31.

4. The communication must be directly related to the seeking, formulating, or giving of legal advice.[11]

[19] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.[12] However, if the four conditions set out above are satisfied, then legal advice privilege applies to the communication and the records relating to it.[13]

[20] Courts have also found that solicitor client privilege extends to communications that are "part of the continuum of information exchanged" between the client and the lawyer in order to obtain or provide the legal advice.[14] A "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[15]

[21] The continuum includes factual information provided by the client to the lawyer at the beginning or throughout the solicitor-client relationship and covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[16]

College's position – s. 14

[22] The College submits that s. 14 applies because the withheld information "clearly falls within the continuum of communications relating to the seeking, receiving, implementing or providing of legal advice."[17] It describes that information in its submissions as follows:

- Communications with its Chief Legal Counsel which relate to the giving or receiving of legal advice;[18]

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[11] *R v. B*, 1995 CanLII 2007 (BCSC) at para. 22 and *British Columbia (Securities Commission) v. CWM*, 2003 BCCA 244 at para. 46. See also Order F17-43, 2017 BCIPC 47 at paras. 38-39 and *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13 (substantially similar criteria, but expressed in a different way).
[12] *Keefer Laundry Ltd v. Pellerin Milnor Corp et al,* 2006 BCSC 1180 at para. 61.
[13] *R v. B*, 1995 CanLII 2007 (BCSC) at para. 22.
[14] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.
[15] *Camp Development* at para. 40.
[16] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.
[17] College's submission at para. 15.
[18] Pages 5 (information duplicated on p. 85), 51, 58 and 67 of the records.

- Communications between the College's external counsel or communications between external counsel and its Chief Legal Counsel; and,[19]

- A small amount of information related to legal invoices or fees for legal services.[20]

[23] The College provided an affidavit from its Chief Legal Counsel who says he reviewed the records at issue. The Chief Legal Counsel's affidavit is three paragraphs in total and his evidence on the content of the disputed records is found in the following paragraph:

> I further confirm that the descriptions of the section 14 information in paragraph 14 of the Initial Submissions and the descriptions of the section 13 information in paragraph 20 of the Initial Submissions reflect the content of the withheld information.[21]

Applicant's position – s. 14

[24] The applicant distrusts the College's claim of privilege and suspects the College may be dishonestly and falsely withholding information. The applicant notes that his suspicions stem from his previous dealings with the College.[22] The applicant predicts the College did not apply s. 14 correctly and is withholding information that is not legal advice.[23] For example, the applicant says solicitor client privilege does not apply to information that does not recommend a course of action based on legal considerations and in which no legal opinion is expressed[24] or where a lawyer gives a non-legal opinion or information that is non-legal in nature such as administrative information.[25]

[25] The applicant also points out that there are exceptions to solicitor-client privilege, specifically where there is evidence of criminality or fraud. The applicant accuses the College of acting criminally by "falsifying a public document or willfully providing false information" in its past dealings with him.[26] As a result, it appears the applicant suspects the withheld information may reveal that the College's communications with its lawyers were for an improper purpose and, therefore, not protected by privilege.

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[19] Pages 17-25 and 42-47 of the records.
[20] Pages 26 and 27 of the records.
[21] Affidavit of Chief Legal Counsel at para. 3.
[22] Applicant's submission at para. 45.
[23] Applicant's submission at paras. 50-56. He cites a number of Ontario OIPC orders in support of his allegations.
[24] Order P-586, 1993 CanLII 4909 (ON IPC).
[25] Order M-233, 1993 CanLII 5050 (ON IPC).
[26] Applicant's submission at para. 48.

Analysis and findings – s. 14

Records involving the Director of Records, Information and Privacy

[26] The College withheld a group of emails between the College's Chief Legal Counsel and its Director of Records, Information and Privacy (Director) under s. 14.[27] Most of the emails are from the Director to the Chief Legal Counsel and all the emails occurred in 2016.[28] The College says "it is apparent on the face of those records that the information consists of communications with [its Chief Legal Counsel] which relate to the giving or receiving of legal advice."[29] However, I am not satisfied that legal advice privilege applies to these records.

[27] It is not always the case that communications involving an in-house lawyer are made within the solicitor-client framework. Whether solicitor-client privilege applies to communications between employees of a public body and in-house counsel, depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.[30] The Supreme Court of Canada has said, "owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose.[31]

[28] The disputed records consist of two email chains between the Director and the Chief Legal Counsel. In one email chain, the Director is seeking instructions from the Chief Legal Counsel, carries out those instructions and gets final approval on the course of action.[32] The other email chain begins with an email from the Chief Legal Counsel to the Director that is best characterized as a request from a supervisor to a subordinate.[33] The subsequent email is from the Director to the Chief Legal Counsel, in which the Director carries out the Chief Legal Counsel's request and offers some suggestions.

[29] Based on my review of the disputed emails, I find the College's Chief Legal Counsel was acting in a managerial role and not in a legal capacity at the time of the relevant communications. In my view, it is clear from these emails that the relationship between the Director and the Chief Legal Counsel is that of manager to senior employee and not solicitor and client.

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[27] Pages 5 (information duplicated on p. 85), 51, 58 and 67 of the records.
[28] The participants and dates of the emails were openly disclosed by the College in its table of records.
[29] College's submission at para. 14.
[30] *R v. Campbell*, 1999 CanLII 676 at para. 50.
[31] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 at para. 20.
[32] Pages 51, 58 and 67 of the records.
[33] Page 85 of the records (information duplicated on p. 5 of the records).

[30] Further, there is nothing in the withheld information that appears to reveal any legal advice or request for legal advice. The Director is not seeking legal advice from the Chief Legal Counsel in these emails, but seeking further instructions and/or approval from a superior about an administrative matter. As well, neither the Director nor the Chief Legal Counsel in their emails appear to discuss any legal advice that the College may have previously sought or obtained.

[31] I also note that the College withheld the header information from some of the emails which includes information about the email's sender, recipient(s), date and subject matter. The College does not explain how any of the information withheld from these email headers reveals any privileged information and I am not satisfied that they do.

[32] For all these reasons, I conclude that legal advice privilege does not apply to the withheld information in these records. As a result, the College cannot withhold this information under s. 14. However, the College also withheld this information under s. 13; therefore, I will later consider whether that exemption applies.

Records involving external counsel

[33] The College submits that s. 14 applies to a series of emails that it describes as "communications between external counsel retained by the College or between external counsel and the College's Chief Legal Counsel."[34] It says the withheld information "clearly falls within the continuum of communications relating to the seeking, receiving, implementing or providing of legal advice."[35]

[34] Based on my review of these emails, I can confirm that the College hired external counsel. However, there is nothing in these emails that reveals the College seeking or receiving legal advice from external counsel or that these emails form part of a continuum of communications between a lawyer and a client in order to obtain or provide legal advice. Instead, these emails reveal that the College hired external counsel to organize or undertake an administrative task that, in my opinion, is normally completed by a non-legal professional.

[35] I am also not satisfied that these communications are of a confidential nature or were intended by the parties to be confidential. It is clear that the substance of these conversations would be disclosed to other individuals, who are not part of any alleged solicitor client relationship, in order to actually complete the task. The College did not adequately explain how these communications could be considered confidential given the requirements of the assigned task.

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[34] College's submission at para. 14.

[35] College's submission at para. 15 and emails found at pages 17-25 and 42-47 of the records.

[36] Ultimately, the College did not provide sufficient argument or evidence to establish that the information at issue is protected by solicitor client privilege.[36] For the reasons given, I conclude these emails are not confidential communications directly related to the seeking or giving of legal advice between a lawyer and a client nor does it disclose such information by inference.

[37] Since I find s. 14 does not apply to the communications involving the College's Chief Legal Counsel or its external counsel, it is not necessary for me to address the applicant's allegations that the College communicated with its lawyers for an improper purpose.

Records involving legal fees

[38] Previous OIPC orders and court decisions have established there is a rebuttable presumption that billing information in a lawyer's statements of account or other documents is subject to solicitor client privilege.[37] This presumption recognizes that a lawyer's bill flows out of privileged communications between the solicitor and client and typically reflects work done on behalf of the client or at the instruction of the client.[38]

[39] Further, the Supreme Court of Canada noted that this presumption reflects the importance of privilege, as well as the inherent difficulties in determining the extent to which the information contained in a lawyer's bill of account discloses communications protected by privilege as opposed to "neutral information" (i.e. information that does not reveal anything in the nature of a privileged communication).[39]

[40] The College submits that the presumption of privilege applies to some information in an email between two College employees regarding a list of expenses coded as "Legal Fees - Others." One employee from the finance department is asking another employee for confirmation about those expenses.[40]

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[36] The College's entire submission about these records is found at paras. 14-15 of its submission. The College declined to provide a reply submission in response to the applicant's submission. The OIPC also offers the parties the option of providing *in camera* submissions, subject to approval, but no such submissions were made in this case.

[37] *Maranda v. Richer*, 2003 SCC 67; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 34-50; *Richmond (City) v. British Columbia (Office of the Information and Privacy Commissioner)*, 2017 BCSC 331 at para. 78; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 [*Central Coast*]; Order F19-47, 2019 BCSC 1132 (CanLII) at para. 13; Order 03-28, 2003 CanLII 49207 (BCIPC) at para. 15.

[38] *Donell v. GJB Enterprises Inc*., 2012 BCCA 135 at para. 55; *Wong v. Luu*, 2015 BCCA 159 at para. 38; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at paras. 35 and 42.

[39] *Maranda v. Richer*, 2003 SCC 67 at paras. 32-33.

[40] Page 26 of the records. The information discussed here was disclosed in the records.

This email is then forwarded to the Chief Legal Counsel who responds, in another email, to the finance employee's questions.[41]

[41] The College withheld the list of expenses and portions of the Chief Legal Counsel's response. The College says these communications contain information related to legal invoices or fees for legal services.[42] It cites some court decisions and a previous OIPC order to argue that "information relating to a lawyer's retainer and legal bills is protected by solicitor client privilege."[43]

Does the presumption apply to the information at issue?

[42] The rebuttable presumption will apply where either the context of the information or a review of the records satisfies the adjudicator that the document does contain legal billing information.[44] In the present case, the records at issue are not a lawyer's bill of account or an invoice, but emails between College employees about the accounting of some expenses coded as legal fees.

[43] The College withheld the following information from those emails:

- The name of some law firms;
- The name of some individuals;
- A brief description of each expense;
- The amount of each expense;
- The Chief Legal Counsel's response about a particular matter; and
- The Chief Legal Counsel's opinion about the coding of expenses.

[44] I find the presumption does not apply to the Chief Legal Counsel's opinion about the coding of expenses and part of the Chief Legal Counsel's response about a particular matter. This withheld information does not reveal any billing information between a lawyer and a client, but instead reveals a discussion between College employees about the College's accounting practices. The College does not sufficiently explain or discuss why this information qualifies for the presumption of privilege or how it would reflect the solicitor-client relationship and what transpires within it.

[45] I also considered whether legal advice privilege applies to these emails and find that it does not. The finance employee is seeking factual information about some expenses and the Chief Legal Counsel provides her with that

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[41] Page 27 of the records (information also withheld under s. 22).
[42] College's submission at para. 14.
[43] College's submission at para. 13: *Maranda v. Richer*, 2003 SCC 67 at para. 32; *Legal Services Society v. BC (Information and Privacy Commissioner)* no citation provided; Order 03-28, 2003 CanLII 49207 (BCIPC) at para. 15 [incorrectly cited by the College as 2003 BCIPC 28] and the cases cited therein.
[44] *Central Coast*, *supra* note 37 at para. 122.

information and gives a non-legal opinion. Based on my review of this information, I conclude these emails are not communications between a solicitor and client for the purposes of obtaining and giving legal advice nor does it reveal any such information.

[46] However, I find the rest of the information raises a presumption of privilege, that is, the name of a legal services provider, a description of each expense and the amount of each expense. I find this information is presumptively privileged since it would reveal information related to a lawyer's bill of account and its payment. The amount of legal fees at a minimum indicates the level of activity carried out on behalf of the client.[45]

[47] Moreover, the fact that the records at issue are not the actual legal invoices does not prevent the application of the presumption; what is relevant is the nature of the information contained in the record.[46] For example, courts have applied this presumption to similar information found in documents such as a general ledger account summary and a computer-generated summary of some legal invoices.[47]

[48] There is one expense item, however, that may or may not be about legal fees.[48] It is not clear to me whether this expense is related to the series of emails involving external counsel that I found above was not protected by privilege.[49] If that is the case, then the presumption of privilege would not apply since the disclosure of this information would not reveal any privileged information. However, it may be that some or all of this expense involves communications where the College did seek and obtain legal advice from external counsel. Given the importance of solicitor client privilege, I have erred on the side of caution and applied the presumption to this information.

Is the presumption of privilege rebutted?

[49] Having found some of the withheld information is presumptively privileged, the question is whether there is sufficient evidence or argument to rebut the presumption. The presumption may be rebutted if it is determined that disclosure of the information at issue will not violate the confidentiality of the client-solicitor relationship by directly or indirectly revealing any communication protected by privilege. If there is a reasonable possibility that an assiduous inquirer, aware of background information, could use the requested information to deduce or

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[45] *Luu Bankruptcy (Re)*, 2013 BCSC 1374 at para. 43.
[46] Order PO-2483, 2006 CanLII 50826 (ON IPC) at pp. 11-12.
[47] *Central Coast*, *supra* note 37 at paras. 7, 135, 138-139.
[48] Line item 4 in list of expenses.
[49] Pages 17-25 and 42-47 of the records.

otherwise acquire privileged communications, then the information is protected by privilege and cannot be disclosed.[50]

[50] The burden is on the party seeking the release of the information to prove through evidence or argument that disclosure will not reveal privileged information.[51] Further, the nature of the information and the circumstances and context of the case may be considered to determine whether the presumption is rebutted as this information may have evidentiary value when considering claims of privilege.[52] When it comes to legal billing information, previous decision-makers have considered a variety of factors to determine whether the privilege was rebutted, including the stage of the litigation if applicable and the inquirer's level of background knowledge.[53]

[51] In this case, I find the presumption of privilege is rebutted for the name of a particular law firm and the nature of the legal proceeding involved.[54] I find the presumption is rebutted for this information since its disclosure would only confirm what is already publicly available online in a reported court decision, that the College hired a particular lawyer and their firm to represent it in a dispute involving a certain individual. It is not apparent to me how disclosing this information a second time would reveal or allow an assiduous inquirer to deduce or acquire privileged communications.

[52] As for the remaining information withheld in the list of expenses, I find there is insufficient evidence or argument to rebut the presumption of privilege for this information. The applicant did not provide any submissions or arguments about this issue even though the College openly disclosed that the withheld information was related to legal fees.[55] The applicant also did not address any of the legal authorities cited by the College in support of its position.

[53] Considering the context and content of the records, the remaining information at issue would reveal who the College hired to complete work on certain matters, the type of matter involved and/or how much was charged and paid for those services. There is nothing within all the responsive records or the surrounding circumstances that allows me to conclude that there is no reasonable possibility that disclosure of this information would not reveal communications protected by privilege. For example, I am unable to determine

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[50] *Central Coast*, *supra* note 37 at para 104; *Legal Services Society v. Information and Privacy Commissioner of British Columbia*, 2003 BCCA 278 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at para. 51.
[51] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 at para. 58. *Central Coast*, *supra* note 37 at para. 100, quoting *Maranda v. Richer*, 2003 SCC 67 at paras. 33-34.
[52] *Central Coast*, *supra* note 37 at para. 113.
[53] For a full list of factors, see Order F19-47, 2019 BCIPC 53 at para. 18.
[54] Information located on pp. 26 and 27 (line items 1-3 in the list of expenses) of the records.
[55] College's submission at para. 13 and the index of records.

the stage of these various proceedings and whether they are ongoing or have concluded. As a result, I find the presumption of privilege is not rebutted and conclude the College is authorized under s. 14 to refuse to disclose this information to the applicant.

Advice or recommendations – s. 13

[54] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Previous OIPC orders recognize that s. 13(1) protects "a public body's internal decision decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."[56]

[55] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. Numerous orders and court decisions have considered the interpretation and meaning of "advice" and "recommendations" under s. 13(1) and similar exceptions in the freedom of information legislation of other Canadian jurisdictions.[57]

[56] I adopt the principles identified in those cases for the purposes of this inquiry and have considered them in determining whether s. 13(1) applies to the information at issue. I note, in particular, the following principles from some of those decisions:

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.[58]

- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.[59]

- "Advice" has a broader meaning than the term "recommendations."[60] Advice also includes an opinion that involves exercising judgment and skill to weigh

[56] Order 01-15, 2001 CanLII 21569 at para. 22.
[57] See, for example: *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; Order 02-38, 2002 CanLII 42472; Order F17-19, 2017 BCIPC 20 (CanLII); Review Report 18-02, 2018 NSOIPC 2 at para. 14.
[58] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.
[59] *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.
[60] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 24.

the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.[61]

- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.[62] This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.[63]

[57] If I find s. 13(1) applies, I will then consider if any of the categories listed in ss. 13(2) or (3) apply. Subsections 13(2) and (3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

The parties' positions on s. 13

[58] The College applied s. 13 to a group of emails between its Chief Legal Counsel and its Director of Records, Information and Privacy.[64] I found above that s. 14 did not apply to the withheld information; therefore, I will now consider whether s. 13 applies.[65]

[59] The College submits that s. 13 applies for the following reasons:[66]

- Page 51 "withholds a small amount of information where a College employee asks the College's Chief Legal Officer in which advice is provided and instructions are sought."
- Page 58 "redacts a small amount of information in which a College employee seeks advice from the College's Chief Legal Officer."
- Page 67 "redacts information where advice is sought internally from the College's Chief Legal Officer and that advice is given."
- Page 85 "redacts information where advice and recommendations are provided to the Chief Legal Officer, in response to a request by him."

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[61] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 113.
[62] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.
[63] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[64] Pages 51, 58, 67 and 85 (information duplicated on p. 5) of the records.
[65] Information located on pp. 51, 58, 67 and p. 5 (information duplicated on p. 85) of the records.
[66] The description of the withheld information is copied from the College's submission at para. 20.

[60] The applicant submits that s. 13(1) does not apply to information that only reveals the general topics and content of presentations or meetings, or to any instructions to staff or requests for advice.[67] The applicant also questions whether ss. 13(2) and 13(3) may apply to the withheld information. The applicant notes that the College cannot withhold any information or records that fall under s. 13(2). However, he says it is not possible for him "for obvious reasons" to argue whether any of the s. 13(2) provisions may apply.[68]

[61] I understand the applicant to mean that he is unable to determine what s. 13(2) provisions may be relevant because he does not know enough about the withheld information or he is unable to extrapolate anything from the College's submission and the surrounding circumstances. As for s. 13(3), the applicant says that his dispute with the College extends back 25 years and s. 13(3) prevents the College from withholding any information that has been in existence for 10 or more years.[69]

Analysis and findings on s. 13

[62] As previously noted, the disputed records consist of two email chains between the Director and the Chief Legal Counsel. I find that s. 13(1) applies to some of the information withheld from the email chain that begins with an email from the Chief Legal Counsel assigning the Director a task.[70] The Director carries out that task and in doing so, provides some suggestions and recommendations to the Chief Legal Counsel for his consideration.

[63] I also find that none of the categories or circumstances under s. 13(2) apply to this information. For example, the information at issue does not consist of factual material that can be severed from any of the recommendations. I am also satisfied that s. 13(3) does not apply since the information has not been in existence for 10 or more years. The emails occurred in 2016 and this s. 13(1) information came into existence during that time. I, therefore, conclude the College can withhold this information under s. 13(1).

[64] However, I do not find that s. 13(1) applies to the other withheld information in this email chain. The information consists of instructions or a request from a manager to an employee, which does not qualify as advice or recommendations under s. 13(1).[71] It also consists of factual information and the Director seeking further instructions from the Chief Legal Counsel. None of this information contains any advice or recommendations to a decision maker nor could any advice or recommendations be inferred from this information.

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[67] Applicant's submission at para. 43, citing Order F18-41, 2018 BCIPC 44 at paras. 15-16.
[68] Applicant's submission at para. 40.
[69] Applicant's submission at para. 39.
[70] Page 85 of the records (information duplicated on p. 5 of the records).
[71] Order F19-27, 2019 BCIPC 29 at para. 32, first bullet point, and the cases cited therein.

[65] As for the other email chain, I also find that s. 13(1) does not apply. This email chain begins with the Director providing some factual information to the Chief Legal Counsel and seeking instructions from him.[72] I do not find any of the withheld information in this email chain reveals any advice or recommendations developed by or for a public body. The withheld information only reveals a decision made by the Chief Legal Counsel and the Director carrying out those instructions and then seeking and receiving final approval about the matter.

[66] The College also withheld several email headers from both email chains, which identifies the email's sender, recipient, subject and date. I find none of this withheld information would reveal any advice or recommendations developed by or for a public body. For example, the withheld information would only reveal the identity of the email correspondents and general information about the topic of the emails. It is not apparent and the College does not explain how the information withheld from these email headers qualifies as advice or recommendations under s. 13(1).

Exercise of discretion under s. 13

[67] Section 13 is a discretionary exemption to access under FIPPA. A public body must exercise that discretion in deciding whether to refuse access to information, and upon proper considerations.[73] The public body must establish that they have considered, in all the circumstances, whether information should be released even though the discretionary exemption applies.[74]

[68] If the head of the public body has failed to properly exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations or the decision failed to take into account relevant considerations.[75]

[69] Previous OIPC orders have stated that when exercising discretion to refuse access under a discretionary exemption, a public body should typically consider relevant factors such as the age of record, the general purposes of FIPPA, the public interest in disclosure and the nature and sensitivity of the record.[76]

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[72] Pages 51, 58 and 67 of the records.
[73] Order 02-50, 2002 CanLII 42486 at para. 144.
[74] Order No. 325-1999, 1999 CanLII 4017 at p. 4.
[75] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52. See also Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144 and Order 02-38, 2002 CanLII 42472 at para. 147.
[76] See Order 02-38, 2002 CanLII 42472 at para. 149, for a full list of non-exhaustive factors that a public body may consider in exercising its discretion.

[70] The College says that it considered whether to exercise its discretion in favour of disclosing the information, but it declined to do so "because of the history of [its] dealings with the access applicant and the nature of the records themselves."[77] The College does not explain what it means by this statement, but I take note this is not the first OIPC inquiry between the College and the applicant.[78] Further, as previously noted, the parties also have a long and contentious history over the removal of the applicant's name from the College's temporary register.

[71] In response, the applicant alleges the College exercised its discretion inappropriately by considering its past dealings with him.[79] The applicant says the College raised this factor to convey the incorrect impression that he has been unreasonable in his dealings with the College.[80] The applicant disputes any allegation of wrongdoing on his part and submits that his previous dealings with the College should not have played any part in the College's decision to withhold information under s. 13(1).

[72] In this case, I find there is insufficient evidence or explanation that the College exercised its discretion appropriately. A public body must be able to demonstrate how it reached its decision and the reasons for making that decision must be appropriate in the circumstances.[81] However, it is unclear and the College does not explain how or in what way its past dealings with the applicant would be a relevant and appropriate consideration in the exercise of its decision to refuse access.

[73] The College also says that it considered the nature of the information and the nature of the records, but it does not explain why the nature of these particular records or the withheld information is an appropriate consideration. The record at issue is an email between the Director and the Chief Legal Counsel. There does not appear to be anything inherently sensitive about the email or its contents. As a result, it is unclear how the nature of the withheld information or the record was an appropriate reason for the College to exercise its discretion to refuse access.

[74] I also find the College did not consider all the relevant factors in this case. A public body will have properly exercised its discretion when it has addressed all relevant considerations in the circumstances of the particular request.[82] When the discretionary exemption at issue is s. 13, a public body should consider

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[77] Affidavit of Chief Legal Counsel at para. 2.
[78] The OIPC also adjudicated matters between the applicant and the College in Order F11-10, 2011 BCIPC 13 and Decision F11-04, 2011 BCIPC 40.
[79] Applicant's submission at paras. 41-42.
[80] Applicant's submission at para. 8.
[81] Investigation Report F08-03, 2008 CanLII 57363 at para. 40.
[82] Investigation Report F08-03, 2008 CanLII 57363 at para. 38.

whether the decision to which the advice or recommendations relates has already been made.[83]

[75] In the present case, I found that s. 13(1) applied to some of the Director's recommendations to the Chief Legal Counsel about a matter.[84] It is clear that the Chief Legal Counsel considered those recommendations and a decision was made and subsequently implemented. The College's submissions and evidence do not explain how or whether it took this factor into account in the exercise of its discretion.

[76] Ultimately, in the absence of sufficient explanation and evidence that the College exercised its discretion on proper grounds and considered all relevant factors, it is appropriate for me in this case to order the head of the College to re-consider their decision to refuse access to the information that I found it may withhold under s. 13(1).

Section 22 – unreasonable invasion of third party personal privacy

[77] Section 22 of FIPPA provides that a public body must refuse to disclose personal information the disclosure of which would unreasonably invade a third party's personal privacy. Numerous OIPC orders have considered the application of s. 22 and I will apply the same approach in this inquiry.[85]

[78] The College applied ss. 14 and 22 to the same information withheld in an email between its Chief Legal Counsel and several employees.[86] I found above that s. 14 does not apply to this information; therefore, I will now consider whether s. 22 applies. I will also consider whether s. 22 applies to information in another related email, which I also found could not be withheld under s. 14.[87] Even though the College did not apply s. 22 to this information, its disclosure would reveal information that the College did withhold under s. 22.[88]

Personal information

[79] The first step in any s. 22 analysis is to determine if the information is personal information. "Personal information" is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[89] Information is about an identifiable individual when it is reasonably capable of

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[83] Investigation Report F08-03, 2008 CanLII 57363 at para. 38.
[84] Page 85 of the records (information duplicated on p. 5).
[85] See for example, Order F17-39, 2017 BCIPC 43 (CanLII) at paras. 71-138.
[86] Email located at p. 26 of the records.
[87] Email located at p. 27 of the records.
[88] At para. 22 of its submission, the College says it applied s. 22 to two pages; however, s. 22 was only applied to page 26 of the records.
[89] See Schedule 1 of FIPPA for this definition.

identifying a particular individual, either alone or when combined with other available sources of information.[90]

[80] 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."[91]

[81] The College says the withheld information names several third parties and describes the status of litigation involving them.[92] From my review of the records, the information at issue under s. 22 consists of the following:

- The name of a third party;
- The name of the law firm hired to represent the College;
- General information about the type of legal proceeding involved; and
- The Chief Legal Counsel's opinion about the coding of expenses.

[82] I find some of this withheld information qualifies as personal information because it identifies an individual by name and reveals information about their dispute with the College. However, I do not find the rest of the information qualifies as personal information because it is not about an identifiable individual.

[83] The name of the law firm is not about an identifiable individual since it is information about a law corporation. Corporations and companies do not have personal privacy rights under s. 22 of FIPPA.[93] The College provided no explanation or evidence to explain how this corporate information is about an identifiable individual for the purposes of s. 22.

[84] There is also no identifiable individual mentioned in the Chief Legal Counsel's opinion. Instead, this information is about the College's accounting practices. As previously noted, a public body has the initial burden of proving that the information at issue is personal information under s. 22. In this case, the College does not explain how the Chief Legal Counsel's opinion about the College's accounting practices qualifies as personal information under s. 22.

Section 22(4) – disclosure not an unreasonable invasion

[85] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an

[90] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 17.
[91] See Schedule 1 of FIPPA for this definition.
[92] College's submission at para. 22.
[93] Order F17-39, 2017 BCIPC 43 at para. 75.

unreasonable invasion of a third party's personal privacy and the information should be disclosed.

[86] The College submits that none of the provisions in s. 22(4) apply to the redacted information.[94] The applicant says he is not able to make any submissions about s. 22(4) since he has not seen the records.[95] I have considered the types of information and factors listed under s. 22(4) and find that none apply.

Section 22(3) – presumptions in favour of withholding

[87] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third party personal privacy.[96]

[88] The College submits that none of the provisions in s. 22(3) apply. The applicant says he is not able to make any submissions about s. 22(3) since he has not seen the records. I have considered the presumptions under s. 22(3) and, based on the materials before me, I find that none apply.

Section 22(2) – relevant circumstances

[89] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances, including those listed under s. 22(2).

[90] The College says the relevant circumstances listed in s. 22(2) that might favour disclosure do not apply here. It submits that there is nothing to indicate that the release of the information would not give rise to an unreasonable invasion of a third party's personal privacy.[97] Therefore, the College submits that it was required to withhold the information since s. 22 is a mandatory exception to disclosure.

[91] The applicant says he is not able to make any submissions about s. 22(2) since he has not seen the records. However, the applicant distrusts the College's application of s. 22 to the records because he says the College has a prior history of incorrectly applying s. 22.[98] The applicant refers to Order F11-10 where

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[94] College's submission at para. 23.
[95] Applicant's submission at para. 63
[96] *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al*., 2006 BCSC 131 (CanLII) at para. 45.
[97] College's submission at para. 23.
[98] Applicant's submission at para. 60.

Adjudicator Francis found the College could not withhold certain information under s. 22.[99]

[92] I have considered the various s. 22(2) factors and I find none apply here. As well, I understand the applicant harbours a deep mistrust of the College's decisions and actions. However, I am not persuaded that the College's severing decision in a previous inquiry that occurred many years ago weighs in favour of disclosure. The adjudicator's findings about s. 22 in that prior order does not mean the College is incorrectly withholding information in this inquiry. The analysis required under s. 22 is fact specific and Order F11-10 was decided on different third party personal information and different circumstances.

[93] I do, however, find a relevant circumstance in this case is that the information at issue is now publicly available. As previously noted, the name of the third party and general information about their dispute with the College is found online in a reported court decision. Unless there are sealing orders or publication bans in place, the parties' names and the nature of their dispute is generally not protected in open court proceedings. The published court decision does not mention any sealing orders or publication bans. It openly lists the third party's name and contains extensive details about their dispute with the College, including the name of the lawyer hired to represent the College. I, therefore, find this factor weighs in favour of disclosure.

Conclusion on s. 22

[94] To summarize, I find only some of the information being withheld under s. 22 qualifies as "personal information." I conclude that s. 22(4) does not apply to any of this personal information and there were no applicable s. 22(3) presumptions. Considering all the relevant circumstances, I am satisfied that disclosing the third party's name and general information about their dispute with the College would not unreasonably invade a third party's personal privacy. Given the public availability of this information, it is not apparent to me how disclosing the third party's name and general information about their dispute an additional time would unreasonably invade this third party's personal privacy. As a result, I find the College is not required to withhold this information under s. 22(1).

Summary of a record under s. 22(5)

[95] Subject to certain conditions, s. 22(5) requires a public body to give an applicant a summary of any personal information supplied in confidence about them by a third party. The applicant accuses the College of violating its obligations under s. 22(5). The applicant says he is entitled, under s. 22(5), to a

[99] Order F11-10, 2011 BCIPC 13 at paras. 29-52.

summary of any information about him that was confidentially supplied by a third party.[100]

[96] Section 22(5) is only relevant when an adjudicator decides that a third party confidentially supplied information about an applicant. In this case, the information at issue does not involve that kind of information; therefore, s. 22(5) is not applicable in this case. As a result, I find the College is not required to provide the applicant with a s. 22(5) summary.

CONCLUSION

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

1. I confirm in part the College's decision to refuse access to the information withheld under ss. 13(1) and 14, subject to paragraph 3 below.

2. The College is not required to refuse to disclose the information withheld under s. 22(1).

3. The College is not authorized or required by ss. 13(1), 14 or 22(1) to refuse to disclose the information withheld on pages 17-25 and 42-47 of the records and the information highlighted in a copy of the records that is provided with this order. The College must disclose to the applicant the information it is not authorized or required to withhold and it must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records.

4. Under s. 58(2)(b), I require the head of the College to reconsider its decision to refuse access to the information that I found it is authorized to withhold under s. 13(1). This information is located on pages 5 and 85 of the records. The head of the College is required to exercise its discretion and consider, on proper grounds and considering all relevant factors, whether this s. 13(1) information should be released even though it is covered by the discretionary exception. It must deliver its reconsideration decision, along with the reasons and factors it considered for that decision, to the applicant and to the OIPC registrar of inquiries.

[100] Applicant's submission at para. 62.

5. Under s. 59 of FIPPA, the College is required to give the applicant access to the information it is not authorized or required to withhold by August 5, 2020. The College is also required to deliver its reconsideration to the applicant and to the OIPC registrar of inquiries by this same date.

June 22, 2020

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F18-76116