Order F20-48

MINISTRY OF ENERGY, MINES AND PETROLEUM RESOURCES
ENVIRONMENTAL ASSESSMENT OFFICE
MINISTRY OF INDIGENOUS RELATIONS AND RECONCILIATION
MINISTRY OF ENVIRONMENT AND CLIMATE CHANGE STRATEGY
OFFICE OF THE PREMIER

Frank DeVries
Adjudicator

November 6, 2020

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Summary: An applicant made seven requests to five public bodies for access to records relating to an identified mining project. The public bodies withheld information in the records under a number of exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act*. For some of the records, the public bodies applied one or more exceptions to the same information. The adjudicator determined the public bodies were authorized or required to withhold some information under ss. 12(1) (cabinet confidences), 13(1) (advice or recommendations), 14 (solicitor client privilege), 15(1)(l) (harm to security of a system), 16(1) (harm to intergovernmental relations), 17(1) (harm to financial or economic interests) and 22(1) (unreasonable invasion of third party personal privacy). However, the adjudicator found that some of the withheld information did not fall within the claimed exceptions, and ordered the public bodies to disclose that information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(2), 12(2)(c), 13(1), 13(2), 14, 15(1)(l), 16(1)(a)(iii) and (c), 17(1) and 22.

INTRODUCTION

[1] This order arises out of seven requests made by the applicant under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records relating to a mining project. The seven requests were made to five public bodies (collectively the Public Bodies). Two requests each were made to the Ministry of Energy, Mines and Petroleum Resources (MEM) and the Environmental Assessment Office (EAO). One request each was made to the Ministry of Indigenous Relations and Reconciliation (MIRR), the Ministry of Environment and Climate Change Strategy (MECCS), and the Office of the Premier (OOP).

[2] Each of the Public Bodies responded by releasing some records but withholding other records or portions of records pursuant to one or more of ss. 3, 12, 13, 14, 15, 16, 17, 21 and 22 of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the decisions of the Public Bodies to withhold information. During mediation, a number of the Pubic Bodies reconsidered their original severing decisions and released additional information to the applicant. Mediation failed to resolve all the issues in dispute and all seven files proceeded to inquiry.

[4] During the inquiry process, the Public Bodies again reconsidered some of their severing decisions and withdrew their reliance on ss. 3 and 21.[1] They also released additional information to the applicant. However, they continued to withhold information under ss. 12, 13, 14, 15, 16, 17 and 22.

[5] The OIPC issued a single Notice of Written Inquiry[2] for all seven inquiries. Each Public Body provided their own initial submission. The submissions were shared with the applicant,[3] and the applicant provided a single response submission which addressed the issues in all seven files. The Public Bodies responded by providing a joint submission in reply.

[6] Although the inquiries involve five public bodies, the applicant is the same in all seven cases, and the applicant's response submission and the Public Bodies' reply submissions were the same for all seven files. Furthermore, the issues and records overlap. I have therefore dealt with the seven inquiries in this one order.

[7] For ease of reference, I will refer to the inquiries in this order as follows: the two MEM inquires as MEM Inquiry #1 and MEM Inquiry #2,[4] the two EAO inquiries as EAO Inquiry #1 and EAO Inquiry #2,[5] and the other inquiries as the MIRR Inquiry,[6] the MECCS Inquiry[7] and the OOP Inquiry.[8]

ISSUES

[8] The issues to be decided in these inquiries are as follows:

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[1] See applicant's submissions para. 90 and Public Bodies' reply submissions para. 86.
[2] Notice of Written Inquiry dated November 14, 2018.
[3] Except for certain *in camera* portions of some of the submissions and affidavits.
[4] OIPC files F16-67922 and F16-69055 respectively.
[5] OIPC files F17-71400 and F18-75036 respectively.
[6] OIPC file F17-69287.
[7] OIPC file F17-69367.
[8] OIPC file F17-70543

1. Are the Public Bodies authorized to withhold the information in dispute under ss. 13, 14, 15, 16 and 17 of FIPPA; and
2. Are the Public Bodies required to withhold the information in dispute under ss. 12 or 22 of FIPPA?

[9] Section 57 of FIPPA governs the burden of proof in an inquiry. The Public Bodies have the burden of proving that the applicant has no right of access to the information they are refusing to disclose under ss. 12, 13, 14, 15, 16 and 17. 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

Background[9]

[10] The applicant is Taseko Mines Limited, a mining company (Taseko or the applicant). The applicant is proposing the development of a copper and gold mine 125 km outside Williams Lake, British Columbia in the traditional territory of the Tŝilhqot'in Nation.

[11] In order to receive the necessary federal and provincial permits to proceed to develop the mine, the applicant has had to pursue environmental approval from both the Federal Government and the Provincial Government.

[12] The original mine was called the Prosperity Gold-Copper Project (Prosperity). Between November 2008 and November 2010, the applicant sought both federal and provincial environmental approval for Prosperity. Taseko succeeded in securing approval from the Provincial Government and received the requisite certificate.[10] However, the Federal Government declined to approve Prosperity following a federal environmental assessment. The government invited Taseko to submit a new mine design for consideration.[11]

[13] In 2011, Taseko redesigned the scope of the proposed mine. The new project was called the "New Prosperity Project". In order to pursue New Prosperity, Taseko applied to the Provincial Government for an amendment to its certificate and submitted a revised project design to the Federal Government. The revised project underwent a new environmental assessment by the Federal Review Panel. The Provincial Government was involved in this process. The review panel held a series of public hearings in relation to New Prosperity and, on October 31, 2013, it publicly released its report and submitted it to the federal

[9] Much of the background information is taken from the submissions and from the affidavits submitted by both the applicant and the Public Bodies.
[10] This occurred in January, 2010.
[11] Applicant's submissions at para. 24.

Minister of Environment. In February, 2014, the federal Minister of the Environment issued a decision statement rejecting the New Prosperity project.[12]

[14] Taseko applied to the Provincial government for an extension of its provincial certificate and, on January 14, 2015, was granted a five-year extension of its certificate.[13] Since that time, there have been various additional legal proceedings initiated in relation to Taseko's projects.[14]

[15] The information requests at issue in this inquiry primarily concern the Prosperity and New Prosperity projects,[15] hereafter referred to collectively as "the Project".

The requests and inquiries

[16] As noted above, the applicant made a total of seven requests to five different public bodies.

[17] The first request was to the MEM[16] and was for all documents and draft documents created during a defined time period that contain references to Taseko, the Project or a number of listed companies and individuals.

[18] Five of the requests were made to each of the MEM, MIRR, MECCS, OOP and EAO.[17] Each of these requests were substantially similar and were for all documents and draft documents that have certain named individuals as either a recipient, a carbon copy ("cc"), or sender and that mention Taseko or the Project.

[19] The last request was made to the EAO[18] and was for all entries in the calendars of two named individuals from the 24 months preceding March 16, 2018 for any meetings, telephone calls, or discussions between them as well as with other identified individuals or representatives. This included any notes or minutes from such meetings, telephone calls or discussions.

Records

[20] In total, the Public Bodies identified 8596 pages of responsive records. Remaining at issue are approximately 751 pages or portions of pages, identified as follows:

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[12] Applicant's submissions at para. 28.
[13] Applicant's submissions at para. 20.
[14] Referenced in the applicant's submissions at paras. 21 and 29-37.
[15] Applicant's submissions at para. 15.
[16] Request made on March 16, 2016 resulting in MEM Inquiry #1.
[17] Requests to the MEM, MIRR, MECCS, OOP and EAO on June 7, 2016, resulting in MEM Inquiry #2, MIRR Inquiry, MECCS Inquiry, OOP Inquiry and EAO Inquiry #1.
[18] Request made on March 16, 2018 resulting in EAO Inquiry #2.

MEM Inquiry #1 – The MEM identified 1784 pages of responsive records. Remaining at issue are approximately 134 pages or portions of pages, withheld under ss. 13, 14, 15 and 22.

MEM Inquiry #2 - The MEM identified 2653 pages of responsive records. Remaining at issue are approximately 197 pages or portions of pages, withheld under ss. 12, 13, 14, 15, 16, 17 and 22.

EAO Inquiry #1 – The EAO identified 2757 pages of responsive records. Remaining at issue are approximately 267 pages or portions of pages, withheld under ss. 12, 13, 14, 15, 16, 17 and 22.

EAO Inquiry #2 – The EAO identified 89 pages of responsive records. Remaining at issue are approximately 18 pages or portions of pages, withheld under ss. 14 or 15.

MIRR Inquiry – The MIRR identified 246 pages of responsive records. Remaining at issue are approximately 15 pages or portions of pages, withheld under ss. 12, 13, 16, 17 and 22.

MECCS Inquiry – The MECCS identified 683 pages of responsive records. Remaining at issue are approximately 42 pages or portions of pages, withheld under ss. 13, 14, 15, 16 and 22.

OOP Inquiry – The OOP identified 384 pages of responsive records. Remaining at issue are approximately 78 pages or portions of pages, withheld under ss. 12, 13, 16 and 22.

[21] The records consist of emails, memoranda, reports, drafts and other documents and correspondence responsive to the request.

Multiple exemptions for identified records

[22] In a number of cases, the Public Bodies have claimed multiple exceptions for the same record or portion of record. In this order, if I find that one of the claimed exceptions applies to a record or portion of a record, I will not review whether another exception also applies.

Duplicate copies of records

[23] A number of records at issue are duplicates.[19] In this order, my findings regarding the application of a section to a record also apply to its duplicate.

[19] This is based on my review of the records, or on the description of the records as identified by the Public Bodies for the records not provided to this office. The duplicates include records which are duplicates except for formatting, and are identified throughout this order.

DISCUSSION

Preliminary matter #1 – Actions of the Public Bodies

[24] The applicant takes the position that the actions of the Public Bodies in these inquiries "reflect a persistent pattern of conduct on the part of government to delay and deny."[20] It states that this corresponds with the government's efforts to delay and deny in other matters relating to the applicant,[21] with a view to "minimizing" the applicant's chance to successfully proceed with the Project.[22]

[25] The applicant then provides a table identifying the dates of the requests, the dates and number of additional disclosures made, and the time that has elapsed from the date of the requests to the dates of the latest releases of records in each of these files.[23] It states that in some instances the Public Bodies "trickled out" relevant information in various releases over time and only in response to complaints made by the applicant, resulting in significant delay to the applicant's access to information.[24] It also states that in some instances the Public Bodies failed to consult with affected third parties in a timely fashion under s. 21.[25]

[26] The applicant then asks that, in assessing whether the Public Bodies appropriately withheld information, consideration should also be given to the "totality of the circumstances."[26] It submits that the actions of the Public Bodies in these freedom of information requests "bring the administration of FIPPA into disrepute" and that the ultimate result of this inquiry "should be to order the substantial disclosure of additional information, as well as a rebuke of the Public Bodies' conduct, which has affected the integrity of the freedom of information process."[27]

[27] In their reply submissions, the Pubic Bodies take the position that the applicant's complaints about the actions of the Public Bodies fall outside the scope of these inquiries. They state that the applicant made no complaints with respect to the Public Bodies' duty to assist[28] prior to their submissions and, if the applicant wished to expand the scope of these inquiries to include a complaint

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[20] Applicant's submissions at para. 4.
[21] The applicant refers to the government's actions in relation to "permitting matters".
[22] Applicant's submissions at para. 4.
[23] Table set out in para. 5 of applicant's submissions.
[24] See, for example, applicant submissions at paras. 50, 60, 67, 71, 77, 78 and 87.
[25] The applicant identifies instances where, after later consulting with the third parties, the Public Body withdrew its reliance on s. 21 (and s. 17) for certain records (see, for example, applicant submissions at para. 58).
[26] The applicant argues that this includes the delays, the extensive redacting, the piecemeal disclosures, the multiple requests for adjournments, and the politically sensitive nature of the information at issue. See para. 180 of the applicant's submissions.
[27] Applicant's submissions at para. 183.
[28] Set out in s. 6 of FIPPA.

regarding the Public Bodies' performance of their duties under s. 6 of FIPPA, this ought to have been raised earlier.

[28] The Public Bodies then state that, in any event, they have "clearly fulfilled their duty to assist the applicant." They state that:

1) There was no improper delay

   - In each of these seven inquiries the OIPC granted the Public Bodies some of the requested extensions, both during the initial record production phase,[29] and in response to the Notice of Inquiry.[30] Some extensions were granted due to the large volume of records at issue, with either the applicant's consent or after giving the applicant the opportunity to respond to those extension requests.[31]
   - The fact that these inquiries proceeded simultaneously, as opposed to separately, may have resulted in additional time for the Public Bodies to prepare submissions.
   - In the course of providing their submissions, the Public Bodies produced more than 20 affidavits and seven separate written submissions.[32]
   - This has been an unprecedented and challenging exercise, involving the coordination and preparation of seven simultaneous inquiries that included more than 8,000 pages of records.

2) The continuing disclosure by the Public Bodies is not evidence of improper delay.

   - The Public Bodies met their on-going obligation to provide access, which is not suspended by the issuance of a Notice of Inquiry. In the circumstance of these inquiries,[33] the Public Bodies continually reassessed what should be disclosed to the applicant.[34]
   - Processing these files involved significant logistical challenges as they included five ministries, seven requests and seven decisions relating to

[29] Pursuant to the authority provided to it by s. 10 of FIPPA.
[30] The Public Bodies refer to the OIPC guidelines which state that an extension may be granted in "exceptional circumstances". *OIPC Guidelines: Instructions for Written Inquiries* (updated May 2017).
[31] The Public Bodies also note that, upon receiving the Public Bodies' initial submissions, the applicant also requested two extensions due to the volume of materials.
[32] The Public Bodies state that, while there was some overlap in the affidavits and submissions, each of the seven separate inquiries required its own record.
[33] Including the passage of time as these inquiries proceeded, as well as the "on-going evolution of the interests at stake."
[34] The Public Bodies refer to how the passage of time affected the possible application of ss. 13, 15, 16 and 17 to certain records.

thousands of pages. Ministry staff working on these files made an effort to ensure the consistent disclosure of information.[35]
- The table prepared by the applicant is misleading, as a relatively small number of additional disclosures were made after the inquiries began in November 2018.[36]

Findings

[29] It is clear that the applicant is frustrated by the manner in which these files have proceeded. However, I accept that these files raised significant logistical challenges because of the number of responsive records and the overlapping nature of the records and submissions. It is also clear that some of the additional time taken to process these files resulted from time extension decisions made by this office in consultation with the parties. I also accept that, generally speaking, the additional disclosures made by the Public Bodies during the processing of these files were made to ensure consistency in disclosure of documents, or to disclose additional records where the passage of time had made certain exceptions no longer applicable.[37]

[30] Furthermore, I note that in this order I uphold the Public Bodies' decisions to withhold many of the records. In the circumstances, I will not consider this issue further.

Preliminary matter #2 – Use of affidavit evidence

[31] The applicant raises two specific concerns regarding the affidavit evidence submitted by the Public Bodies.

1) The applicant submits that in some instances the evidence provided in the affidavits by the Public Bodies exceeds the proper bounds of affidavit evidence.

   The applicant argues that some of the affiants' statements go beyond facts within their direct knowledge and include inadmissible hearsay, beliefs unsupported by first-hand knowledge of the facts, argument, opinions, or

[35] The Public Bodies state that those efforts resulted in further disclosure. Prior to November 2018, no one single person had access to all of the records and would have been able to undertake that work. Failing to disclose as much information as possible, even where that information was disclosed in other inquiries being conducted simultaneously would be unacceptable. In addition, inconsistent disclosure would have caused the parties and the OIPC unnecessary confusion.
[36] The Public Bodies prepare their own table of disclosures in support of their position.
[37] The exception to this is the few additional disclosures made by the Public Bodies after eventually notifying third parties under s. 21. It is not clear to me why this was not done earlier in the processing of these files.

speculation.[38] It submits that this office should refuse to consider or place little weight on the objectionable portions.

2) The applicant refers to the "extraordinary volume of affidavit evidence" submitted by the Public Bodies" and submits that a "substantial part" of this evidence is not actually of assistance in determining whether the exemptions claimed by the Public Bodies are correctly applied.[39] The applicant submits that the narrow purpose of this inquiry (determining access to the records) should not be overwhelmed by the sheer volume of materials advanced by the Public Bodies.

[32] In response, the Public Bodies state that administrative tribunals are not bound by the strict rules of evidence and that, in the case of written inquiries before the OIPC, "contextual evidence provides the Commissioner with the factual matrix" necessary to decide whether or not the public body appropriately applied the various exceptions.[40] They also state that, in the case of harms-based exceptions, the case law requires that affiants provide sufficient context prior to asserting that harm is likely to follow the release of particular information.[41] They state that, in these inquiries, the contextual evidence provided is unchallenged and "has not been provided by either side for the truth of its content as those issues are not before the OIPC."

[33] The Public Bodies also state that hearsay evidence is acceptable in an administrative context and may be admitted by the OIPC.[42] However, they accept that this office may determine that the hearsay evidence should be given little weight and note that this determination is made, in part, by considering whether there was another person available who could have provided better evidence or more direct evidence.[43]

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[38] The applicant refers to specific examples of statements made in affidavits which it argues support it position. These include statements in the affidavits submitted in the MIRR Inquiry and the MECCS Inquiry which the applicant argues are not "facts" that can be attested to, and where the affiant offers no foundation for the statements and does not temper the statements by stating that they are their opinion or the beliefs of the public body they are employed by.

[39] Applicant's submissions at para. 94. The applicant refers in particular to the "tremendous amount of background regarding the government's general reconciliation efforts," but states that there is very little evidence regarding the actual harm that would allegedly arise from the release of specific records.

[40] The Public Bodies' reply submissions at para. 37.

[41] The Public Bodies refer to *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (*Community Safety*) and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (*Merck Frosst*).

[42] The Public Bodies refer to *Cambie Hotel (Nanaimo) ltd. V British Columbia (General Manager, Liquor Control and licensing Branch)*, 2006 BCCA 119 at para. 30 (*Cambie Hotel*), and Order F16-38, [2016] B.C.I.P.C.D. No. 42.

[43] The Public Bodies refer to Order F14-23, 2014 BCIPC No. 26 at para. 41.

Findings

[34] Regarding the applicant's concerns about the nature of the evidence contained in the affidavits, I accept that some of this information includes the beliefs, opinions or public policy comments of the affiants.[44] However, I am satisfied that this information is provided as background contextual information, and I will admit this evidence and give it the appropriate weight.[45] With respect to the concerns raised by the applicant about hearsay evidence, it is clear that administrative tribunals may admit hearsay evidence if it is relevant and can fairly be regarded as reliable, and that the weight to be given to such evidence is a matter for the adjudicating body.[46]

[35] I agree with the applicant that an "extraordinary volume" of affidavit evidence has been provided by the Public Bodies. In the seven inquiries, the Public Bodies have provided a total of 21 affidavits which, if the attachments and exhibits are included, comprise over 1000 pages of material.[47]

[36] However, I note that eight of the affidavits are sworn by lawyers in support of the Public Bodies' position that certain records qualify for exemption under s. 14.[48] Previous orders have confirmed that, where public bodies decline to provide records withheld under s. 14, affidavit evidence can be provided.[49]

[37] Regarding the other affidavits, I note that this order addresses all seven inquires. On my review of the affidavits submitted in those seven inquires, there is much overlap in the information provided because these inquiries were not initially joined. In addition, a number of the Public Bodies chose to provide portions of their submissions in affidavits (which they are entitled to do). The resulting volume of affidavits is, in the circumstances, understandable, and I will not comment on it further.

Section 14 - Solicitor client privilege

[38] Five of the Public Bodies withheld information under s. 14, and some of them withheld considerable information under that section; therefore, I will consider this section first.

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[44] This includes some of the information referenced by the applicant.
[45] See Order F16-38, 2016 BCIPC 42; Order F06-07, at para. 7.
[46] *Cambie Hotel*, *supra* note 42 at para 30, Order P07-01, para. 59.
[47] This is in addition to the 358 pages of submissions provided in the seven inquiries.
[48] Six of these affidavits were attached to the Public Bodies initial submissions in five of the inquiries, and two were attached to the Public Bodies' reply submissions.
[49] See, for example, Order F20-16, 2020 BCIPC 18. See also *Intact Insurance Company v 1367229 Ontario Inc*, 2012 ONSC 5256 at para. 22 (stating that a party was required at a minimum to provide a sworn affidavit or viva voce evidence setting out the basis of the claim to privilege). See also Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014) at §9.19.

[39] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The courts have determined that s. 14 encompasses legal advice privilege and litigation privilege.[50] The Public Bodies are claiming legal advice privilege for the withheld information.

[40] Solicitor client privilege is a foundational legal principle. As Justice Côté for the majority in *Alberta (Information and Privacy Commissioner) v University of Calgary* stated, "[t]he importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole."[51] The protection it affords ensures that clients can speak fully and frankly with their lawyers and receive appropriate legal advice. Solicitor client privilege must be jealously guarded and infringed upon only in unusual circumstances.[52] Once privilege has been established, it applies "to all communications made within the framework of the solicitor-client relationship…."[53]

[41] In the context of FIPPA, the purpose of s. 14 is "to ensure that what would at common law be the subject of solicitor-client privilege remains protected."[54] As explained in *Legal Services Society v British Columbia (Information and Privacy Commissioner)*:

> Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.[55]

[42] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal

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[50] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[51] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 [*University of Calgary*] at para. 26.
[52] *University of Calgary*, *ibid* at paras. 34–35.
[53] *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC) [*Descôteaux*] at p. 893.
[54] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 (leave to appeal denied) [*Lee*] at para. 31 relying on *Legal Services Society v British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 [*Legal Services*] at para. 35.
[55] *Legal Services, ibid* at para. 35, referencing *Legal Services Society v. The Information and Privacy Commissioner of the Province of B.C.*,1996 Can LII 1780 (BC SC) at para. 26.

advice. In order for legal advice privilege to apply to a communication (and records related to it), the communication must:

1) be between a solicitor and client;
2) entail the seeking or giving of legal advice; and
3) the parties must have intended it to be confidential.[56]

[43] 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.[57] Legal advice privilege also extends to internal client communications that discuss legal advice and its implications,[58] as well as communications involving a lawyer's support staff, and communications dealing with administrative matters if the communications were made with a view to obtaining legal advice.[59] The protection given to these communications ensures that the party seeking the information is unable to infer the nature and content of the legal advice sought or received.[60] As stated by the Supreme Court of Canada:

> … a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.[61]

Records

[44] The Public Bodies are relying on s. 14 to withhold information from approximately 344 pages or portions of pages in five of the inquiries.[62] The records consist mostly of emails and email chains, some with attachments. The Public Bodies chose not to provide the records for my review. They rely instead on their submissions, the affidavit evidence from lawyers and others, and the

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[56] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837.
[57] *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*] at paras. 40-46.
[58] *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para. 12; *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.
[59] *Descôteaux*, *supra* note 53 at p. 892-893; *Oleynik v Canada (Privacy Commissioner)*, 2016 FC 1167 at para. 60.
[60] *Lee*, *supra* note 54, at para. 39, quoting *Camp, supra* note 54 at para. 46.
[61] *Descôteaux*, *supra* note 53 at p. 892-893.
[62] The withheld records are found in the following files: *MEM Inquiry #1* (approx. 80 pages or portions of pages); *MEM Inquiry #2* (approx. 63 pages or portions of pages); *EAO Inquiry #1* (approx. 187 pages or portions of pages); *EAO Inquiry #2* (25 pages); and *MECCS Inquiry* (portions of 2 pages).

Schedules to the lawyers' affidavits which contain indexes with descriptions of the records.

[45] A number of the records withheld under s. 14 are duplicates.[63] As previously stated, my findings on a record will apply to the duplicates.

The parties' position under s. 14

[46] The Public Bodies in each of these files review in considerable detail the manner in which s. 14 has been applied by the courts and this office. The Public Bodies then refer to the fact that the Taseko file is a complex transaction involving "protracted dealings" and several ministries, and that it has been ongoing for a number of years. They provide evidence regarding the context and content of the Taseko matter, including information related to environmental assessments generally and the facts and matters concerning the environmental assessment processes related to the Project. They also state that the "legal advice" component of solicitor-client privilege must be viewed in the context of the continuum of communications as between the lawyers and clients on the Taseko file, a "complex file with various ongoing matters, across several ministries and on a broad range of issues, including hearings and applications, and the variety of issues that necessarily arise on complex transactions or matters such as these."[64]

[47] In each of the five files in which the Public Bodies claim that s. 14 applies, the Public Bodies provide affidavit evidence from lawyers involved in providing the legal advice. The Public Bodies initially provided the following six separate affidavits from lawyers with the Legal Services Branch (LSB) of the Ministry of Attorney General:

MEM Inquiry #1 – affidavit from Lawyer E.R. (dated March 14, 2019).

MEM Inquiry #2 - affidavit from Lawyer E.R. (dated March 14, 2019).

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[63] The duplicates include the following records or portions of records (some of which are duplicates except for formatting) and I will not consider them further: *MEM Inquiry #1*: pp. 995-998, 999-1000, 1002-1003,1004-1005 and 1006-1007 are duplicates of pp. 990-994, p. 1039 is a duplicate of the withheld portion of p.1035, and pp. 1667 and 1748, 1759, 1765 and 1771 are duplicates of the withheld portions of p.1642; *MEM Inquiry #2*: pp. 379, 381, 404, 665, 667, 2585, 2590, 2592 and 2594 are duplicates of the withheld portion of p. 377, the withheld portion of pp. 1088 and 1090 are duplicates of the withheld portion of p. 1078, and the withheld portion of p. 2007 is a duplicate of the withheld portion of p. 1998; *EAO Inquiry #1*: the withheld portions of pp. 417 and 418 are duplicates of the withheld portion of p. 415, the withheld portion of p. 513 is a duplicate of the withheld portion of pp. 511-512, and the withheld portion of p. 550 is a duplicate of the withheld portion of p. 549.

[64] The Public Bodies make these statements in each of their submissions in the files where s. 14 has been claimed. The Public Bodies also provide affidavits sworn by senior members of the MEM and the EAO in support of these statements.

EAO Inquiry #1 – affidavit from Lawyer E.R (dated March 14, 2019) and affidavit from Lawyer C.J. (dated Feb 22, 2019).

EAO Inquiry #2 - affidavit from Lawyer C.J. (dated Feb 22, 2019).[65]

MECCS Inquiry - affidavit from Lawyer E.R (dated March 14, 2019).

[48] The Public Bodies state that, in these inquiries, their approach was to list each document in Schedule 1 of the lawyers' affidavits in a way that "indicates how the record fits within the claimed privilege."[66]

[49] In each of the affidavits from Lawyers E.R. and C.J., the affiants depose that:

- Each of them is a lawyer with LSB.
- Each provides legal advice to employees of the government of British Columbia on matters including environmental assessments.
- For a portion of the material time (the search period covered by each of the relevant requests) each lawyer was in a solicitor-client relationship with the Government of British Columbia in relation to Taseko's proposed gold/copper mine matter (the Project).
- At the material times, matters ongoing regarding Taseko included the federal environmental assessment process of Taseko's proposed mine and the application for extension and amendment of the provincial environmental assessment certificate.
- Within the formal solicitor-client relationship each lawyer was involved in confidential communications and exchanges of information related to the provision of legal advice and was kept apprised of work by ministry clients on relevant matters so that they would be in a position to provide legal advice.
- Other LSB Legal Counsel gave advice on the files as well.
- All the advice and related information in the s. 14 records listed in Schedule 1 to their affidavits was made within the solicitor-client relationship and was confidential.

[65] There was initially some confusion regarding this affidavit, which the Public Bodies ultimately provided to the applicant on May 24, 2019.
[66] The Public Bodies refer to *Canadian Natural Resources limited v. ShawCor Ltd*, 2014 ABCA 289, at para. 9; also paras. 45 and 50.

- Each lawyer reviewed Schedule 1 to their affidavits and the documents listed in Schedule 1.
- All the s. 14 information relates to legal advice provided directly to clients, communications falling within the continuum of communications, and/or information which, if disclosed, would allow accurate inferences to be made as to the legal advice sought or given.
- Also included are discussions between ministry clients about legal advice received or (in the case of some of the affidavits) legal advice intended to be sought.

[50] Attached to each of the affidavits is a Schedule 1 with descriptive information about the record or portion of record for which s. 14 is claimed. The Public Bodies state that the descriptions of the documents in these schedules indicate how solicitor-client privilege applies to each record.

[51] The Public Bodies then state that the affidavits of the lawyers as well as the affidavits of the ministry clients provide "significant content and context" supporting the elements for solicitor-client privilege, and confirm the existence of the formal solicitor-client relationship between LSB lawyers and ministry employees. In addition, the Public Bodies provide evidence that the communications between solicitors and clients were confidential.[67]

[52] As noted, the applicant provided one set of submissions in response to the submissions of the Public Bodies in the seven files. With respect to the information withheld under s. 14, the applicant's general position can be summarized as follows:

- Solicitor-client privilege is not a shield for the withholding of any information that is tangentially connected to the seeking of legal advice or merely copied to lawyers internally employed by government.[68]
- Not all information communicated between a solicitor and a client is privileged - it must be directly related to seeking, formulating, or giving legal advice.[69]
- The privilege generally does not extend to communications with outside third parties.[70]

[67] The Public Bodies refer to the nature of the records, the confidentiality obligations on government employees, and the express sworn statements in the lawyers' affidavits that the communications were confidential.
[68] Applicant's submissions, para. 127.
[69] Applicant's submissions, para. 131. The applicant refers to Orders F07-11, 2007 CanLII 30396 (BC IPC) and F15-52, 2015 BCIPC 55.
[70] Applicant's submissions, para. 132.

- Privilege does not apply to a communication "solely because it was copied to the public body's lawyer."[71]

[53] The applicant also argues that, in the five files in which s. 14 is claimed, the Public Bodies have given "broad and generally vague" descriptions regarding the information they are withholding pursuant to s. 14, which limits the applicant's ability to challenge the claims of privilege.

[54] In addition, the applicant identifies concerns about the application of s. 14 to records where the description of the records simply refers to clients speaking of the need to seek legal advice, and states that this is insufficient to establish the application of s. 14.[72]

[55] In their reply submissions, the Public Bodies reiterate their position. They also address the applicant's concerns about records where the description of the records refers to clients speaking of the need to seek legal advice. In addition, the Public Bodies provide two further affidavits sworn by legal counsel.

Analysis and Findings

[56] Based on the evidence provided by the Public Bodies and on the description of the records as set out in Schedule 1 to each of the affidavits of the Lawyers E.R. and C.J., I am satisfied that legal advice privilege applies to most of the records for which the Public Bodies claim s. 14.

[57] To begin, I accept the sworn testimony of Lawyers E.R. and C.J. regarding the nature of the documents and the descriptions of the records set out in Schedule 1 to their affidavits. Each of them is a practicing lawyer with LSB, and they depose that they were in a solicitor-client relationship with the Government of British Columbia in relation to the Project, that they provided legal advice and were involved in confidential communications and exchanges of information related to the legal advice, and were kept apprised of the work by ministry clients on relevant matters so that they would be in a position to provide legal advice.

[58] In addition, each lawyer also deposes that they reviewed the documents listed in Schedule 1 to their affidavits and the descriptions of the documents as set out in those Schedules. They depose that when those descriptions refer to "ministry clients", these include government employees in the subject ministry and other ministries (as the case may be) who were involved in matters relating to the Project. They also depose that, in addition to them, other lawyers within the LSB are referred to as "LSB Legal Counsel" in the Schedules to the affidavits

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[71] Applicant's submissions, para. 132. The applicant refers to Order F07-13, 2007 CanLII 30398 (BC IPC) at para. 35.

[72] Applicant's submissions, paras. 134 and 135.

because they also provided, or assisted with the provision of, legal advice to ministry clients on these matters.

[59] Furthermore, based on the evidence provided by the Public Bodies, including the lawyers' affidavits and the affidavits of the ministry clients who provide the context regarding how legal counsel were involved, I am satisfied that the LSB lawyers involved in these communications were involved in their role as legal counsel, and were not involved for purposes other than seeking, formulating and giving legal advice. The Public Bodies confirm that legal advice was sought from legal counsel by ministry clients involved in the complex Taseko file, which involved "various ongoing matters, across several ministries and on a broad range of issues, including hearings and applications." In addition, based on the evidence provided, I am satisfied that the communications at issue were confidential.

[60] In light of the above, I make the following findings regarding the specific records at issue.

Email communications involving legal counsel

[61] A number of the records for which s. 14 is claimed are described as emails or email chains sent between LSB legal counsel and ministry clients.[73] The schedules to the lawyer's affidavits identify the dates of the email or email chains, and the identities of the primary ministry staff members who were involved in these emails. The descriptions also identify whether the emails included other staff members.

[62] In addition, each of the descriptions identify that these emails either request legal advice, refer to legal advice that was provided, or relate to the legal advice that was provided.

[63] For the reasons set out above and based on the descriptions of the records, I am satisfied that legal advice privilege applies to these emails between LSB Legal Counsel and ministry clients. I find that these communications relate directly to the seeking, formulating and giving of legal advice by legal counsel to their clients. In the circumstances, I am satisfied that these emails represent a true "back and forth" between counsel and clients for the purpose of seeking, formulating and giving legal advice.

Email communications between ministry staff/clients referencing legal advice

[73] EAO Inquiry #1 pp. 420-421, 511-512, 568-571, 1708-1714, 1715-1722, 1723-1729 and pp. 110-111, 652-656, 657-685, 1061-1065, 1253-1257, 1262-1266, 1276-1283, 1292-1303, 1322-1324, 1463-1468, 1470-1471 (first email), 1472-1481, 1482-1489 and 1506-1514; EAO Inquiry #2 pp. 2-3, 13-25 (last 2 email strings); MEM Inquiry #1 pp. 366-367 and 1113; MEM Inquiry #2 pp. 2021-2027.

[64] A number of the records are described by the lawyers swearing the affidavits as email communications between ministry staff/clients which refer to legal advice requested from LSB legal counsel, or refer to legal advice received from LSB legal counsel.[74] The schedules to the lawyer's affidavits identify the dates of the email or email chains, and the identities of the primary ministry staff members. In some instances, only small portions or sentences from an email have been redacted.

[65] For the reasons set out above and based on the descriptions of the records, I am satisfied that the legal advice privilege applies to these internal client communications between ministry clients that discuss legal advice and its implications.[75] I am satisfied that disclosure of the redacted information in these communications would reveal solicitor-client privileged information or would allow persons to accurately infer the legal advice sought or given.

Email communications between ministry staff/clients referencing the need to seek legal advice

[66] A number of the records are described by the lawyers in the initial affidavits as email communications between ministry staff/clients which refer to legal advice "to be obtained."[76]

[67] As noted above, the applicant identifies concerns about the application of s. 14 to records where the description in the Schedules to the affidavits simply refers to clients speaking of the need to seek legal advice.[77] It notes that this evidence is insufficient because it does not confirm whether those clients did in fact seek legal advice.[78] It states that "an internal Ministry discussion regarding whether to seek legal advice does not satisfy the section 14 test."[79] It states:

> There are numerous instances in these inquiries where no evidence is advanced as to whether legal advice was in fact later obtained, and no

[74] MEM Inquiry #1 pp. 1028-1031, 1063-1066, 1069-1076; MEM Inquiry #2 pp. 377, 676-677, 697, 699-700, 1078, 1683 and pp. 106-107, 803, 1187, 1268-1275 (second email), 1284-1286, 1398-1399, 1470-1471 (second email), 1557, 1559-1560, 1571-1575; EAO Inquiry #2 pp. 13-25 (1st email string). This includes, in some cases, drafts of these emails. (Some of these emails were also identified as being copied to LSB legal counsel).

[75] See *Bank of Montreal v Tortora*, 2010 BCSC 1430 at para. 12; *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.

[76] The applicant refers to the following pages (some of which are duplicates as noted above): MEM Inquiry #1 pp. 990-994, 995-998, 999-1000, 1002-1003, 1004-1005, 1006, 1007, 1008-1012, 1035-1036, 1039-1040, 1642-1644, 1665-1669, 1747-1750, 1751-1753, 1755, 1757, 1758-1762, 1763-1768, and 1767-1779; MEM Inquiry #2 pp. 717-719, 1599, 1600, 1601, 1616-1617, 1618-1619, 1620-1621, 1622-1623 and 1630-1631.

[77] Applicant's submissions at paras. 134-137.

[78] The applicant refers to Order F17-23, 2017 BCIPC 24 at para. 49 in support.

[79] Applicant's submissions at para. 134.

> evidence is given as to whether disclosing the redacted information would in any way reveal confidential communications with legal counsel.[80]

[68] In their reply submissions, the Public Bodies state that "there is no established legal principle articulated in the general law that statements of intention to obtain legal advice are not part of the continuum of communications." They state that solicitor-client privilege protects the relationship of solicitor and client, and the client's ability to consult with their solicitor in confidence. They refer to the extension of the privilege to the "continuum of communications" which provides for "a broad context of enabling legal advice to be sought and given in confidence."[81] They state that the same rationale that extends the privilege to discussions among employees after legal advice was obtained, applies to the continuum of communications at the beginning, when there are discussions around the intent to seek or obtain that legal advice.[82]

[69] The Public Bodies then state that, in any event, for many of the documents which fall within this category and refer to the need to seek legal advice, legal advice was ultimately obtained. The Public Bodies provide the following two supplemental affidavits in support of the s. 14 claim:

> MEM Inquiry #1 – affidavit #2 from Lawyer E.R (dated June 3, 2019).
>
> MEM Inquiry #2 – affidavit #2 from Lawyer E.R. (dated June 3, 2019).

[70] In these supplemental affidavits, the lawyer deposes that, with one exception, the communications between ministry staff/clients referencing the need to seek legal advice ultimately resulted in legal advice being sought in relation to the redacted information. The one exception is the reference to seeking legal advice in the email at p. 1035 of MEM Inquiry #1.[83] The Public Bodies state that, for this email, ministry clients have not been able to confirm whether legal advice was obtained, and Lawyer E.R. was also unable to confirm whether any LSB lawyer ultimately provided the legal advice referenced.[84] In her supplemental affidavit in this file, Lawyer E.R. identifies how, in her initial affidavit

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[80] Applicant's submissions at para. 135.
[81] The Public Bodies' reply submissions at para. 63.
[82] The Public Bodies state that it would be anomalous if employees would be protected in their discussions about legal advice obtained at one end of the continuum but not the intent to obtain it at the other. They state that employees must be able to speak to each other about the intent to obtain legal advice and have the discussion in confidence. See Public Bodies' reply submissions at para. 64.
[83] Although the reference in the affidavit is to pp. 1035-1036, the redacted information is only contained on p. 1035. This is the same for the duplicates on pp. 1039 – 1040, where the sole redaction is on p. 1039.
[84] Public Bodies' reply submissions at para. 66.

on this record, she may have confused the reference to legal advice as being in relation to information in another communication.[85]

[71] Regarding p. 1035 of MEM Inquiry #1, the evidence from the Public Bodies is that this email is between ministry staff, and that the redacted portion of this email refers to "legal advice intended to be obtained from Legal Counsel." However, the Public Bodies have not been able to confirm that legal advice was obtained or provided regarding this communication.

[72] Order F17-23 addressed a similar situation, and stated:

> 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.[86]

[73] I agree with the above and find that, in the absence of sufficient evidence to establish that the disclosure of the redacted information on p. 1035 would reveal actual communication between legal counsel and their client, s. 14 does not apply to this information.

[74] However, regarding the other records which the Public Bodies initially identified as referring to legal advice intended to be obtained, the supplemental affidavits of Lawyer E.R. confirm that legal advice was ultimately sought and obtained for all of the other referenced records. In these circumstances, I am satisfied that the ministry clients did seek legal advice regarding the information discussed in these communications. Based on the evidence provided, I find that disclosure of the remaining communications referring to the need to seek legal advice would reveal the legal advice that was sought, and that s. 14 applies to these records.

Attachments to emails

[75] A number of the email communications referenced above include attachments as part of the identified pages of emails. In the descriptions of the documents set out in the schedules to the affidavits of Lawyers E.R. and C.J., the attachments are described as either being the subject of the requested legal advice, containing the referenced legal advice, or relating to the legal advice.

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[85] MEM Inquiry #1 – affidavit #2 from Lawyer E.R. at para. 7.
[86] Order F17-23, 2017 BCIPC 24 at para. 49.

[76] In the circumstances and based on the evidence provided, I am satisfied that the attachments to the emails form an integral part of the communications which I have found relate to the seeking, formulating and providing of legal advice. In my view, these attachments form part of the "continuum of communications" between a solicitor and client aimed at keeping both informed so that advice may be sought and given as required. Accordingly, I find that s. 14 applies to the attachments.

Other documents:

[77] A few of the records withheld under s. 14 are either not email communications or attachments, or raise other issues. My findings on them are as follows:

[78] *MEM Inquiry #1: draft document (pp. 259-286)* - In Schedule 1 to Lawyer E.R.'s initial affidavit in MEM Inquiry #1, these pages are described as a draft document relating to the Project "that was the subject of the legal advice from LSB Legal Counsel, as referenced for the record at page 366, below."

[79] Pages 366-367 are described as an email chain between ministry staff which was forwarded to LSB Legal Counsel, and I have found that s. 14 applies to that email chain. The description of those pages states that legal advice was sought and received from LSB Legal Counsel "on the document that is the record at pp. 259-286."

[80] Based on the evidence provided and the description of the records, I am satisfied that disclosure of the draft document would reveal legal advice or would allow persons to make accurate inferences as to the legal advice sought or given, and that s. 14 applies to this document.

[81] *MEM Inquiry #2: internal ministry email (pp. 678-679)* - This record is described in Lawyer E.R.'s initial affidavit as an email communication between ministry clients forwarding an email sent to LSB Legal Counsel. The applicant raised a concern that, based on the limited description of this record, it is unclear how its disclosure would reveal legal advice.

[82] In the supplemental affidavit by Lawyer E.R., she deposes that legal advice was sought and obtained in relation to the information redacted from these pages. As a result, I am satisfied that disclosure of the redacted information would reveal legal advice or would allow persons to make accurate inferences as to the legal advice sought or given, and that s. 14 applies to these pages.

[83] *MEM Inquiry #2: draft correspondence (pp. 1669-1676)* - In Schedule 1 to Lawyer E.R.'s initial affidavit in MEM Inquiry #2, these pages are described as

"Draft correspondence related to [the Project], that is the subject of the legal advice sought and obtained from LSB Legal Counsel referred to … in the description of the document at page 1683."

[84] Page 1683 is email correspondence between ministry staff and LSB Legal Counsel, which I have found is privileged. Based on the evidence provided and the description of the records, I am satisfied that disclosure of the draft correspondence on pp. 1669-1676 would reveal legal advice or would allow persons to make accurate inferences as to the legal advice sought or given. As a result, s. 14 applies.

[85] *MECCS Inquiry: Portions of an Information Note (pp. 140 and 141)* - In Schedule 1 to Lawyer E.R.'s affidavit in the MECCS Inquiry, the pages within which these redactions are made are identified as an EAO Information Note on an issue related to the Project. Schedule 1 also states: "Redacted from the Information Note is a reference to legal advice received from LSB Legal Counsel."

[86] Based on the evidence provided and the description of the records, I am satisfied that disclosure of the redacted information would reveal legal advice, and that s. 14 applies to it.

[87] *EAO Inquiry #1: Draft correspondence (pp. 1241-1250)* - In Schedule 1 to Lawyer C.J.'s affidavit in EAO Inquiry #1, pages 1241-1250 are described as "[Three] drafts of proposed correspondence on matters related to the environmental assessment processes regarding [the Project]." The description states that each of these drafts reflect legal advice received from LSB Legal Counsel.

[88] Based on the evidence provided and the description of the records, I am satisfied that disclosure of the draft correspondence would reveal legal advice or would allow persons to make accurate inferences as to the legal advice sought or given, and that s. 14 applies.

[89] *EAO Inquiry #1: Attachment to an email chain (p. 1290)* - Pages 1289-1291 are identified as an email chain between named ministry staff. The description identifies a draft document attached to the email. The description then reads: "The information withheld from that attachment [on p. 1290] is a reference to legal advice that had been requested from LSB Legal Counsel."

[90] Based on the evidence provided and the description of this record, I am satisfied that disclosure of the redacted information would reveal legal advice that has been sought, and that s. 14 applies to this information.

Summary – s. 14

[91] In summary, I find that solicitor-client privilege applies to most of the records for which the Public Bodies claim the s. 14 exception. However, I find that I have not been provided with sufficient evidence to establish that s. 14 applies to the redacted information on p. 1035 of MEM Inquiry #1.[87] As no other exception has been claimed for this redaction, I will order that it be disclosed.

Section 12(1) - Cabinet confidences

[92] Section 12(1) of FIPPA requires a public body to withhold information that would reveal the substance of deliberations of Executive Council (also known as Cabinet) and any of its committees. Section 12(1) specifically includes any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[93] The purpose of s. 12(1) is to protect the confidentiality of the deliberations of Cabinet and its Committees, including committees designated under s. 12(5).[88] Past OIPC orders and court decisions have recognized the public interest in maintaining Cabinet confidentiality to ensure and encourage full discussion by Cabinet members.[89]

[94] Determining whether information is properly withheld under s. 12(1) involves a two-part analysis. The first question is whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. In *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner) [Aquasource]* the BC Court of Appeal said that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.[90] According to *Aquasource*, the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee's deliberations.[91]

[95] The second step in the s. 12 analysis is to decide if any of the circumstances under s. 12(2) applies, in which case the information cannot be withheld under s. 12(1). Only s. 12(2)(c) is a possible relevant circumstance in this case. Section 12(2)(c) states the following:

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[87] And its duplicate on p. 1039 of MEM Inquiry #1.

[88] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.

[89] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 69, and the reference therein to *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para. 18.

[90] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, 1998 CanLII 6444 (BC CA) [*Aquasource*] at para. 39.

[91] *Ibid* at para. 48.

> (2) Subsection (1) does not apply to …
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,
> (ii) the decision has been implemented, or
> (iii) 5 or more years have passed since the decision was made or considered.

Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."[92] However, any information of a factual nature which is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).[93]

The parties' positions

[96] Four of the Public Bodies claim s. 12(1) applies to certain redacted information.[94]

[97] Each of the Public Bodies provides general submissions in support of their position that s. 12 applies to the withheld records. The Public Bodies refer specifically to the wording of s. 12(1) and (5), and confirm that, during the material times, Treasury Board was designated as a committee for the purposes of section 12(5).[95] The Public Bodies also state that s. 12 "legally obligates that any information that would reveal the substance of the Executive Council and any of its committees (collectively referred to as "Cabinet") deliberations not be disclosed by the public body when it is responding to an access to information request."[96]

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[92] Order No. 48-1995, July 7, 1995 at p. 12. The Court in *Aquasource* confirmed that Order No. 48-1995 correctly interpreted s. 12(2)(c) in relation to s. 12(1). Other BC Orders that have taken the same approach include Order 01-02, 2001 CanLII 21556 (BC IPC), and Order F19-38, 2019 BCIPC 43.

[93] Order No. 48-1995, July 7, 1995 at p. 13 and *Aquasource*, *supra*, note 90 at para. 49.

[94] Being MEM Inquiry #2, EAO Inquiry #1, the MIRR Inquiry and the OOP Inquiry. However, in MEM Inquiry #2, the MEM withheld portions of pages 2340, 2343, 2344, 2345, 2348 and 2353 under s. 12. The withheld portions of pages 2340 (duplicated on pages 2343, 2345 and 2348) and the one-line response found on page 2344, are duplicates of the information on pages 191 and 192 of the MIRR Inquiry, and I will not review the withheld pages in MEM Inquiry #2 further. My decision about the application of s. 12 to the MIRR Inquiry information applies equally to the duplicate information in MEM Inquiry #2.

[95] The Public Bodies reference the *Committees of the Executive Council Regulation*, BC Reg 229/2005, s. 1(b), now BC Reg 156/2017, s. 1(a).

[96] See, as an example, the initial submissions made in the MIRR Inquiry at para. 41.

[98] The Public Bodies also state that the purpose of s. 12 is to ensure that Cabinet is able to deliberate freely. They then refer to the *Aquasource* decision as the appropriate test which they say focuses on the nature of the information, rather than its distribution. They acknowledge that "[s]imply because information is provided to Cabinet does not automatically require that it be withheld pursuant to section 12."[97] They also cite previous OIPC orders that have said that s. 12 is:

> … broad enough to encompass a document that was not submitted to Cabinet, but would nonetheless reveal the substance of its deliberations. The issue is whether disclosure of the withheld information - alone or in connection with other available information - would directly reveal, or allow an applicant to draw accurate inferences about, the substance of the deliberations.[98]

[99] The Public Bodies submit that the information severed under s. 12 in this case meets this test. The Public Bodies in each of these files also provide specific evidence, including affidavit evidence, in support of their positions.

[100] The applicant states that the Public Bodies' position on applying s. 12 should be carefully reviewed, as s. 12 should not be applied in a manner that is "overbroad." The applicant then provides specific submissions regarding the application of s. 12 to specific records.

[101] In their reply submissions, the Public Bodies reiterate their position, and also say that s. 12 not only requires that information be withheld if it would reveal the substance of Cabinet deliberations, but also if it would permit the drawing of accurate inferences about those deliberations.[99]

Specific records – submissions, analysis and findings:

MIRR Inquiry (portions of pages 78-80, 191, 192, 193, 195 and 203)

[102] The MIRR takes the position that for all of the records for which it claims s. 12, except p. 203, the severed information refers to the deliberations of Treasury Board, a Cabinet Committee designated for the purposes of section 12(5). The MIRR also submits that releasing the information in any of the records would either disclose the substance of deliberations or allow an "assiduous" seeker of information to infer the substance of those deliberations contrary to section 12.

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[97] See, as an example, the initial submissions made in the MIRR Inquiry at para. 58.
[98] This quote is taken from Order F15-39, 2015 BCIPC 42 para. 16, citing Order F14-51, 2014 BCIPC 55 (CanLII) para. 16.
[99] Public Bodies' reply submissions, at para 46, referencing *Aquasource*, *supra* note 90 at para. 39.

[103] In support of its position that s. 12 does not apply, the applicant notes that some of the information in certain emails "was composed after the decision was made by the Treasury Board (a Cabinet committee) and was not part of a document submitted (or prepared for submission) to Cabinet (or its Committee)" and that "[a] discussion of the implications of a decision that has already been made does not fit within the section 12 exception."[100] The applicant also submits that at least some of the withheld information must be disclosed pursuant to subsection 12(2)(c) of FIPPA.

[104] *Portions of pages 78-80*[101] - The MIRR states that the records found at pages 78-80 are a decision note and attachments prepared for Cabinet. It then relies on the affidavit sworn by the Deputy Minister of the MIRR who asserts that s. 12 has been applied to withhold information about the deliberations of Treasury Board.

[105] The applicant refers to pages 78-80 as an example of information which should be disclosed pursuant to subsection 12(2)(c). It states:

> The … affidavit says that the Decision Note and associated attachments were prepared for a decision of the [the Minister of Aboriginal Relations and Reconciliation (as it then was)] …. As the Minister's decision on the agreement has long ago been implemented, and the agreements are public and published on the government of British Columbia's website, subsection 12(2)(c) of FOIPPA provides that the background information provided to the Minister is not exempted from disclosure.[102]

[106] In reply, the MIRR states that, with respect to pages 78 - 80, it "relies on the content of the record in support of its position that s.12 was properly applied to withhold the information."

[107] On my review of pages 78-80, I am satisfied that s. 12 applies to the first sentence in the first withheld paragraph on p. 78, and the first sentence in the last withheld paragraph on p. 80. I find that disclosure of these two sentences would reveal the substance of deliberations of Treasury Board, a Cabinet Committee. I am also satisfied that s. 12(2)(c) does not apply to this information. Although the first sentence is contained in the "background" portion of the decision note, I find that it does not contain "background explanations or

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[100] I note these submissions were made with reference to MEM Inquiry #2, in which some duplicate copies of records withheld in this MIRR inquiry were at issue. In that inquiry, different affidavit evidence was provided by the MEM; however, as I am considering these emails in this MIRR inquiry, I will also consider the applicant's submissions made in MEM Inquiry #2 that s. 12 does not apply to the information in these emails.

[101] The MIRR has withheld select information from these pages including two paragraphs on p. 78, one paragraph on p. 79, and two paragraphs on p. 80.

[102] Applicant's submissions at para. 103.

analysis" for the purpose of s. 12(2)(c), and that its disclosure would reveal the substance of the deliberations of Treasury Board.

[108] However, I find that s. 12(1) does not apply to the other information contained on pages 78-80. I am not satisfied that the disclosure of this other information would reveal the substance of the deliberations of Cabinet or one of its committees.[103]

[109] *Portions of pages 191, 192, 193 and 195* - The MIRR provides submissions in support of its position that the withheld portions of these records qualify for exemption under s. 12 because:

> - the portion of p. 191 is an email that discusses past and (then-current) Treasury Board and Cabinet deliberations;
> - the portion of p. 192 is part of an email which confirms information provided by Treasury Board; and
> - the portions of pp. 193 and 195 are part of an email that includes references to Treasury Board deliberations.

[110] The MIRR provides an affidavit sworn by the Deputy Minister of the MIRR in support of its position that s. 12 applies to the withheld portions of these records. The affidavit also provides additional *in camera* information in support of the position that s. 12 applies.

[111] The withheld information consists of two redacted portions from the emails on page 191, three lines severed from an email on page 193 (duplicated on page 195) and a one-line response found on page 192. I accept that the withheld emails were not part of a document prepared for submission to a committee of Cabinet, and were in fact composed after a Cabinet decision was made. However, based on my review of the records themselves and the MIRR's submissions, I am satisfied that disclosure of the information would reveal the substance of deliberations of Treasury Board, or allow accurate inferences to be made about those deliberations. I am also satisfied that none of this information constitutes "background explanations or analysis" for the purpose of s. 12(2)(c).

[112] *Portion of page 203* - The MIRR states that the Record found at page 203 is an email that references the development of Cabinet Submissions, and that disclosure of this information could readily enable someone to accurately infer the substance of Cabinet deliberations.

[113] In the affidavit sworn by the Deputy Minister of the MIRR, this individual deposes that the information that has been severed from p. 203 "discusses the development of a series of Cabinet Submissions," and that disclosure of this

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[103] The MIRR has also claimed that s. 16 applies to the severed information on pp. 78 -80.

information would allow accurate inferences to be made about the substance of Cabinet deliberations.

[114] On my review of the four lines of information redacted from an email on page 203, I am satisfied that the information refers to the development of certain Cabinet Submissions, and that disclosure would allow the substance of deliberations of Cabinet to accurately be inferred. I also find that s. 12(2)(c) does not apply to this information. As a result, I find that s. 12 applies to the redacted information on p. 203.

EAO Inquiry #1

[115] The EAO submits that the withheld information on page 1613 is a calendar entry that, if disclosed, would reveal the subject of the matters discussed at Treasury Board, a committee of the Executive Council. On my review of this brief redaction, I am satisfied that it would reveal what was discussed at Treasury Board, and that s. 12 applies to it.

OOP Inquiry

[116] The OOP withheld a number of pages or portions of pages under s. 12.[104] In its specific submissions on the records at issue, the OOP states that, with respect Cabinet Presentations:

> When a Ministry or Crown Corporation has an item on the agenda at a Cabinet meeting, it will often prepare materials in advance of the meeting. These materials may include PowerPoint presentations, Cabinet Summary Sheets, informational tables or other documents. It provides those materials to Cabinet Operations who distributes them to Cabinet Ministers. Ministers may use these materials to prepare for the Cabinet meeting and may bring these materials to the Cabinet meeting.[105]

[117] The OOP also states that after a Cabinet meeting, Cabinet Operations prepares minutes of the meeting and Records of Decisions that are provided to the appropriate Ministry. The OOP also provides two affidavits in support of its position on s. 12.[106]

[118] The applicant states that the affidavits relied on by the OOP indicate that many of the records at issue in the OOP Inquiry are being withheld because they were relied upon by Cabinet when it conducted its deliberations. It states that, to

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[104] Pages or portions of pages 29, 31-43, 88, 95, 96, 99-108, 111-115, 117, 337-351, 352, 361, 362, 365-375, 378-382 and 384.

[105] OOP Inquiry, initial submissions at para. 61.

[106] These affidavits are sworn by the Executive Director, Cabinet Operations, OOP, and the Director of Executive Operations, Deputy Minister's Office, OOP.

the extent that any of the records provide background explanations or analysis for decisions previously made public or implemented, then s. 12 does not apply.

[119] *Pages 29 and 31-43* - The OOP states that these pages are a PowerPoint presentation provided to Cabinet and relied on by Cabinet when it conducted its deliberations. It states that the release of this information would reveal the substance of Cabinet deliberations, as "it shows Cabinet made a decision based on a number of presented options." It then states:

> The fact that this presentation was relied on by Cabinet in making its decision is supported by the Records of Decision … attached as *in-camera* exhibits.[107]
>
> Based on [one of the Records of Decision] …, disclosing the title slide found at page 29 of the record would disclose the substance of Cabinet deliberations.[108]
>
> With respect to the record at page 31, disclosing the information would reasonably lead to an accurate inference about what Cabinet considered and deliberated on …. On that basis, section 12 … has been applied to withhold the information.[109]

[120] Pages 29-43 consist of portions of a PowerPoint presentation. Based on my review of the evidence and the withheld information, I am satisfied that disclosure would reveal the substance of deliberations of Cabinet or allow accurate inferences to be made about the deliberations, and that s. 12 applies to this information.

[121] I have considered the applicant's submissions that background information ought to be disclosed. I note that the "Background" portion of the presentation is found on pages 30-32, and portions of these pages have been disclosed to the applicant. I am satisfied that disclosure of the withheld portions of the "Background" would allow accurate inferences to be made about the deliberations. I am also satisfied that s. 12(2)(c) does not apply to this information. Although some of the redacted information contains some background or factual information, I find that this information is interwoven with advice and policy considerations, and is not considered "background explanations or analysis" under s. 12(2)(c).

[122] *Pages 88, 95, 96, 99-108, 111-115 and 117 (substantially similar information on pp. 352, 361, 365-375, 378-382 and 384)* - The OOP states that these pages are a PowerPoint presentation provided to Cabinet and relied on by

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[107] It references the affidavit of the Director of Executive Operations, Deputy Minister's Office, OOP, at paras. 8-13, and two *in camera* exhibits.
[108] It references affidavit #1 of the Director of Executive Operations, Deputy Minister's Office, OOP, at para. 12, and an *in camera* exhibit.
[109] It references affidavit #1 of the Director of Executive Operations, Deputy Minister's Office, OOP, at paras. 14-16.

Cabinet when it conducted its deliberations at an identified meeting.[110] It also states: "With respect to the records at page 88 and 352, given the Record of Decision, the release of the information on these records would disclose the substance of Cabinet deliberations or permit someone to infer the subject of those deliberations… ."[111]

[123] The OOP also provides an affidavit sworn by the Director of Executive Operations, Deputy Minister's Office, OOP, in support of the above. The affiant deposes that releasing the withheld information on pages 88-117 and 352-384 "would disclose the substance of Cabinet deliberations."[112]

[124] Based on the evidence provided by the OOP and my review of the records, I find that disclosing the information withheld on these pages would reveal information considered by Cabinet or allow accurate inferences to be made about that information and that s. 12 applies.

[125] I also find that s. 12(2)(c) does not apply to this information. I note that portions of these pages have been disclosed. With respect to the remaining withheld information, although some of this information contains some background or factual information, I find that this information is interwoven with advice and policy considerations, and is not considered "background explanations or analysis" under s. 12(2)(c).

[126] *Pages 337-351* - The OOP states that these pages are a Cabinet Decision Summary Sheet and a Cabinet Submission from the then-Ministry of Aboriginal Affairs and Reconciliation and the Ministry of Energy and Mines. It states that those records were considered at identified Cabinet meetings and that the Records of Decision from those Cabinet meetings expressly reference these records.[113]

[127] Based on the evidence provided by the OOP and my review of the records, I find that disclosing the information withheld on pages 337-351 would reveal information considered by Cabinet, and would reveal the substance of Cabinet deliberations or allow accurate inferences to be made about them. As a result, I am satisfied that s. 12 applies. In addition, I find that any withheld factual information is interwoven with advice and policy considerations, and is not considered "background explanations or analysis" under s. 12(2)(c).

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[110] It references affidavit #1 of the Director of Executive Operations, Deputy Minister's Office, OOP, paras. 17-22, and an *in camera* exhibit.
[111] OOP Inquiry initial submissions at para. 67.
[112] Affidavit #1 of the Director of Executive Operations, Deputy Minister's Office, OOP, paras. 23-24. The Director also provides additional *in camera* information in support.
[113] It references the affidavit of the Executive Director, Cabinet Operations, OOP, paras. 9-12, and *in camera* exhibits.

Summary

[128] In summary, I find that s. 12 applies to all of the records for which it is claimed, except for certain portions of pp. 78-80 in the MIRR Inquiry. As the MIRR has also claimed s. 16 for those pages, I will consider the remaining withheld portions of those pages under s. 16.

Section 13 - Advice or Recommendations

[129] The Public Bodies withheld information under s. 13(1) in six of the inquiries.[114]

[130] 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-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."[115]

[131] 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.[116]

[132] I adopt the principles identified in those decisions 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.[117]

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[114] MEM Inquiry #1, MEM Inquiry #2, EAO Inquiry #1, MECCS Inquiry, MIRR Inquiry and the OOP Inquiry.
[115] Order 01-15, 2001 CanLII 21569 at para. 22
[116] See, for example: *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (*College*); Order 02-38, 2002 CanLII 42472; Order F17-19, 2017 BCIPC 20; Review Report 18-02, 2018 NSOIPC 2 at para. 14.
[117] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 at para. 19.

- 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.[118]
- "Advice" has a broader meaning than the term "recommendations."[119] Advice also includes an opinion that involves exercising judgement and skill to weigh 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.[120]
- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice.[121] 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.[122]

[133] If I find that disclosing the information would reveal advice or recommendations, I will then consider if any of the categories listed in ss. 13(2) or (3) applies. Sections 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).

Positions of the parties on s. 13 generally

[134] The Public Bodies that rely on s. 13 all provide lengthy submissions on various aspects of how s. 13 has been interpreted. They refer to a number of the decisions set out above, including the rationale of exempting advice and recommendations from disclosure as described by the Supreme Court of Canada.[123] They also note that the British Columbia Court of Appeal stated that s. 13 of FIPPA "recognizes that some degree of deliberative secrecy fosters the decision-making process"[124] and that "the deliberative process includes the investigation and gathering of facts and information necessary to the consideration of specific or alternative courses of action."[125]

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[118] *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras. 23-24, considering *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 13 (the equivalent to s. 13 of BC's FIPPA).
[119] *Ibid* at para. 24.
[120] *College*, *supra* note 116 at para. 113.
[121] *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.
[122] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[123] *John Doe v. Ontario (Finance)*, *supra* note 118, para. 45. See also Order F17-23, 2017 BCIPC 24 (CanLII) at para. 12.
[124] *College*, *supra* note 116 at para. 105.
[125] *Ibid* at para. 106.

[135] In addition, the Public Bodies note that "advice" includes policy options, whether communicated to anyone or not.[126] The Public Bodies also note that many decisions of the Commissioner have held that information concerning options and the implications of those options are protected under s. 13(1).[127]

[136] Regarding s. 13(2), the Public Bodies note that "factual material" in s. 13(2)(a) differs from factual information. They submit that none of the information withheld under section 13(1) is "factual material" and no other subsections of s. 13(2) apply. In the alternative, they submit that the information withheld under s. 13 that may be considered factual material is inextricably interwoven with and integral to the advice and recommendations and the implications of the advice and recommendations, and cannot be reasonably severed.

[137] The Public Bodies also state that s. 13(3) has no application in these files, as the records at issue in this inquiry were not created more than 10 years ago.

[138] Each Public Body relying on s. 13 to withhold records provides specific submissions on the application of s. 13(1) to each of the records or portions of records for which they are claimed. In each of the files, the Public Bodies also provide this evidence through affidavits sworn by the individuals who created the records or who were familiar with how and why they were created. These affidavits identify the circumstances resulting in the creation of the records and who created them, and identify the specific information they assert contains the advice or recommendations, or would reveal that information.

[139] The applicant refers to the general approach to the application of s. 13, as set out in previous decisions. It then states that, given the volume and scope of what the Public Bodies have redacted under subsection 13(1), it is likely that the Public Bodies treated subsection 13(1) as a blanket exception applying it to these pages in their entirety without any evidence that the Public Bodies exercised their discretion under subsection 13(1). The applicant also states that the Public Bodies must exercise their discretion in deciding to apply s. 13, and refers to the considerations that they should take into account in exercising that discretion.[128]

[140] The applicant also states that the OIPC has construed the meaning of advice and recommendations developed for a public body narrowly in its decisions. It argues that, for information to constitute advice, it must be offered to

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[126] *John Doe v. Ontario (Finance)*, *supra* note 118.
[127] Reference to Order 02-38, 2001 CanLII 21582 (BC IPC) at para. 135 and to Order F13-01, 2013 BCIPC 1 (CanLII) at para. 14 which found that " … options, implications, and recommendations" were all were protected by s. 13(1).
[128] The applicant refers to the considerations identified by former Commissioner Loukidelis in Order 02-38, *ibid* at para. 149.

inform a specific decision,[129] and be connected to the deliberative process.[130] It also states that this would not include "heads up" information-sharing such as communicating personal opinions or giving instructions to a subordinate,[131] and that any such withheld information, which does not allow an inference about advice or recommendations to be made, must be disclosed.

[141] The applicant also lists various categories of information that are not eligible to be withheld pursuant to subsection 13(1) including "speculative assertions" or questions that do not reveal recommendations or advice,[132] and issues that are referred to, but not identified, and contain no discernible recommendations or advice in the surrounding sentences.[133]

[142] The applicant also addresses a number of the affidavits provided by the Public Bodies in support of the s. 13(1) claim, and submits that, in many instances, the information described in the affidavits is not "advice or recommendations" for the purposes of s. 13(1) because, in some instances:

- it is not advice or recommendations developed by or for the public body, as it was not offered to inform a specific decision of the public body or minister or connected to the deliberative process;[134]
- the evidence fails to identify any decision or deliberative process engaged in by the public body;[135] and
- the descriptions of some of the records in certain affidavits are insufficient to establish that s. 13 applies, or appear to include questions and/or factual information that do not reveal recommendations or advice.[136]

[143] In their reply submissions, the Public Bodies state that, in asserting that information must be offered to inform a specific decision of the public body or minister and be connected to the deliberative process in order to constitute

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[129] The applicant refers to Order F12-15, 2012 BCIPC 21 (CanLII) at para. 14.
[130] The applicant refers to Order F12-15, *ibid* at para 14, quoting Order F05-06, 2005 CanLII 11957 (BC IPC) at para. 16.
[131] The applicant references Order F15-52, 2015 BCIPC 55 (CanLII) at para. 25.
[132] The applicant refers to Order F12-01, 2012 BCIPC 1 (CanLII).
[133] *Ibid*.
[134] The applicant refers to specific sections of the affidavits sworn by the Deputy Chief Inspector of Compliance and Enforcement with MEM in MEM Inquiries #1 and #2.
[135] The applicant refers to specific sections of the affidavits sworn by the Deputy Chief Inspector of Compliance and Enforcement with MEM in MEM Inquiries #1 and #2. It states that the affidavits refer to written submissions developed and submitted by the public body to the federal review in a federal environmental assessment process, and argues that although the federal environmental assessment was a decision of federal decision-makers, the public body was not itself engaged in any decision-making process.
[136] The applicant refers to particular pages of the affidavits submitted in MEM Inquiry #2, the MIRR Inquiry, EAO Inquiry #1 and the OOP Inquiry.

advice, the applicant has mischaracterised the current state of the law with respect to this point. They refer to various orders which have applied s. 13.[137] They then refer to the SCC decision which they state determined that the meaning of "advice" in access to information statutes is in fact broad.[138]

Analysis and findings on s. 13(1)

[144] I must make findings on access to the records for which the Public Bodies have claimed s. 13. These do not include records which qualify for exemption under other sections of FIPPA, duplicate copies of records or records where s. 13 is claimed in the submissions but no redactions are actually made on the referenced page.[139]

[145] Based on my review of the submissions of the parties, the affidavits, and the records, I find that a number of the redactions and parts of the redactions are advice or recommendations or would enable the reader to make accurate inferences about advice or recommendations. I find that the balance of the information withheld under s. 13, however, is not advice and recommendations, nor would it reveal any such information. My findings are set out below.

[146] In making my findings I note that, contrary to the position taken by the applicant, the large majority of the redactions made to the records under s. 13 are brief redactions made to specific sentences or paragraphs on a page. Section 13 was not applied in a blanket fashion to pages "in their entirety," as suggested by the applicant.[140]

MEM Inquiry #1

[147] Page 844: The handwritten notes, which were redacted from this portion of a draft submission, contain advice on how to respond to a particular matter, and s. 13 applies.

[148] Page 851: The redactions on this page are notes of an individual's summary of certain submissions made to the federal review panel. Although the

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[137] The Public Bodies take issue with the applicant's reliance on Order F12-15, 2012 BCIPC No. 21 and refer to Orders F14-57, 2014 BCIPC 61 and F17-43, 2017 BCIPC 47 as supporting the view that what constitutes "advice and recommendations" within the meaning of s. 13 can include general advice about a file and that there is no requirement that it be linked to a specific decision.
[138] They refer to *John Doe v. Ontario (Finance)*, *supra* note 124 at paras. 29 – 33. They state that the SCC concluded that, absent the operation of subsection 13(2), "advice" could have been interpreted so broadly that it included objective factual information. They state that the legislature's decision to specifically exclude objective information from being captured by subsection 13(1) confirms the potentially broad meaning "advice" under subsection 13(1).
[139] MEM Inquiry #1, p. 1773.
[140] This is based on my review of the pages for which I considered the s. 13 exemption. I cannot comment on the pages which I have found qualify for exemption under s. 14, and which were not provided to this office.

MEM takes the position that they are the author's assessment of those submissions, I am not satisfied that disclosure would reveal advice or recommendations for the purpose of s. 13.

[149] Page 925: The brief redacted handwritten comment in the margin of this page identifies an individual's opinion on a particular matter. After reviewing this redaction and the supporting affidavit relating to this page, I am not satisfied that disclosure would reveal confidential "advice or recommendations" under s. 13.

[150] Page 1103: The redacted portion of this draft document includes a recommendation as a brief comment in the margin. Disclosure of this redaction would reveal a suggested course of action, and s. 13 applies.

[151] Page 1624 (duplicates at pages 1625 and 1627): The redacted portions of these email exchanges would reveal advice regarding a particular matter.

[152] Page 1665: The redacted portions of this page contain an individual's advice or recommendations on a draft letter (including his views and comments which would reveal the advice), and s. 13 applies.

[153] Pages 1697, 1699, 1700-1701, 1703-1706, 1721, 1723, 1725, 1726-1727, 1729 and 1731-1733: The brief redactions made to the emails on these pages contain advice and recommendations made to the Minister by staff about recommended messaging in response to a media request. Many of them are similar to each other, and include specific recommendations,[141] emails between staff relating to the development of the recommended messaging which would reveal the recommendations,[142] and/or requests for recommended messaging which, in my view, would reveal the recommendations.[143] As a result, s. 13 applies to this information.

MEM Inquiry #2[144]

[154] Page 1080: The two brief redactions made to this page (which is a string of emails) include brief comments regarding the authors' assessments of a matter, and a request to have a document drafted, with some general suggestions. I am not satisfied that the redacted information on this page constitutes "advice or recommendations" under s. 13.

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[141] Redactions on pp. 1699, 1703, 1706, 1721, 1725, 1729 and 1733.
[142] Redactions at pp. 1700, 1704, 1722, 1726 and 1731.
[143] Redactions on pp. 1697, 1701, 1705, 1723, 1727 and 1732.
[144] The other records in this file for which the MEM claimed s. 13 are either exempt from disclosure under other sections, or are duplicates of other records in other inquiries. The duplicates are the following: The redacted portion of page 700 is a duplicate of the redacted portion of page 141 in the MECCS inquiry; the redacted portion of page 1478 is a duplicate of the redacted portion of p. 844 in MEM Inquiry #1, and the redacted portion of p. 1544 is a duplicate of the redacted portion of page 925 in the MEM Inquiry #1.

[155] Pages 1608, 1705, 1712, 1940 and 1947: These pages relate to drafts of a letter to be sent by the ministry, and include email and handwritten comments and input from ministry staff. The redacted portions of these pages contain "advice or recommendations" or would reveal such information.

[156] Page 1986: The brief redaction appears to simply be a request for information, and I am not satisfied that it contains or would reveal s. 13 information.

[157] Page 1994: The portion of this page redacted under s. 13 contains a brief comment regarding a suggested approach and course of action to take regarding a particular matter, and disclosure would reveal advice or recommendations.

[158] Page 2006: The redacted portion of this email contains a ministry staff member's views, comments and advice on a draft letter. The redactions contain "advice or recommendations" or would reveal such information.

[159] Page 2082: The two paragraphs redacted from this email contain an assessment of a particular matter, including the author's views on how an issue should be managed, and his advice on how to proceed.[145] I find that the redactions contain "advice or recommendations" or would reveal such information.

[160] Page 2085: The brief redaction to the email on this page contains the author's views on how to proceed on a particular matter, and disclosure would reveal the author's advice.

[161] Pages 2120, 2124 and 2134: The brief redactions to these pages are notes taken during conference calls and a meeting, and contain advice provided by participants. Disclosure would reveal the advice of the participants.

[162] Page 2160: The redactions on this page, which is a draft version of a briefing note, list various options, and s. 13 applies.

[163] Page 2415: The brief redaction of a comment in the margin of this letter contains the author's advice on a particular matter, and s. 13 applies.

[164] Page 2416 (duplicate at page 2417): The brief redaction to this email relates to advice given by the author of the email, and s. 13 applies.

[165] Page 2460: The two brief redactions on this page relate to advice on a particular matter.

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[145] Some of the affidavit evidence in support the application of s. 13 to this record was provided *in camera*.

[166] Page 2561: There are three brief redactions to an email on this page. The second and third redactions contain specific advice or recommendations about how to proceed in particular negotiations, and I am satisfied that s. 13 applies to them. However, the first redaction simply contains factual information, and s. 13 does not apply to it.[146]

[167] Page 2608: The three sentences redacted from an email on this page contain advice and recommendations about a strategy and approach to an identified issue, and s. 13 applies to this information.

MECCS Inquiry

[168] Page 1 (duplicate at page 148): Redacted from this page is one portion of a paragraph, which contains the author's advice about the consequences of choosing a particular course of action, and also contains a specific recommendation.

[169] Page 141: The redacted portion of this page identifies four specific options. Previous decisions have confirmed that options can constitute advice or recommendations.[147] In the circumstances, I find that s. 13 applies to the redacted options on this page.

[170] Page 648: Redacted from this page (which is part of an Information Note) is one paragraph. I find that most of this paragraph simply provides background information about a matter, and is not advice or recommendations under s. 13, nor would it reveal such information. However, the last sentence of this paragraph identifies the author's view on the possible consequences of a particular course of action, and I find that s. 13 applies to that one sentence.[148]

MIRR Inquiry

[171] Page 185: There are two brief paragraphs redacted from an email on this page. Disclosure of the second paragraph would reveal advice or recommendations of the author, or allow accurate inferences to be made regarding the advice. However, the first paragraph does not contain such information, and I am satisfied that s. 13 does not apply to it.[149]

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[146] The MEM also claims that s. 17 applies to this information.
[147] See for example Order F13-01, 2013 BCIPC No. 1 at para. 14.
[148] The MECCS also claims that s. 16 applies to this information.
[149] The MIRR also claims that s. 22 applies to this information.

EAO Inquiry #1[150]

[172] Page 1609: The three brief notations redacted from the "Comments" portion of this record contain recommendations on how to address identified issues, and s. 13 applies to them.

OOP Inquiry

[173] Pages 10-12 (duplicates at pages 127 and 132): On my review of the information severed from pages 10 -12, I find that much of the information does not contain advice or recommendations. Much of the withheld information is factual or background information.

[174] However, I find that the first sentence redacted from the first redacted portion of page 10 does constitute advice for the purpose of s. 13. This sentence identifies the author's view regarding the possible outcomes of certain actions, and I find that disclosure of this sentence would reveal the author's advice. I am also satisfied that the last redacted sentence on page 12 contains advice or recommendations under s. 13. However, I find that the remaining redacted portions of pages 10 - 12 do not contain s. 13 information, and that s. 13 does not apply to them.[151]

Sections 13(2) and (3)

[96] As noted above, I have found that s. 13(1) does not apply to some of the information for which that section is claimed.[152] With respect to the remaining information, I have considered whether any of the factors under ss. 13(2) or (3) apply to this information and conclude that neither s. 13(2) nor s. 13(3) apply. To the extent that any of this remaining information also contains factual information, this information is interwoven with the advice or recommendations. Therefore, I conclude the Public Bodies are authorized to withhold this information under s. 13(1).

Summary

[175] In summary, I find that s. 13(1) does not apply to some of the information the Public Bodies are refusing to disclose under that exception. Where that

[150] The only record in this file for which I must make a finding under s. 13 is the redacted portion of p. 1609. The other records in this file for which the EAO claimed s. 13 are either exempt from disclosure under other sections, or are duplicates of other records. The duplicates are the following: The redacted portions of pp. 553, 558 and 564 are duplicates of the redacted portion of p. 141 in the MECCS inquiry; the redacted portions of pp. 1428 and 1636 are duplicates of the redacted portion of p. 648 in the MECCS inquiry; and the redacted portion of p. 1694 is a duplicate of the redacted portion of p. 1 in the MECCS inquiry.

[151] The OOP also claims s. 16 applies to this information.

[152] In some cases this is because the redacted information is factual or background information.

information has also been withheld under another exception, I will consider it again below. The only information that I find may not be withheld under s. 13(1), and which is not also withheld under another exception, is on pages 851 and 925 of MEM Inquiry #1 and pages 1080 and 1986 of MEM Inquiry #2.

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

[176] The Public Bodies state that the information remaining at issue which is withheld under s. 15(1)(l) consists of conference call ID numbers for individuals to be able to participate in work-related calls.[153] The applicant states that it does not take issue with the application of s. 15 to conference call ID numbers.[154] I have reviewed all of the portions of the records for which the Public Bodies claim s. 15(1)(l). I find that all of these withheld portions of records consist of conference call ID numbers.[155] As a result, I will not consider the information withheld under s. 15 as part of this inquiry since it is no longer in dispute.

Section 16 – Harm to intergovernmental relations

[177] Section 16 allows a public body to withhold information that could reasonably be expected to harm the conduct of relations between the government of British Columbia and another government. The relevant portions of s. 16 read as follows:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> …
>
> (iii) an aboriginal government;
>
> …
>
> (c) harm the conduct of negotiations relating to aboriginal self government or treaties.

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[153] The MIRR initially applied s. 15 to other types of records, however, the MIRR indicated in its submissions that it was no longer relying on the s. 15 exemption claim (para. 10). The Public Bodies refer to Order F17-23, 2017 BCIPC 24 as an order in which s 15(1)(l) applied to conference call ID numbers.

[154] Applicant's submissions at para. 140.

[155] This includes the moderators' conference ID numbers, participant code numbers, or conference code numbers found on the following pages: *MEM Inquiry #1*: pp. 980, 1001, 1106, 1156, 1371, 1666, 1747, 1748, 1758, 1759, 1764, 1765, 1770 and 1771; *MEM Inquiry #2*: pp. 1681, 1997, 1998, 2006, 2007 and 2134; *EAO Inquiry #1*: pp. 1218, 1550, 1611, 1616, 1619, 1620, 1622-1625, 1614, and 1628-1631; *EAO Inquiry #2*: pp. 1, 64 and 65; and *MECCS Inquiry*: pp. 3, 4 and 5.

> (2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of
>
> (a) the Attorney General, for law enforcement information, or
>
> (b) the Executive Council, for any other type of information.
>
> …

[178] Five of the Public Bodies take the position that ss. 16(1)(a)(iii) and/or 16(1)(c) apply to the withheld portions of certain records.[156]

[179] Sections 16(1)(a) and (c) are harms-based exceptions. The question under these sections is whether disclosure of the information in dispute could reasonably be expected to result in the identified harms. The "reasonable expectation of harm" standard lies between "that which is probable and that which is merely possible."[157] The Public Bodies are required to provide evidence "well beyond" or "considerably above" a mere possibility of harm.[158] It is the disclosure of the information itself that must give rise to a reasonable expectation of harm.[159]

Preliminary issue: Nature of evidence required to establish harms

[180] The Public Bodies acknowledge that the standard set out above, established by the Supreme Court of Canada in *Community Safety*, applies. They then note that the decision specifically stated that "the inquiry is *contextual* and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the 'inherent probabilities or improbabilities or the *seriousness of the allegations or consequences*…'."[160] [emphasis added by the Public Bodies].

[181] The Public Bodies in each of the files then provide extensive submissions in support of their position that the quantity and quality of the evidence required to meet this standard for ss. 16(1)(a)(iii) and 16(1)(c) should be "relatively modest and should be made up of both subjective and objective evidence." I will not repeat all of their submissions in detail; however, in support of their position, the Public Bodies refer to a number of factors including the following:

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[156] The following redacted records are duplicates. OOP Inquiry: the redactions on pp. 122 and 127 are duplicates of p. 10; the redaction on p. 132 is a duplicate of a portion of p. 11; EAO Inquiry #1: pp. 1428 and 1636 are duplicates of the redacted information from the MIRR Inquiry p. 648; the redaction on p. 1528 is a duplicate of p. 1526.
[157] *Community Safety*, *supra* note 41 at para. 54, citing *Merck Frosst*, *supra* note 41.
[158] *Ibid*.
[159] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43 (*Citizens' Services*).
[160] Reference to *Community Safety*, *supra* note 41 at para. 54, citing *Merck Frosst*, *supra* note 41, at para. 94.

- the important interests protected by s. 16 (the ability of the province to build relationships and negotiate with external entities);

- the unique features of s. 16 (that it includes both harms-based and non-harms-based sections, and that the Executive Council must consent to the release of any information to which section 16 applies), as identified in s. 16(2);

- that ss. 16(1)(a)(iii) and 16(1)(c) enable the Provincial Government to work with Indigenous groups in such a way that mutual trust and confidence can be established and maintained, and that it creates the necessary conditions for the confidential pursuit of constitutionally mandated negotiations (both treaty and non-treaty) and reconciliation;

- the constitutional and legal dimension of the Provincial Government's relationship with Indigenous groups;

- the unique relationship between the Crown and Indigenous peoples; and

- the "unquantifiable" consequence of the breakdown of a relationship between the Provincial Government and any Indigenous group, as well as the negative effects on both Indigenous and non-Indigenous peoples which may result from less land/resource based economic activity.

[182] The Public Bodies then provide submissions stating what they believe the evidence required to prove a "reasonable expectation of probable harm" should be for these sections.

[183] The applicant objects to the position taken by the Public Bodies, and provides lengthy submissions refuting the Public Bodies' arguments.

[184] In reply, the Public Bodies provide further submissions is support of their position. They also state that "the evidence provided in these inquiries meets or exceeds [the standard set by the Supreme Court of Canada in *Community Safety*],"[161] and that they have provided "the best available evidence from persons who are familiar with the context, the relationship at issue and who can provide their professional opinion about the consequences of releasing the information."[162]

Findings

[185] Both parties, and the Public Bodies in particular, have provided lengthy submissions on this issue. However, both parties acknowledge that the Supreme

[161] Public Bodies' reply submissions at para. 80.
[162] Public Bodies' reply submissions at para. 82.

Court of Canada in *Community Safety* has clearly established the standard of proof for harms-based exemptions.

[186] Furthermore, it is clear that the Court in *Community Safety* was aware of the fact that the various types of harms-based exemptions found in access to information legislation apply in a variety of circumstances including those relating to federal-provincial affairs, international affairs, National Defence, law enforcement, law enforcement investigations, safety of individuals, and a government's economic interests.[163] The Court found that the "reasonable expectation of probable harm" formulation should be used wherever the "could reasonably be expected to" language is used in access to information statutes. I note that the Court specifically rejected the argument that a lower standard should apply where, for example, the protection of personal safety was at issue, as opposed to some other interests such as third-party interests.[164]

[187] With respect to the nature of the evidence required to establish the harms in a given instance, the Court confirmed that a public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm. However, as noted by the Public Bodies, the Court also stated: "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 the 'inherent probabilities or improbabilities or the seriousness of the allegations or consequences'."[165]

[188] I will accordingly apply this standard in my review of the application of s. 16 to the records.

Section 16(1)(a)(iii) – relations with aboriginal governments

[189] Five of the Public Bodies have redacted information on the basis that disclosure could reasonably be expected to harm the conduct of relations between the government and aboriginal governments.

Do the identified First Nations qualify as "aboriginal governments"?

[190] Under FIPPA, "aboriginal government" means an aboriginal organization exercising governmental functions.[166] Previous OIPC orders have found that the term "aboriginal government" is not limited to bands or groups that have

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[163] The SCC refers to these categories found in the exemptions set out in the Federal Access to Information Act. See *Community Safety*, *supra* note 41 at para. 53 referencing *Merck Frosst*, *supra* note 41 at para. 195.
[164] *Community Safety*, *supra* note 41 at para. 55.
[165] *Community Safety*, *supra* note 41, at para. 54, also citing *Merck Frosst*, *supra* note 41 at para. 94, citing *F.H. v. McDougall*, [2008] 3 S.C.R. 41, at para. 40.
[166] See FIPPA, Schedule 1.

concluded self-government agreements or treaties.[167] In Order 01-13, former Commissioner Loukidelis held that "at the very least, an 'aboriginal government' includes a 'band' as defined in the Indian Act (Canada)."[168]

[191] The Public Bodies provide submissions in support of their position that the redacted information relates to "aboriginal governments" within the meaning of FIPPA, including information relating to the Tŝilhqot'in Nation, as well as information relating to other aboriginal governments.

[192] With respect to the Tŝilhqot'in Nation, the Public Bodies state:

> In this case, the Provincial Government was working with the Tŝilhqot'in Nation through the Tŝilhqot'in National Government. The Tŝilhqot'in National Government is made up of a number of Indigenous groups that are recognized as "bands" within the meaning of the *Indian Act* and therefore are "aboriginal governments" for the purposes of section 16(1)(a) and "aboriginal self government" for the purposes of section 16(1)(c).[169]

[193] Regarding the information relating to other aboriginal governments, the Public Bodies provide submissions in support of their position that the withheld information relates to Indigenous groups that the Provincial Government considers to be "aboriginal governments" within the meaning of FIPPA. For example, in the MIRR Inquiry, the affidavit in support of the submissions states that the identified Indigenous groups are "aboriginal governments" within the meaning of FIPPA on the basis that they are:

> a. a band within the meaning of the *Indian Act* (whether referred to by their traditional name or their band name);
>
> b. participating in or have completed the Treaty Process; or
>
> c. part of or provide a representative function. In some cases, an Indigenous group(s) has provided the Provincial Government with written direction to negotiate with a certain entity as their representative, such as where that entity is a part of a traditional governance structure.[170]

[194] The other Public Bodies relying on s. 16 similarly provide submissions in support of their view that the Indigenous groups named in the records are "aboriginal governments" within the meaning of FIPPA. In most cases the submissions refer to specifically named aboriginal governments.[171]

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[167] Order 01-13, 2001 CanLII 21567 at para. 14, citing Order No. 14-1994, [1994] BCIPCD No. 17.
[168] Order 01-13, 2001 CanLII 21567 at para. 14.
[169] See EAO initial submissions, EAO Inquiry #1 at para. 227.
[170] Affidavit of the Deputy Minister, MIRR in the MIRR Inquiry at paras. 45-47.
[171] Some of this evidence, including the identity of certain aboriginal governments, was provided *in camera*.

[195] The applicant does not address this issue.

[196] I accept the evidence provided by the Public Bodies and, based on that evidence and the manner in which "aboriginal government" has been interpreted in previous OIPC orders,[172] I am satisfied that the information redacted on the basis of s. 16(1)(a)(iii) and (c) relates to "aboriginal governments" within the meaning of FIPPA.

Harm to the conduct of relations.

[197] The Public Bodies begin by identifying that the Provincial Government's interaction with Indigenous groups is guided by its commitment to build a true and lasting reconciliation.[173] They state that doing so includes negotiating and entering into a variety of agreements which support Indigenous groups to exercise their inherent right to self-determination and self-government.[174]

[198] The Public Bodies then confirm that the Provincial Government negotiates various types of agreements with Indigenous groups ranging from treaties to revenue-sharing agreements, and from shared decision-making agreements to land stewardship agreements.[175] They also identify that the Provincial Government must continue to consult, negotiate, collaborate and build the necessary trusting relationship with the Tŝilhqot'in National Government and with all Indigenous groups so that it can fulfill its constitutional obligations to them.[176]

[199] The Public Bodies then state that building trusting relationships and negotiating agreements requires that each party have confidence that their conversations will be kept confidential and be held on a without-prejudice basis. They state that releasing information about the subject matter of negotiations or how negotiations are proceeding would breach that trust, harming the relationship not only with the Indigenous group, but also with other Indigenous groups who would assume that if the Provincial Government would breach the trust it shared with one Indigenous group, it may very well breach it in other cases like their own.[177]

[200] The Public Bodies identify that a number of the withheld records relate to the Provincial Government's work with the Tŝilhqot'in Nation through the Tŝilhqot'in National Government. Some of the records also include information about other Indigenous groups. They refer to the information redacted from specific pages at issue and state that, in addition to the reasons set out above,

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[172] Order 01-13, 2001 CanLII 21567 and Order No. 14-1994, [1994] BCIPCD No. 17.
[173] See, for example, EAO Inquiry #1, EAO initial submissions at para. 225.
[174] *Ibid*.
[175] See, for example, EAO Inquiry #1, supporting affidavit at para. 64.
[176] *Ibid*, at para. 80.
[177] See, for example, EAO Inquiry #1, EAO initial submissions at para. 226.

release of the identified information would harm the Provincial Government's relationship with the Tŝilhqot'in Nation and other Indigenous groups for a number of reasons including:

- that the information discussed is confidential, and release would be a breach of the trust and confidence essential to the ongoing relationship between the Provincial Government and the Tŝilhqot'in Nation and/or other Indigenous groups;
- that redacted information which includes the Provincial Government's impression of how the identified negotiations are going and the status of those negotiations could be misinterpreted and be used to damage the relationship with Tŝilhqot'in Nation and/or with other Indigenous groups;
- that disclosure of the "provincial negotiating positions" taken during negotiations could damage future negotiations; and
- that release of certain information about identified negotiations would also harm the Provincial Government's relationship with other Indigenous groups because the Provincial Government was pursuing a particular type or topic within that negotiation, which it may not be pursuing with the other Indigenous group.

[201] The Public Bodies also refer to a recent decision by the Ontario Information and Privacy Commissioner, Order PO-3817-I, in which the equivalent provision to s. 16[178] was addressed in the context of records of negotiations between the Provincial Ministry and a local First Nation. The information at issue in that decision is described as essentially documenting the "give and take" of the negotiation process, including opinions regarding past negotiations, the parties' positions, and the development of the course of action that was negotiated between the parties.[179] The Public Bodies refer to the adjudicator's findings that information "that could reasonably be expected to weaken intergovernmental relations …, including when collaboration is necessary for resource management" should not be released.[180] They also note that the adjudicator found that the release of the information would be taken as a sign of "bad faith"' by both the relevant First Nation as well as "by other first nations with whom the provincial government continues to negotiate."[181]

[202] The Public Bodies also provide submissions about the application of s. 16(1)(iii) to other types of information, identified below.

[203] For each of the redactions made under s. 16, the Public Bodies provide affidavits in support of their position that the identified harms would result. The Public Bodies state that these affidavits are sworn by "persons with knowledge of

[178] Being s. 15 of the *Ontario Freedom of Information and Protection of Privacy Act*.
[179] Ontario IPC Order PO-3817-I, 2018 CanLII 15253 (ON IPC) at para. 53.
[180] *Ibid*. at para. 57.
[181] *Ibid*. at para. 59.

the records, the relationship at issue and the potential harms that could befall the Provincial Government if the information was released."[182] The Public Bodies in each of these files also identify the experience and the roles and responsibilities of these individuals, and how they are qualified to speak about the nature of the relationship between the Provincial Government and the relevant Indigenous group.

[204] Some of the submissions provided by the Public Bodies, as well as some of the affidavit evidence, was properly received *in camera*.

[205] The applicant takes the position that the evidence tendered by the Public Bodies is insufficient to support the reasonable expectation of harm. It refers to Order F18-14 as an example of an order where the adjudicator determined that the public body failed to establish that there is a reasonable expectation of harm to the conduct of relations with the entity because the Ministry's evidence on harm relied on the drawing of inferences which she considered to be speculative. The adjudicator in that order held that the Ministry had not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harm.[183]

[206] The applicant then points to several instances where it says the Public Bodies' evidence is insufficient to establish the alleged harms:

> - Instances where it states the affidavits lack sufficient evidence to support a "clear and direct connection" between disclosure of the particular information and any harm to the conduct of negotiations.[184]
> - Instances where the applicant says the Public Bodies refer to the reasonable expectation of harm because the information "could be misinterpreted or incorrectly interpreted" or would reveal "the Provincial Government's internal parameters of negotiation (as they were at the time)". It states that concerns about possible misinterpretations are entirely speculative, and that it is not clear how releasing information on past internal parameters would affect the conduct of current negotiations or relationships with aboriginal governments.[185]

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[182] These individuals are the Deputy Minister with the Ministry of Indigenous Relations and Reconciliation (or its predecessor) who swore the affidavits in the MIRR and OOP Inquiries; the MEM Assistant Deputy Minister, Mines, Health Safety and Enforcement Division who swore the affidavit in MEM Inquiry #2; the Associate Deputy Minister and Executive Director, Environmental Assessment, who swore the affidavit in the EAO Inquiry #1; and the Regional Director of Mining Operations, Environmental Protection Division of the MECCS, who swore the affidavit in the MECCS inquiry.

[183] Order F18-14, 2018 BCIPC 17 (CanLII) at para. 34.

[184] The applicant refers specifically to the affidavit of the ADM in MEM Inquiry #2. It also refers to the affidavits of the MIRR DM in the MIRR and OOP Inquiries.

[185] The applicant refers specifically to the instances where these concerns are raised in the affidavits in MEM Inquiry # 2, EAO Inquiry #1 and the MECCS Inquiry. It states that these affidavits are "extremely vague and fall far short of providing evidence as to how the release of

Analysis and Findings

[207] I have reviewed the redacted information, and the parties' submissions and supporting affidavits. My findings are set out below.

Information relating to specific discussions or negotiations

[208] A number of the redactions made to the records are brief excerpts from emails or other documents which contain discreet, specific information about the progress of certain identified discussions or negotiations.[186] Some of these redactions relate to the Project, and others relate to other discussions and/or negotiations. The redactions include information identifying the specific positions taken by the Tŝilhqot'in Nation, the relevant Indigenous group or the BC government in these discussions or negotiations while these discussions or negotiations were proceeding. This includes, in some cases, the government staff member's comments on those positions.

[209] For each of the discreet redacted portions of records, the Public Bodies provide affidavits referring to the harm that would result to the relationship between the Provincial Government and the Indigenous group with whom it was negotiating. They say that disclosure of the details of the negotiations would be a breach of the "trust and confidence necessary to engage in meaningful and successful negotiations".[187]

[210] Based on my review of the redacted information and the evidence submitted by the Public Bodies, I am satisfied that s. 16(1)(a)(iii) applies to the withheld information. The redacted information identifies the specific positions and strategies taken by the Tŝilhqot'in Nation, the relevant Indigenous group and/or the government during the discussions or negotiations. This includes, in some cases, the government's assessment of the Tŝilhqot'in Nation's or the relevant Indigenous group's position. On my review of these specific redactions and the affidavit evidence, I am satisfied that disclosure of these portions of the records could reasonably be expected to harm the conduct of the government of British Columbia's relations with aboriginal governments.

[211] I have considered the applicant's concerns about the sufficiency of the evidence; however, I am satisfied that disclosure of the brief redacted portions of

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this specific information will actually harm relationships with either the Tsilhqot'in or other aboriginal governments."

[186] MEM Inquiry #2: p. 2092 (one short severance), pp. 2469-2471 (withheld portions of a briefing note), p. 2624 (two redacted sentences); EAO Inquiry #1: p. 472 (two withheld paragraphs), p. 1526 (redacted 5-line paragraph); MIRR Inquiry: p. 78 (remaining portion of two paragraphs), p. 79 (one sentence) and p. 80 (remaining portion of two paragraphs): MECCS Inquiry: p. 648 (the remaining redacted information in a portion of one paragraph).

[187] See the affidavits in MEM Inquiry #2 at para. 40, MECCS Inquiry at para. 67, and EAO Inquiry #1 at para. 70.

the records could reasonably be expected to result in the identified harms in s. 16(1)(a)(iii). I find that the redactions made to the records would reveal the "give and take" between parties during the relevant negotiations. This includes, in some instances, the government's own reconsideration of its position, which would also reveal the positions taken by the Tŝilhqot'in Nation or the relevant Indigenous group. I am satisfied that disclosure of the details of this nature would be a breach of the trust and confidence necessary to engage in meaningful and successful negotiations, and could reasonably be expected to harm the conduct by the government of British Columbia of relations between it and an aboriginal government.

[212] I am supported in my finding by Ontario Order PO-3817-I where the adjudicator found that records relating to the negotiation process, including opinions regarding past negotiations, the parties' positions, and the development of the course of action that was negotiated between the parties fit within Ontario's equivalent to s. 16(1)(a)(iii).[188] Accordingly, I find that s. 16(1)(a)(iii) applies to the identified information.

Other Information about government interactions with Indigenous groups/bands

[213] The Public Bodies have withheld some specific, discreet information about other government interactions with Indigenous groups. This information is located in summaries of critical incident reports and in other documents.[189]

[214] The Deputy Minister with the Ministry of Indigenous Relations and Reconciliation says that if the information redacted from these pages was disclosed it would be "very harmful" to the Provincial Government's ability to establish and strengthen a government to government relationship with each of the relevant indigenous groups.[190] He also states that disclosure would also "irreparably damage" the relationships between the government and the Indigenous groups which have been established.[191] The Deputy Minister also provides additional *in camera* information in support of the position that disclosure would result in the harms under s. 16.

[215] The Deputy Minister explains why he believes that disclosing this information would harm the relationship between various Indigenous groups and the Province. Based on my review of the redacted information and on the Deputy Minister's affidavit (some of which is *in camera*), I am satisfied that the disclosure of the redacted portions of these records could reasonably be expected to harm

[188] Order PO-3817-I, 2018 CanLII 15253 (ON IPC).
[189] MIRR Inquiry: portions of pp. 176, 181, 183 and 190; and OOP Inquiry: portions of pages 10, 11 and 12.
[190] Deputy Minister's affidavit in MIRR Inquiry, at para. 49, and in the OOP Inquiry at para. 30.
[191] Deputy Minister's affidavit in MIRR Inquiry, at para. 50, and in the OOP Inquiry at para. 31.

the conduct of relations with aboriginal governments, and that s. 16(1)(a)(iii) applies.

Other records

[216] There are two other redactions for which the Public Bodies have claimed s. 16(1)(a)(iii) applies, both of which are in EAO Inquiry #1. My findings are as follows:

[217] Pages 1576-1578 – These pages are an Information Note prepared for the Minister. The only information at issue in this document is under the heading "Discussion." The EAO states that this document discusses the implications of a specific agreement, including how it may impact existing projects and how to communicate the information to stakeholders. It states that "given that trust is paramount to build lasting reconciliation and that trust is being continually earned, it is reasonable to expect that the comments made could be misinterpreted and damage the relationship between the Provincial Government and the Tŝilhqot'in Nation."[192]

[218] I find that I have not been provided with sufficient evidence to support a finding that s. 16(1)(a)(iii) applies to this redacted information. In my view the redacted information is fairly general in nature and, to the extent it refers to any negotiations, the references are also general. It is also not clear to me how the redacted information could be misinterpreted, nor how disclosure could reasonably be expected to result in the harms under s. 16(1)(a)(iii). As a result, I find that this section does not apply to the withheld portions of pp. 1576-1578.

[219] Page 1433 – The information at issue is in a brief comment made in the margin of a draft document. The EAO states in its submissions that the redacted information "could be misinterpreted and thereby undermine the trust necessary to moving forward with negotiations."[193] On my review of this comment and the evidence provided by the EAO, it is not clear to me how disclosure of the redacted information could reasonably be expected to harm the conduct of relations with aboriginal governments, and I find that s. 16(1)(a)(iii) does not apply to this information.

[220] I have also considered the EAO's submissions and affidavit evidence about how s. 16(1)(c) applies to the information in dispute on pages 1433 and 1576-1578. I find that the EAO has not provided sufficient evidence to establish that disclosure of the withheld information could reasonably be expected to harm the conduct of negotiations relating to aboriginal self government or treaties. As a

[192] The EAO refers to the affidavit sworn by the ADM in support of its position.
[193] The EAO refers to the affidavit of the ADM in support of its position. I note that the ADM does not specifically refer to this redaction in his affidavit.

result, I find that s. 16(1)(c) does not apply to the withheld portions of pp. 1576-1578 or p. 1433.[194]

Summary

[221] In summary, I find that ss. 16(1)(a)(iii) applies to most of the information withheld under s. 16. However, I find that neither ss. 16(1)(a)(iii) nor 16(1)(c) apply to the withheld information on pages 1433 and 1576-1578 of EAO Inquiry #1. As no other sections are claimed for this information, I will order that it be disclosed.

Section 17 - Harm to Financial or Economic Interest

[222] 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. The relevant portion of s. 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:
>
> …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[223] 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. Disclosing information that does not fit into the enumerated examples can still constitute harm under s. 17(1).[195]

[224] The standard of proof for s. 17 is the same as it is for s. 16 (see paragraph 179 above)

Positions of the Parties

[225] The only records remaining at issue for which s. 17 has been claimed are in MEM Inquiry #2.[196] The MEM takes the position that the disclosure of the

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[194] Regarding the records for which I have found s. 16(1)(a)(ii) applies, there is no need to also consider whether s. 16(1)(c) applies to those records.

[195] This is because the legislation uses the word "including" as it lists the examples in (a) - (f). Order F16-38, 2016 BCIPC 42 (CanLII), para. 100.

[196] This includes some records which I have found above may not be withheld under other exceptions.

withheld information in the records would result in harm under s. 17. It states that:

> … the Provincial Government must not only manage its relationships with other governments, but also manage its relationships with private businesses who wish to develop natural resources and invest in the Province's economy and contribute to the provincial government's revenue stream.
>
> In order to successfully negotiate with other governments and private businesses, the Provincial Government must be able to develop individual and independent relationships with those entities. It would undermine the Provincial Government's negotiating position for the world at large to know its position or parameters, including its past positions or parameters. Releasing [the withheld information] would, therefore, harm the Provincial Government's economic interest and its financial interests.[197]

[226] The MEM also provides specific submissions on the withheld records and an affidavit from the MEM Assistant Deputy Minister, Mines, Health, Safety and Enforcement Division (ADM). The ADM provides specific evidence regarding the s. 17 harms which will result from disclosure of the records.

[227] The applicant refers to the standard of proof and states that previous OIPC orders have held that the public bodies "must establish that disclosure could reasonably be expected to result in the specified harm."[198] It also states that speculative or subjective evidence is inadequate to establish harm, and that there must be a "clear and direct connection between the disclosure of the withheld information and the alleged harm."[199] The applicant argues that the MEM has not met the burden of proof for withholding information under s. 17. It also provides specific submissions regarding some of the withheld records, which will be discussed in more detail below.

[228] In its reply submissions, the Public Bodies state that they have provided the "best evidence available to establish a reasonable expectation of probable harm: the records themselves, and sworn statements explaining what it reasonably expects will happen if information withheld under section 17 is disclosed."[200] They state that an example of one such anticipated harm is that third parties would use this information to the Public Bodies' detriment in future negotiations.[201]

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[197] MEM initial submissions at paras. 280 and 281.
[198] The applicant refers to Order F16-26, 2016 BCIPC 28 at para. 38.
[199] The applicant refers to Order F07-06, 2007 CanLII 9597 (BC IPC).
[200] Public Bodies' reply submissions at para. 84.
[201] Public Bodies' reply submissions at para. 84.

Analysis and findings

[229] Pages 681-682 – The information withheld from these pages is in a chart entitled: "Dashboard for selected major mining projects." This chart sets out the status of five specific projects as of the date of the chart. The MEM has disclosed all of the information about the two projects in which the applicant is involved. The redacted information is about the three other projects.

[230] The ADM says that these pages are a spreadsheet discussing major mining projects. He states that investors, including mining companies, need to have confidence that the status of their project and the Government's position with respect to their project is kept confidential.[202] He also deposes that the negotiated amounts of specifically identified agreements are different for different identified groups, and that "releasing details about the different negotiations would impact the Provincial Government's position in future negotiations" and harm its financial or economic interests.[203] The ADM also provides *in camera* information about certain agreements.

[231] The withheld information in the chart on pages 681-682, identifies the name and type of project, the participants, the status of the project, the issues raised by the project, the key challenges faced by the project, and background information about the project. The background information includes the dates certain incidents occurred, the status of certain stages of the projects, the impact of actions taken by the proponents of the project (whether positive or negative), the proponent's intentions and target dates, the status of involvement with certain Indigenous groups, details about any compliance issues faced during the project, and some information relating to specifically identified agreements.

[232] Based on my review of the redacted information and the submissions and affidavit evidence of the MEM, I am satisfied that disclosure of the redacted information could reasonably be expected to harm the financial or economic interests of the government of British Columbia. I note the level of detail contained in a number of the columns in the spreadsheet, and that this detail includes information about the manner in which the projects are proceeding. I am also satisfied that disclosure of some of this information, which contains details about particular negotiations, could impact the government's position in future negotiations under s. 17(1)(f). As a result, I find that s. 17(1) applies to the redacted information.

[233] Page 2350[204] - The portions of page 2350 which are withheld consist of two short paragraphs redacted from an email, and are about the estimated

[202] ADM affidavit at para. 44(a).
[203] Affidavit at para. 44(a).
[204] This information is duplicated on p. 2355.

revenue sharing from various projects (including the basis upon which the estimates are made).

[234] The ADM says that he wrote this email and it includes his thoughts on "how best to estimate revenue sharing from various projects and how those different [methods] may apply to revenue generated from [the Project]."[205] The ADM then deposes that the release of this information would harm the Provincial Government's financial and economic interests "by disclosing financial or commercial information that could be used by Indigenous groups or private investors in negotiations with the Provincial Government."[206]

[235] Based on the records as well as the submissions and affidavit evidence provided by the MEM, I find that disclosure of this information could reasonably be expected to harm the financial or economic interests of the government, as it could be used by others in future negotiations to the detriment of the government. As a result, I find that s. 17(1) applies to the redacted information.

[236] Page 2468 – This is a spreadsheet outlining the status of various mining permits throughout the Province of British Columbia. The MEM has disclosed to the applicant the information in the spreadsheet relating to the applicant's mining permit. The redacted information relates to other mining permits. This spreadsheet identifies the parties involved, the status of the permits, the relevant dates and locations, as well as, in some instances, details about the steps taken by the parties, the challenges and obstacles faced, and the status of involvement with certain Indigenous groups and the positions taken by them.

[237] The ADM states that the release of the information would harm the Provincial Government's economic interests as "the release of the information may prejudice an investor." He states that "If investors knew that confidential information was freely available through the FOI process, it may discourage other investors from doing business in the province and with the Provincial Government, thus harming the Provincial Government's economic interest."[207]

[238] The applicant submits that the affiant's position regarding the possible harm to the Provincial Government for this record is "entirely speculative" and that the public body has not provided sufficient evidence of a specified harm to satisfy s. 17.

[239] Based on my review of the record and the submissions of the MEM, I find that I have not been provided with sufficient evidence to establish that disclosure of the redacted information could reasonably be expected to result in s. 17 harms. The nature of the withheld information relates to various mining permits

[205] ADM affidavit at para. 44(c).
[206] Affidavit at para. 44(c).
[207] ADM affidavit at para. 44(d).

and their status throughout the Province. I have considered the affidavit evidence stating that disclosure of this information may discourage other investors from doing business in the Province. I note that the ADM refers to the disclosure of the "confidential" information; however, I have not been provided with any other evidence regarding the confidentiality of the withheld information, nor is it clear to me how this information could be considered "confidential". The MEM has not referred to any assurances of confidentiality relating to these permits, or any specific information in the record which may result in s. 17 harms. On my review of the record, it is not clear to me how the disclosure of this information could reasonably be expected to result in s. 17(1) harms and I find that s. 17(1) does not apply.

[240] Pages 2561 and 2563 - In its submissions about these pages, the MEM states that "releasing information about how the Provincial Government manages its finances would detrimentally affect its negotiating position with institutional lenders, indirectly influencing interest rates that the provincial government would have to pay on any debt or deficit and ultimately affect its credit rating. All of which would harm the Provincial Government's financial interests."[208]

[241] The ADM says that pages 2561-2563 are an email on which he was carbon copied. He states that the redacted information includes financial analysis forecasts and recommendations regarding what debt-to-capital ratio should be selected and what interest rate should be selected regarding particular matters. The ADM states that, if this information were to be released, it would harm the government's financial interests by impacting its credit rating and the interest paid on debt/deficit.[209]

[242] Based on my review of the detailed financial information redacted from these pages and MEM's evidence and submissions, I find that disclosure of the redacted information on these pages could reasonably be expected to harm the financial or economic interests of the government. As a result, I find that s. 17(1) applies to the redacted information.

Summary

[243] In summary, I find that the Public Bodies are authorized to refuse the applicant access to most of the information withheld under s. 17. However, I find that s. 17 does not apply to the redacted portions of page 2468 of MEM Inquiry #2.[210]

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[208] MEM Inquiry #2 initial submissions at para. 281.
[209] ADM affidavit at para. 44(e).
[210] No other exceptions were claimed for this information.

Section 22 – Unreasonable Invasion of Personal Privacy

[244] Section 22(1) of FIPPA requires public bodies to refuse to disclose personal information if the disclosure would result in an unreasonable invasion of a third party's personal privacy.

[245] In Order F15-03 the adjudicator set out the approach to applying s. 22(1) 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.[211]

I will apply the same approach here.

Personal Information

[246] The first step in any s. 22 analysis is to determine whether the information in dispute is personal information.

[247] The term personal information under FIPPA means "recorded information about an identifiable individual other than contact information".[212] FIPPA defines contact information as:

> …information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

[248] As Adjudicator Francis pointed out in Order F05-31, the purpose of this exclusion is to clarify that information relating to the ability to communicate with a person at that person's workplace, in a business capacity, is not personal information and that, accordingly, public bodies need not have s. 22 concerns regarding disclosure of such information when it is sought. Whether information

[211] Order F15-03, 2015 BCIPC 3 (CanLII), para. 58.
[212] Definitions are in Schedule 1 of FIPPA.

will be considered "contact information" depends on the context in which the information appears or in which it is sought or disclosed.[213]
[249] The Public Bodies provide submissions and affidavit evidence in support of the position that the information withheld under s. 22 is personal information, and that disclosure would be an unreasonable invasion of a third party's personal privacy.

[250] The applicant says that to the extent that any withheld information is "contact information" as defined in the Act, it should not be severed.[214] However, the applicant says that if the withheld information is *personal contact* information, the applicant "does not take issue with its severance."

[251] The information withheld under s. 22 is as follows:

- the names, telephone numbers, addresses and other similar contextual identifying information[215] of numerous individuals who have written to one or more of the Public Bodies regarding their views on the Project (the content of the correspondence to and from the Public Bodies has been disclosed to the applicant);
- information contained in ministry staff calendar and notebook entries, which relate to matters of a personal nature including personal appointments, medical appointments, personal travel-related information, etc.[216]
- information in emails, notes or other documents which relate to matters of a personal nature such as personal relationships between individuals,[217] and information about vacation plans, personal appointments, medical matters, leaves, etc.[218] It also includes facial photographs.[219]

Identifying information of individuals writing to the Public Bodies

[252] I have reviewed the withheld names, telephone numbers, addresses and other similar contextual identifying information of the individuals who have written

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[213] Order F14-45, 2014 BCIPC 48 at para. 41; Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 82.
[214] Applicant's submissions para. 178.
[215] This other identifying information includes the name, address, email address, etc. of the individual contained in other internal emails and written responses by the Public Bodies to the individual, as well as information in the body of the correspondence which could otherwise allow the individual to be identified.
[216] This information is found in the redactions made to the relevant pages in MEM Inquiry #2 and EAO Inquiry #1.
[217] MIRR Inquiry: p. 185 (first redacted paragraph).
[218] This includes the brief redactions made to the relevant pages in MEM Inquiry #1, MEM Inquiry #2, EAO Inquiry #1 and the OOP Inquiry.
[219] MEM Inquiry #2: pp. 548 and 583.

to one or more of the Public Bodies regarding their views on the Project.[220] The large majority of this severed information is clearly not contact information as defined by FIPPA. This is because the names and other identifying information is about people in their personal rather than business capacities, and is their personal contact information such as personal email addresses, home telephone numbers and home addresses. I am satisfied that these individuals were communicating with the public body as private individuals, and that the withheld information constitutes the *personal* contact information of these individuals.

[253] In a few instances the individuals have included what appears to be a work or business phone number or address, or organizational information. However, based on the context, it is clear the person is communicating in their personal capacity, not their business capacity. Therefore, I find that this information is not contact information as defined by FIPPA.[221] Because the applicant has indicated that it is not seeking *personal* contact information, I will not consider that information any further as it is no longer in dispute.

Calendar entries, notebook entries and emails of a personal nature

[254] I find that all of the information withheld in calendar and notebook entries, and in email exchanges and other documents, constitutes personal information as defined by FIPPA.

Section 22(4) – disclosure not unreasonable

[255] The Public Bodies submit that s. 22(4) does not apply to the withheld information. The applicant states that, to the extent that any withheld information is information about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, then the presumption in subsection 22(4) applies and the disclosure is presumed not to be an unreasonable invasion of the third party's personal privacy.

[256] On my review of the withheld personal information remaining at issue, I am satisfied that none of it is the type of information identified in s. 22(4), and I find that this subsection has no application.

Section 22(3) – presumptions in favour of withholding

[257] Section 22(3) provides the circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. The Public Bodies submit that ss. 22(3)(a), (d) and (g) apply. Those sections say as follows:

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[220] As noted, the content of the correspondence to the Public Bodies has been the disclosed to the applicant.

[221] See Orders F14-38, 2014 BCIPC 41 at para. 19 and F14-39, 2014 BCIPC 42 at para. 25.

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (d) the personal information relates to employment, occupational or educational history,
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

[258] On my review of the information remaining at issue, I find that s. 22(3)(a) applies to some of the redacted information because it is about an identifiable individual's medical history, condition or treatment.[222] I also find that section 22(3)(d) applies to some of the redacted information because it is information about an individual's employment or educational history.[223]

Section 22(2) – all of the relevant circumstances

[259] Section 22(2) requires the Public Bodies to consider all of the relevant circumstances in each situation when determining whether disclosure would be an unreasonable invasion of privacy. Section 22(2) sets out some relevant circumstances to consider, but does not contain an exhaustive list; other factors that do not appear in s. 22(2) may also merit consideration depending on the facts of the case.[224]

[260] The applicant does not make any specific submissions regarding s. 22(2). The Public Bodies' submissions address the following s. 22(2) circumstances:

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

[222] This is the information redacted from MEM Inquiry #1, p. 829 and MEM Inquiry #2, pp. 969, 1629, 2394 and 2395.
[223] The information redacted from MEM Inquiry #2, pp. 2119 and 2450.
[224] Order 00-53, 2000 CanLII 14418 (BC IPC) at section 3.5; Order F09-15, 2009 CanLII 58553 (BC IPC) at para. 32.

(f) the personal information has been supplied in confidence,
…

Scrutiny of the public body – s. 22(2)(a)

[261] The Public Bodies submit that they 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 ministries to public scrutiny.[225]

[262] As noted, the remaining withheld information relates to matters of a personal nature including personal appointments, medical appointments, personal travel-related information, personal relationships between individuals, vacation plans, and facial photographs. I do not see how disclosing this third party personal information would enable public scrutiny of the Public Bodies' activities. Section 22(2)(a) relates to the scrutiny of a public body's activities rather than subjecting a third party's activities to public scrutiny.[226] The information at issue would only reveal a third party's activities; therefore, s. 22(2)(a) is not a factor favouring disclosure.

Supplied in confidence – s. 22(2)(f)

[263] Some of the Public Bodies state that the factor in 22(2)(f) applies to some of the withheld personal information, as the information is about an identifiable person and was provided in confidence.[227] This includes information such as statements disclosing where an employee is spending their personal leave.[228] In the circumstances, I am satisfied that some of the withheld personal information was supplied in confidence.

Sensitivity of the information

[264] Past orders have also considered the sensitivity of the personal information at issue as a relevant circumstance. For example, if information is particularly sensitive or private in nature, this factor may weigh against disclosure. In my view, much of the personal information at issue, which includes references to personal and medical appointments, personal travel-related information, photographs and personal relationship information, is sensitive and private in nature. Therefore, this factor weighs against disclosure.

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[225] See, for example, MEM Inquiry #1, initial submissions at para 154.
[226] Order F16-14, 2016 BCIPC 16 at para. 40 and Order F12-12, 2012 BCIPC 17 at para. 38.
[227] See, for example, MEM Inquiry #2, initial submissions at para. 313, and the supporting affidavit evidence.
[228] See, for example, MEM Inquiry #1, initial submissions at paras. 155-156.

Conclusions on s. 22

[265] I find that the information remaining at issue under s. 22 is "personal information." I also find that s. 22(4) does not apply to this information.

[266] I find that that the s. 22(3)(a) and (d) presumptions apply to some of the third party personal information. Having considered the above relevant circumstances, I find that the s. 22(3)(a) and (d) presumptions have not been rebutted. Therefore, disclosing this information would be an unreasonable invasion of third party personal privacy and the Public Bodies must withhold it under s. 22(1).

[267] Regarding the remainder of the personal information, I find there are no s. 22(3) presumptions that apply. However, considering the nature of the information and the relevant circumstances, I find that it would be an unreasonable invasion of third party personal privacy for the Public Bodies to disclose this information.

[268] As a result, I uphold the Public Bodies' decisions under s. 22.

CONCLUSION

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

1. Subject to paragraph 2 below, I confirm in part the Public Bodies' decisions to refuse access to information withheld under ss. 12(1), 13(1), 14, 15(1)(l), 16(1), 17(1) and 22 of FIPPA.

2. The Public Bodies are not authorized or required to refuse to disclose the information they refused to disclose on the following pages under ss. 13(1), 14, 16(1) and 17(1):

- *MEM Inquiry #1*, pages 851 and 925, and *MEM Inquiry #2*, pages 1080 and 1986, for which s. 13(1) was claimed;
- *MEM Inquiry #1*, page 1035 for which s. 14 was clamed;
- *EAO Inquiry* #1, pages 1433 and 1576-1578 for which s. 16 was claimed; and
- *MEM Inquiry #2*, page 2468 for which s. 17 was claimed.

3. The Public Bodies must disclose to the applicant the information they are not authorized or required to withhold and they must concurrently copy the OIPC registrar of inquiries on their cover letter to the applicant, along with a

copy of the relevant records.

[270] Under s. 59 of FIPPA, the Public Bodies are required to give the applicant access to the information they are not authorized or required to withhold by December 21, 2020.

November 6, 2020

ORIGINAL SIGNED BY

Frank DeVries, Adjudicator

OIPC File Nos.: F16-67922, F16-69055, F17-69287, F17-69367, F17-70543, F17-71400 and F18-75036