Order F21-08

MINISTRY OF HEALTH

Laylí Antinuk
Adjudicator

March 1, 2021

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Summary: The applicant asked the Ministry of Health (Ministry) for records related to the workplace investigation that led to the well-known 2012 Ministry employee firings. The Ministry provided some information in response, but withheld other information under several sections of the *Freedom of Information and Protection of Privacy Act*. This order considers ss. 3(1)(c) (out of scope), 14 (solicitor client privilege), 22 (unreasonable invasion of privacy) and 25 (public interest disclosure). The adjudicator found that s. 25 did not apply. The adjudicator also found that ss. 3(1)(c) and 14 applied, and that s. 22 applied to some, but not all, of the information withheld under it. The adjudicator ordered the Ministry to disclose the information that she found s. 22 did not apply to.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), 14, 22(1), 22(2)(a), 22(2)(b), 22(2)(e), 22(2)(f), 22(2)(g), 22(2)(h), 22(2)(i), 22(3)(d), 22(3)(g), 22(3)(h), 22(4)(a), 22(4)(e), 22(4)(f), Schedule 1.

INTRODUCTION

[1] In three separate access requests spanning a two-year period, the applicant asked the Ministry of Health (Ministry) for records related to the workplace investigation that resulted in the well-known 2012 Ministry employee firings. The Ministry disclosed some information in response, but withheld other information under ss. 13 (advice and recommendations), 14 (solicitor client privilege), 15 (harm to law enforcement), 17 (harm to financial or business interests) and 22 (unreasonable invasion of privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry no longer relies on ss. 13, 15 or 17 to withhold any information, but has requested and received permission to add s. 3(1)(c) (out of scope) as an inquiry issue.[1] In addition, the

[1] Ministry's February 14, 2020 email to the OIPC sent 10:23 AM. OIPC's Revised Notice of Written Inquiry sent to the parties February 21, 2020.

applicant says the Ministry should disclose all the information under s. 25 (public interest disclosure). This decision addresses ss. 3(1)(c), 14, 22 and 25.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to withhold information in response to all three access requests. Mediation at the OIPC did not resolve the issues. All three matters proceeded to this inquiry.

[3] During the inquiry process, the Office of the Auditor General of British Columbia (Auditor General) requested permission to make submissions in relation to some information withheld under s. 3(1)(c).[2] The OIPC invited the Auditor General to participate as a party regarding the s. 3(1)(c) issue and the Auditor General made submissions.[3]

Preliminary matters

[4] Many of the responsive records consist of emails, some of which have attachments. In its initial inquiry submission, the Ministry informed the applicant and the OIPC that "many of the email attachments… were never provided to the applicant" and "due to the passage of time, the Ministry no longer has the original emails and cannot produce the attachments."[4] The applicant responded by saying she was "shocked and angered to discover… that ALL previously-withheld email attachments have mysteriously vanished".[5] The applicant then requested that the OIPC investigate the events surrounding the apparent destruction of these missing documents.[6]

[5] After the applicant made her response submission, the Ministry located a database that contained the original emails and their attachments. The Ministry notified the OIPC and processed the email attachments, applying ss. 14 and 22 to some information and disclosing the rest to the applicant. These additional records now form part of the records in dispute in this inquiry. Both the applicant and the Ministry made submissions about them.

[6] For the purposes of this inquiry, I will not consider what took place when the attachments were lost and then found. The Ministry ultimately produced these records and applied ss. 14 and 22 to some information in them. Accordingly, I can adjudicate the inquiry issues as they relate to these records. If the applicant wants to pursue an investigation into this matter, she must follow the usual complaint process with the OIPC.

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[2] Auditor General's February 13, 2020 letter to the OIPC.
[3] Under s. 54 of FIPPA, the OIPC can invite any person it considers appropriate to participate in an investigation or inquiry arising from an applicant's request for review.
[4] Ministry's initial submission at paras. 13-14.
[5] Applicant's response submission at para. 9. Capitalization in original.
[6] *Ibid* at para. 11.

ISSUES

[7] This inquiry raises the following issues:

1. Does s. 3(1)(c) exclude certain records from the scope of FIPPA?
2. Does s. 25(1)(b) require the Ministry to disclose the information in dispute?
3. Does s. 14 authorize the Ministry to withhold the information in dispute under that section?
4. Does s. 22 require the Ministry to withhold the information in dispute under that section?

[8] The Ministry bears the burden of proving that the applicant has no right to access the information withheld under ss. 3(1)(c)[7] and 14.[8] The Ministry also must prove that the information withheld under s. 22 is personal information.[9]

[9] The applicant bears the burden of proving that disclosing any personal information at issue would not constitute an unreasonable invasion of third party personal privacy.[10]

[10] When it comes to s. 25, the applicant and the Ministry both have an interest in providing evidence to support their positions.[11]

[11] I have carefully read all of the parties' evidence and submissions, including the records, all of which total several thousand pages. In these reasons, I will discuss the material before me only to the extent necessary to explain my decision respecting the inquiry issues.[12]

DISCUSSION

Background

[12] In 2012, the Ministry began an investigation (internal investigation) after receiving a complaint made to the Auditor General by a whistleblower

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[7] Order F16-15, 2016 BCIPC 17 at para. 8.
[8] Section 57(1) of FIPPA.
[9] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.
[10] Section 57(2) of FIPPA.
[11] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 38.
[12] This is the appropriate approach: *White v. The Roxy Cabaret Ltd.*, 2011 BCSC 374 at paras. 40-41; *TransAlta Corporation v. Market Surveillance Administrator*, 2014 ABCA 196 at para. 56; *Grillo Barristers v. Kagan Law*, 2019 ONSC 5380 at para. 5.

(complainant).[13] The complainant alleged that several Ministry employees and external contractors had engaged in wrongdoing in relation to contracting and data practices. The Ministry's internal investigation lasted 16 months and, over its course, the Ministry took serious actions against employees and contractors including: data suspensions; employment suspensions without pay; employment terminations; and the cancellation of external contracts.

[13] The Ministry's actions resulted in multiple lawsuits, all of which settled before going to trial, as well as union grievances. Tragically, one of the individuals fired by the Ministry committed suicide shortly after the Ministry fired him. The Premier, Minister and Deputy Minister ultimately apologized for the way the Ministry had treated this individual.

[14] In 2015, the Ombudsperson began an investigation into the Ministry's actions at the request of a Select Standing Committee of the Legislative Assembly. In a public report (*Misfire*) released in 2017, the Ombudsperson concluded that the internal investigation was flawed and the terminations unjustified.[14] The Ombudsperson found that the original complaint made to the Auditor General was almost entirely inaccurate, but the Ministry did not assess its factual validity from the outset. The Ombudsperson also found that the Ministry did not have a sufficient evidentiary basis to dismiss any of its employees for just cause. When it came to the contract terminations, the Ombudsperson concluded that the decisions to terminate contracts were arbitrary and made without any evidence of wrongdoing.

[15] The applicant was one of the individuals unjustifiably fired by the Ministry. She says she made the three access requests at issue because the public has a right to know why and how the internal investigations and firings happened.

[16] As noted above, this inquiry combines three separate access requests and the Ministry and OIPC files subsequently generated in relation to them. Where necessary, I will refer to these files as the 2012 file,[15] the first 2014 file,[16] and the second 2014 file.[17]

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[13] The information summarized in the Background section comes from the Ministry's initial submission at paras. 1-2; the lawyer's affidavit at paras. 2-7 and exhibit A; and the applicant's response submission at paras. 1, 2, 4-7 and appendices 1, 3-4.
[14] *Misfire: The 2012 Ministry of Health Employment Terminations and Related Matters* (Victoria: Office of the Ombudsperson, April 2017), online at <https://bcombudsperson.ca/assets/media/Referral-Report-Misfire.pdf>. The applicant and the Ministry both included the link to *Misfire* in their respective submissions.
[15] File numbers: F12-50793 (OIPC) and HTH 2012-00125 (Ministry).
[16] File numbers: F14-58603 (OIPC) and HTH 2014-00130 (Ministry).
[17] File numbers: F14-58984 (OIPC) and HTH 2014-00160 (Ministry).

Responsive records

[17] The records comprise 4,670 pages and consist of:

- emails (some with attachments);
- summaries of emails and contracts;
- various versions of the internal investigation report;
- internal investigation work plans and status updates;
- internal investigation interview notes;
- contracts and related documents, such as contract amendment forms;
- briefing notes and privacy impact assessments;
- grant applications;
- scientific articles; and
- other miscellaneous documents related to the internal investigation.

[18] As noted, the Ministry withheld the information in dispute in these records under ss. 3(1)(c), 14 and 22. The Ministry provided me with copies of the records withheld under s. 22, but not ss. 3(1)(c) or 14. Instead, the Ministry supplied affidavit evidence that includes a table of records describing all the material withheld under s. 14 in some detail. When it comes to s. 3(1)(c), I have detailed submissions from the Ministry and an affidavit from an Auditor General manager. After carefully reviewing this evidence, I have decided that I have enough information to make my findings respecting ss. 3(1)(c) and 14 without seeing those records.

[19] The applicant says that she does not dispute the Ministry's decision to refuse her access under s. 22 to third parties' personal email addresses and personal information such as information about third parties' medical histories, vacations, family, or personal lives.[18] Therefore, I conclude the Ministry's decision to refuse access to that information is not in dispute and I will make no decision about it.

EXCLUSION FROM FIPPA'S SCOPE – SECTION 3(1)(c)

[20] Section 3(1)(c) says FIPPA does not apply to records created by or for an officer of the Legislator that relate to the exercise of that officer's legislative functions under an Act. This section serves to facilitate and prevent interference with the exercise of an officer of the Legislature's functions under an enactment.[19] It does this by excluding certain records from FIPPA's scope.

[18] Applicant's initial response submission at para. 42; applicant's additional response submission at paras. 3 and 8.
[19] Order 01-43, 2001 CanLII 21597 (BC IPC) at para. 25; Order F16-07, 2016 BCIPC 9 at para. 9.

[21] The Ministry submits that s. 3(1)(c) applies to 10 pages of records in the second 2014 file. These records consist of communications between either: *(a)* Auditor General employees and Ministry employees (the Auditor General records); or *(b)* a Ministry employee and an OIPC employee (the OIPC record).

[22] For s. 3(1)(c) to apply, three criteria must be met:[20]

1) An officer of the Legislature (officer) must be involved;
2) The records must either:
    a) have been created by or for the officer; or
    b) be in the custody or control of the officer; and
3) The records must relate to the exercise of the officer's functions under an Act.

[23] Beginning with the first criterion, FIPPA's definition of "officer of the Legislature" includes the Auditor General and the Information and Privacy Commissioner.[21] Therefore, both the Auditor General and the OIPC (collectively, the two Officers) meet the first criterion under s. 3(1)(c). The applicant does not dispute this.

[24] I find it equally clear that the two Officers created or received the records at issue. The evidence shows that the records comprise email communications and meeting invites (or records generated therefrom) that either originated from, or were sent to, one of the two Officers.[22] Given this, I find that the Auditor General and the OIPC records meet the second criterion under s. 3(1)(c) because the records were either created by or for the Officers. The applicant does not dispute this either.

[25] The final criterion requires that the records relate to the exercise of the officer's functions under an Act. In discussing this criterion, previous decisions of the OIPC and the BC Supreme Court have drawn a distinction between the administrative and operational records of an officer.[23] Operational records relate to the exercise of an officer's statutory functions and fall outside the scope of FIPPA per s. 3(1)(c), but administrative records do not.[24]

[26] Operational records include case-specific records received or created during the course of opening, processing, investigating, mediating, settling,

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[20] Order 01-43, *ibid* at para. 9.
[21] Schedule 1 of FIPPA contains its definitions.
[22] Ministry's initial submission at para. 24; Auditor General's initial submission at para. 19; Manager's affidavit at para. 5.
[23] Order 01-43, *supra* note 19 at paras. 28-30.
[24] Adjudication Order No.17 at paras. 19-20 (online: https://www.oipc.bc.ca/adjudications/1180). See also Order F07-07, 2007 CanLII 10862 (BC IPC) at para.14.

inquiring into, considering taking action on, or deciding a case.[25] For example, past orders have held that records created by the OIPC as part of the mediation process involved when applicants make requests for review under FIPPA are operational records that fall outside the scope of FIPPA under s. 3(1)(c).[26]

[27] In contrast, administrative records do not relate to specific case files, but instead include things like personnel, competition, and office management files as well as records related to the management of facilities, property, finances, or information systems.[27] For instance, a previous OIPC order found that job descriptions for jobs with Elections BC were administrative records that FIPPA applied to.[28]

[28] The Ministry and the Auditor General submit that the records withheld under s. 3(1)(c), taken together, are case-specific records related to either the OIPC's or the Auditor General's investigative powers under their respective enabling legislation.[29] Therefore, the Ministry and the Auditor General say the records qualify as operational records of the two Officers, so s. 3(1)(c) applies.[30] For the reasons that follow, I agree.

[29] The applicant does not dispute that s. 3(1)(c) applies, but instead argues that s. 25 overrides s. 3(1)(c). I will begin by deciding if s. 3(1)(c) applies, then I will consider the applicant's arguments.

OIPC record

[30] The OIPC record consists of an email sent by a Ministry employee to the OIPC in August 2012.[31] This email appears in the records twice. In it, the Ministry employee provides the OIPC with documents. The Ministry's undisputed submission states that this email relates to an investigation that the Ministry told the OIPC it was conducting into suspected privacy breaches. The Ministry informed the OIPC about this investigation in July of 2012 and remained in regular contact with the OIPC about it, providing the OIPC with copies of relevant records. In September of 2012, the Ministry notified the OIPC that it found evidence of a privacy breach. The next day, the OIPC told the Ministry that it was

[25] Adjudication Order No.17, *ibid* at para. 22.
[26] For example, see Order 03-44, 2003 CanLII 49223 (BC IPC) at para. 24.
[27] Adjudication Order No. 6 at paras. 14-15 (online: https://www.oipc.bc.ca/adjudications/1169). Adjudication Order No. 10 at para. 14 (online: https://www.oipc.bc.ca/adjudications/1173).
[28] Order F16-07, 2016 BCIPC 9 at para. 22.
[29] The Commissioner's enabling legislation in this case is FIPPA. The Auditor General's enabling legislation is the *Auditor General Act*, S.B.C. 2003, c. 2.
[30] Ministry's initial submission at paras. 25 and 33-34; Auditor General's initial submission at paras. 11 and 21-23.
[31] The information summarized in this paragraph comes from the Ministry's initial submission at paras. 27-29 and 33-34.

formally investigating the breach. The OIPC ultimately released a public report about its investigation and findings.[32]

[31] Under FIPPA, the commissioner has the responsibility to monitor how FIPPA is administered to ensure its purposes are achieved.[33] Part of this responsibility includes the power to conduct investigations and audits to ensure that public bodies are complying with FIPPA. The Ministry submits that receiving information about potential privacy breaches falls within these aspects of the commissioner's statutory functions. I agree.

[32] I conclude that the commissioner used information received from the Ministry, including the information in the email at issue, to ultimately launch an investigation into alleged privacy breaches at the Ministry. Therefore, I find that the email qualifies as an operational record created for the OIPC. As a result, I find that the OIPC record meets the final requirement of s. 3(1)(c).

Auditor General records

[33] The Auditor General records consist of email communications and meeting requests sent between Ministry employees and two Auditor General employees, one of whom (the manager) provided affidavit evidence for this inquiry.[34]

[34] The manager deposes that the Auditor General records relate to his work at the Auditor General's office and result from preliminary information-gathering carried out by the office about a government program operated by the Ministry. The manager says that he engaged in this information-gathering to determine whether to conduct an audit or examination of a Ministry program under ss. 11-13 of the *Auditor General Act*. The manager says Auditor General employees often do this type of information-gathering in the daily operations of their office before commencing an audit or examination.

[35] I find that the Auditor General records relate to the exercise of the Auditor General's statutory functions. Under the *Auditor General Act*, the Auditor General has the responsibility to perform financial and performance audits and prepare other, non-audit reports. The evidence shows that the Auditor General records fit squarely within this legislative responsibility. In these records, Auditor General employees are performing preliminary investigative work to determine whether to

[32] Investigation Report F13-02 (online: https://www.oipc.bc.ca/investigation-reports/1546).
[33] Section 42(1) of FIPPA.
[34] The information summarized in this paragraph and the one that follows comes from the Auditor General's initial submission at paras. 4 and 10; the Manager's affidavit at paras. 5-7; and the Ministry's initial submission at para. 21.

begin an audit or examination of a particular Ministry program. Therefore, I find that the Auditor General records meet the final requirement of s. 3(1)(c).

The applicant's arguments about ss. 3(1)(c) and 25

[36] The applicant says that she accepts that some of the records are "legally out of scope for FOI requests" because of s. 3(1)(c).[35] However, the applicant goes on to argue that s. 25 (public interest disclosure) ought to apply despite this because s. 25 overrides all the other sections of FIPPA.[36] Section 25 states (emphasis added):

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies **despite any other provision of this Act**.

[37] The Ministry does not specifically address the applicant's arguments about the impact of s. 25 on s. 3(1)(c), but does assert that s. 25 does not apply to any of the information in dispute.[37] The Auditor General acknowledges that s. 25 has been described by the commissioner as an override of s. 3(1)(c).[38] However, the Auditor General submits that the information in the Auditor General records does not meet the high threshold for disclosure under s. 25.[39]

[38] I agree with the applicant's submission that s. 25 overrides s. 3(1)(c). FIPPA explicitly states that s. 25 applies "despite any other provision of this Act." Section 3(1)(c) is clearly a provision of the Act.

[39] Additionally, previous orders have consistently said that s. 25 overrides every other section in FIPPA.[40] When it comes to whether or not this override includes s. 3, Madam Justice Levine (as she then was) clarified:

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[35] The information summarized in this paragraph comes from the applicant's response submission at paras. 17-18 and 24-25.
[36] Applicant's response submission at paras. 18 and 25.
[37] Ministry's reply submission at paras. 14-17.
[38] Auditor General's reply submission at para. 2.
[39] *Ibid* at paras. 8-9.
[40] Order F10-09, 2010 BCIPC 14 at para. 14; Order F20-42, 2020 BCIPC 51 at para. 35; Order F16-40, 2016 BCIPC 44 at para. 13; Order F19-49, 2019 BCIPC 55 at para. 10; Order F15-64,

> Counsel for the Commissioner submits that section 25 does not apply to the present records because they are excluded from the operation of the Act under section 3. I disagree. Section 25(2) makes it clear that section 25(1) applies despite any other provision of the Act. Section 25 is accordingly paramount over section 3. However, only information, not the entire operational record, that satisfies either the significant harm [s. 25(1)(a)] or clear public interest tests [s. 25(1)(b)] must be disclosed … pursuant to section 25.[41]

[40] Given this clear statement of the law, I have no doubt that s. 25 overrides s. 3(1)(c). This means that if I find that s. 25 applies to any information in dispute, including information in the OIPC or the Auditor General records, then the Ministry must disclose that information to the applicant despite the fact that the test for s. 3(1)(c) has been met.

[41] With this in mind, I turn to s. 25.

PUBLIC INTEREST DISCLOSURE – SECTION 25

[42] Section 25 requires a public body to disclose information in certain circumstances without delay despite any other provision of FIPPA. As I have said, this section overrides all the other sections of FIPPA.[42] Consequently, previous orders have found that s. 25 sets a high threshold such that it applies in only the clearest and most serious situations.[43]

[43] The applicant argues that s. 25(1)(b) applies here.[44] Disclosure under s. 25(1)(b) requires that the information at issue be "of clear gravity and present significance to the public interest."[45] Previous orders have determined that the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e. unmistakably) in the public interest."[46] Former Commissioner Denham clarified that "clearly means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest."[47]

2015 BCIPC 70 at para. 16; Order F14-40, 2014 BCIPC 43 at para. 11; Order F16-50, 2016 BCIPC 55 at para. 17; Order F15-27, 2015 BCIPC 29 at para. 29.

[41] Adjudication Order No. 3, June 30, 1997 (online: https://www.oipc.bc.ca/adjudications/1166). Former Commissioner Loukidelis referred to this case with approval in Decision F06-08, 2006 CanLII 32977 (BC IPC) at para. 21.

[42] *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

[43] For example, see Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3; and Order F15-27, 2015 BCIPC 29 at para. 29.

[44] Applicant's response submission at para. 60.

[45] Order 02-38, *ibid* at para. 65.

[46] *Ibid* at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3. Emphasis in original. See also Order F18-26, 2018 BCIPC 29 at para. 14.

[47] Investigation Report F15-02, 2015 BCIPC 30 at p. 28.

[44] Public interest under s. 25(1)(b) does not mean merely that the public would find the information interesting, but rather that the disclosure of the information itself is in the public interest. The British Columbia Supreme Court put it this way:

> The term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity.[48]

[45] To determine whether disclosure is clearly in the public interest, I must consider whether "a disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[49] To answer this question, I must first decide whether the information at issue relates to a matter that engages the public interest.[50] Questions to consider at this stage include:

- Is the matter the subject of widespread debate or discussion by the media, the Legislature, Officers of the Legislature or other oversight bodies?[51]
- Does the matter relate to a systemic problem instead of an isolated situation?

[46] If the information relates to a matter that engages the public interest, I must then decide whether the nature of the specific information at issue meets the high threshold for disclosure.[52] Factors to consider at this stage include whether the information would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

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[48] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BC SC) at para. 33.
[49] Investigation Report F16-02, 2016 BCIPC No. 36 at p. 26.
[50] Order F18-26, 2018 BCIPC 29 at paras. 15-16 and 24-29; Order F20-42, *supra* note 40 at para. 38.
[51] Previous orders have said that a matter does not need to be the subject of widespread public debate in order to engage the public interest. See Order F20-42, *supra* note 40 at para. 39.
[52] Order F20-42, *supra* note 40 at para. 40.

Parties' positions

Ministry's submissions

[47] The Ministry submits that s. 25(1)(b) does not require the disclosure of any of the information in dispute.[53] While the Ministry acknowledges that the media covered the firings widely when they occurred, it contends that disclosure of the information in dispute will not contribute meaningfully to educating the public or holding the Province accountable. This, the Ministry argues, is because the Ombudsperson exhaustively investigated the firings and publicly released *Misfire*. The Ministry also says the Province retained an independent investigator to review the Ministry firings before the Ombudsperson's investigation happened. In her public report (the McNeil report), the investigator also concluded that the Province had engaged in wrongdoing.

[48] The McNeil report and *Misfire* both contain recommendations that the Province accepted. Three independent parties have reviewed and reported publicly about the Province's implementation of these recommendations. The Ministry argues that these reports and recommendations, paired with the litigation that arose following the firings, have all subjected the Province to public scrutiny and accountability and have led to an "unprecedented amount of public transparency."[54]

Auditor General's submissions

[49] The Auditor General's s. 25 submissions relate only to the Auditor General records.[55] I have considered these submissions because they directly relate to whether or not the Ministry can withhold the Auditor General records under s. 3(1)(c).

[50] As noted, the Auditor General recognizes that s. 25 overrides s. 3(1)(c), but submits that s. 25 does not apply to the information in the Auditor General records.[56] The Auditor General acknowledges that the internal investigation and firings are of general public interest and subject to public debate, but argues that the specific information in the Auditor General records does not substantively relate to those firings. Instead, these records primarily consist of email communications sent between the manager and a Ministry employee about setting up a meeting. The records also contain a response about the meeting and

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[53] The information summarized in this paragraph and the one that follows comes from the Ministry's initial submission at paras. 42-50 and 54-55.
[54] *Ibid* at para. 54.
[55] The Auditor General takes no position on any other records in dispute between the applicant and the Ministry. Auditor General's initial submission at para. 8.
[56] The information summarized in this paragraph and the one that follows comes from the Auditor General's reply submission at paras. 2, 9, and 12-14.

the electronic records generated in relation to a meeting request. The Auditor General submits that these eight pages of records are largely procedural in nature, and duplicative in content.

[51] The Auditor General says *Misfire* publicly described the limited involvement the Auditor General had in the Ministry firings. Thus, the Auditor General contends that the information in the Auditor General records would not make a meaningful contribution to the body of information already publicly available about the Ministry firings. The Auditor General notes that the applicant says the central question she wants answered is: why and how did the Ministry investigations and firings in 2012 happen? The Auditor General submits that the information in the Auditor General records does not assist in answering this question, nor is its disclosure clearly in the public interest.

Applicant's submission

[52] The applicant submits that the Ministry firings are arguably the worst example of misconduct by government officials in the history of the province.[57] The applicant says that, in addition to the suicide of her colleague, the firings have probably caused other deaths in BC because they resulted in the termination of real-world drug safety research and surveillance. According to the applicant, despite these significant issues:

> Incredibly, after eight years, and several publicly-funded inquiries into the firings, it is still not clear what happened. How did the bogus investigation start, and why did it continue for so long, with so much misconduct by investigators, despite a complete lack of evidence of any wrongdoing? Who authorized the firings, and why? Were politicians and/or pharmaceutical companies involved, and if so, how?[58]

[53] The applicant also argues that there are other gaps in available information including the public not knowing the cost of the investigations, and the damage to the public purse and public health caused by the cancellation of drug safety research and surveillance. The applicant further submits that ongoing costs for PharmaCare remain elevated by continued coverage for drugs whose effects and harms were being investigated by the cancelled research. To support her argument, the applicant provides media articles on these issues.

[54] The applicant contends that the Ministry's submission that s. 25 does not apply because there has been sufficient transparency is "ludicrously untrue."[59] The applicant asserts that nothing in *Misfire*, the McNeil report, any other public

[57] The information summarized in this paragraph and the two that follow comes from the applicant's response submission at paras. 3, 8, 14, 33 and 35-38.
[58] *Ibid* at para. 8.
[59] *Ibid* at para. 33.

reports, or the lawsuits answered the key questions of who made the firing decisions or why the internal investigation started in the first place – including whether it involved political or drug company interference. The applicant argues that "[r]evealing further information about this travesty is in the public interest, because the public deserves to know everything possible about such an awful event, involving government misconduct affecting public health and finances."[60]

Analysis and findings

[55] The first question in the s. 25 analysis is: does the information in dispute relate to a matter that engages the public interest? I find that it does.

[56] The information in dispute relates to the internal investigation and the 2012 Ministry firings. I have no doubt that this part of the Ministry's recent history engages the public interest. The fact that a Select Standing Committee of the Legislature asked the Ombudsperson to investigate the firings provides ample evidence that a careful examination of the Ministry's decisions and actions was unquestionably in the public interest. In addition, the evidence before me clearly establishes that this matter was the subject of widespread discussion by the media and the Legislature, and that at least three Officers of the Legislature were involved in some form.[61]

[57] Furthermore, I find that the matter relates to a systemic problem rather than an isolated incident. *Misfire* makes several systemic recommendations, all of which the Province accepted and has worked to implement. When introducing these recommendations in *Misfire*, the Ombudsperson states:

> I have made recommendations that speak directly to systemic issues that came to light in this investigation. Some of these recommendations are aimed at preventing the events described in this report from recurring… Others of the systemic recommendations are aimed at remedying some of the broader impacts of the 2012 investigation.[62]

Given that the Ombudsperson's investigation uncovered systemic issues and, as a result, made systemic recommendations, I find it clear that the Ministry firings arose as a result of systemic problems, rather than isolated incidents.

[58] Taking all this into account, I have no hesitation in concluding that the matter at the heart of the applicant's three access requests clearly engages the public interest.

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[60] *Ibid* at para. 38.
[61] *Misfire, supra* note 14 at p. 364.
[62] *Misfire, supra* note 14 at p. IX.

[59] Next, I must decide whether the nature of the *specific* information at issue meets the high threshold for disclosure. I have reviewed most of the information in dispute with the parties' arguments respecting s. 25(1)(b) in mind. However, as mentioned previously, the Ministry did not provide me with copies of the information withheld under ss. 3(1)(c) and 14. When it comes to that information, I carefully considered the Ministry's and the Auditor General's descriptions of it – which I find comprehensive and helpful – and have decided that I have sufficient material to decide whether or not s. 25(1)(b) applies.

[60] In my view, the circumstances of this case are quite unique. First, I find that the public has access to what I consider to be an unusually extensive amount of information related to the internal investigation and the Ministry firings. Two distinct, independent investigators released two public reports related to the Ministry's decisions and actions. Additionally, the uncontested evidence before me establishes that the implementation of the multiple recommendations contained in both these reports has been overseen and publicly reported on by three different independent third parties. Furthermore, the applicant's submission includes multiple news articles that provide detailed information regarding various aspects of the Ministry firings.[63]

[61] With all this in mind, I find that the body of publicly available information respecting this matter is vast and substantial. It includes detailed, thorough, professional analyses performed by an independent oversight body and a third party individual as well as the media. Consequently, I find that the public has already received extensive opportunities to learn about the firings in order to make informed political decisions. I also find that there have been ample opportunities for the expression of public opinion respecting the Ministry firings.

[62] Broadly speaking and in general terms, the information in dispute includes emails sent by and between the employees and contractors who the Ministry investigated, emails (with attachments) sent between Ministry investigators, various drafts of the internal investigation report, status updates and work planning for the investigation. Having reviewed all this information carefully, I can say that none of it will assist in answering the applicant's question about why and how the internal investigation happened or whether there was political or drug company interference. Additionally, the information in dispute does not fill in other "gaps" in the available information identified by the applicant – such as the public not knowing the cost of the investigations, and the damage to public health and the public purse caused by the cancellation of drug safety research and surveillance. The information in dispute does not address any of these issues. Furthermore, in my view, this information does not explain anything about the firings in any greater detail or cogency than *Misfire*.

[63] Applicant's response submission at appendices 3-7.

[63] Considering all this, I am not satisfied that the specific information in dispute will:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information already available; or
- facilitate the expression of public opinion or allow the public to make informed political decisions.

[64] Moreover, considering the numerous implemented recommendations contained in *Misfire* and the McNeil report, as well as the multiple lawsuits settled by the Province and grievances resolved in relation to the firings, I am not persuaded that the disclosure of the specific information in dispute would contribute in a meaningful way to holding the Ministry and the Province accountable for its actions or decisions related to the firings. Taking all this into account, I find that the nature of the *specific* information at issue does not meet the high threshold for disclosure under s. 25(1)(b).

[65] To summarize, I find that a disinterested and reasonable observer, knowing the information and all the circumstances, would not conclude that disclosure of the specific information in dispute is plainly and obviously in the public interest. In coming to this conclusion, I have kept at the forefront of my mind the fact that the reasons for invoking s. 25 must be of sufficient gravity to override all other provisions of FIPPA, including the jurisdictional parameters of the Act set out in s. 3(1) and privacy protections for third party individuals. Accordingly, despite the applicant's able submissions respecting s. 25 and the fact that the Ministry firings clearly engage the public interest, I am not satisfied that s. 25(1)(b) applies.

[66] I will now turn to a discussion of s. 14.

SOLICITOR CLIENT PRIVILEGE – SECTION 14

[67] Section 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.[64] The Ministry claims legal advice privilege over the information in dispute.[65]

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

[64] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[65] The Ministry's initial submission at para. 56.

advice. In order for legal advice privilege to apply to a communication (and records related to it),[66] 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.[67]

[69] The scope of legal advice privilege extends beyond the explicit seeking and giving of legal advice to include communications that make up "part of the continuum of information exchanged [between solicitor and client], provided the object is the seeking or giving of legal advice."[68] Legal advice privilege also extends to internal client communications that discuss legal advice and its implications.[69]

Parties' positions

[70] The Ministry says that it sought legal advice from various lawyers within the Legal Services Branch (LSB) and from external counsel during and after the internal investigation.[70] It submits that the information it claims privilege over in this case comprises its confidential communications with its lawyers, or information that reveals those confidential communications. The Ministry submits that the communications at issue primarily consist of emails between the Ministry's lawyers and individuals working on the internal investigation and related matters. The Ministry says these emails all relate to seeking and providing legal advice regarding the internal investigation, or are otherwise within the continuum of communications related to that advice. The Ministry also says the communications at issue include internal Ministry emails. In these internal emails, the Ministry says its employees discuss legal advice already received, or the need to seek legal advice.

[71] The Ministry acknowledges that the information in dispute was likely provided to the Ombudsperson during his investigation of the firings. However, the Ministry submits that disclosing privileged documents to the Ombudsperson did not constitute a waiver of privilege because a Select Standing Committee of the Legislature required the Province to disclose the privileged documents to the

[66] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.
[67] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837.
[68] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.
[69] *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.
[70] The information summarized in this paragraph and the one that follows comes from the Ministry's initial submission at paras. 56, 63-67, 70-71, 76, 78-79, 83, 102-103; and the Ministry's reply submission at para. 19.

Ombudsperson. The Ministry also submits that none of the information it claims privilege over in this inquiry was expressly referred to in *Misfire*.

[72] The applicant submits that solicitor client privilege is important in general but says "it is not sacrosanct, and the public interest can override it."[71] The applicant goes on to argue that the public interest would be best served by revealing the unredacted legal advice provided to government employees during the internal investigation, suspensions, and firings. The applicant refers to examples in *Misfire* that describe instances in which the government ignored legal advice it received regarding the internal investigation. She suggests that it would be useful to know how government employees used legal advice to decide on actions, and who authorized ignoring or not seeking legal advice where this occurred.

Analysis and findings

[73] For the reasons that follow, I find that s. 14 applies to all the information the Ministry claims legal advice privilege over. Having carefully reviewed the Ministry's uncontested affidavit evidence from an LSB lawyer (the lawyer), I find that the information withheld under s. 14 consists of:

- emails between Ministry employees and Ministry lawyers;
- internal Ministry emails;
- an email between Ministry employees and other provincial employees;
- email attachments; and
- Ministry employee notes.

[74] I will discuss each category in turn and then move on to waiver. The applicant's arguments about s. 14 do not address the legal test for privilege or specific records, but focus instead on the public interest in disclosure. I will address these arguments at the end of my s. 14 analysis.

Emails between Ministry employees and Ministry lawyers

[75] The evidence shows that the emails and email chains between Ministry employees and Ministry lawyers[72] involve the seeking and providing of legal advice related to the internal investigation. Wherever these emails do not explicitly ask for or provide legal advice, the evidence demonstrates that they

[71] Applicant's response submission at para. 56. The remainder of the information summarized in this paragraph comes from this submission at paras. 56 and 58-59.
[72] Ministry lawyers include LSB lawyers and external counsel retained by the Province to represent the Province in litigation with third parties.

were part of the continuum of communications in which the Ministry's lawyers provided legal advice.[73]

[76] The evidence also indicates that some email chains between the Ministry and its lawyers include prior emails involving external third parties or Ministry employees who were under investigation. In all such cases, the uncontested evidence establishes that Ministry employees forwarded these communications to the Ministry's lawyers so that the lawyers could provide legal advice.[74] Given this evidence, I am satisfied that the emails involving third parties were provided by the client to the lawyer in order to seek and receive legal advice and are clearly not stand-alone communications. As I see it, these forwarded messages form an integral part of the content of the ongoing communications between client and lawyer. In other words, wherever emails between the Ministry and its lawyers include prior communications involving third parties, I consider the communications to be exclusively between the Ministry and its lawyers.

[77] All these emails/chains meet the three criteria required for legal advice privilege to apply. The Ministry's evidence shows that these records consist of written communications between the Ministry and its lawyers that entail the seeking and giving of legal advice. For the reasons expressed above, I find that these communications are exclusively between the Ministry and its lawyers which – when paired with the highly sensitive and litigious nature of the internal investigation – leads me to conclude that the Ministry and its lawyers intended to keep these emails confidential. Taking all this into account, I find that legal advice privilege protects the emails between the Ministry and its lawyers.

Internal Ministry emails

[78] The evidence establishes that some communications withheld under s. 14 involve Ministry employees only. The Ministry's affidavit evidence satisfies me that in these emails/chains, Ministry employees discuss legal advice received from Ministry lawyers, or the need to seek legal advice.

[79] The courts have consistently held that legal advice privilege extends to internal client communications that discuss legal advice and its implications.[75] Given this, I find that legal advice privilege applies to the internal Ministry emails that discuss previously received legal advice because they contain or would reveal privileged communications the Ministry had with its lawyers.

[80] There are also several internal Ministry emails that discuss the need to seek legal advice. Previous orders have held that a statement in a record about

[73] Lawyer's affidavit at para. 15.
[74] *Ibid* at paras. 16 and 18.
[75] *Supra* note 69.

the intent or need to seek legal advice at some point in the future does not, on its own, suffice to establish that a confidential communication between a client and solicitor actually occurred. In order to establish that legal advice privilege applies, there must be evidence that disclosure of the statement would reveal actual confidential communications between solicitor and client.[76] In this case, the lawyer deposes that for every internal client email that discusses the need to seek legal advice, he "can see from subsequent emails that they did in fact receive such advice from LSB lawyers."[77] This evidence leads me to conclude that privilege also applies to the internal client emails discussing the need to seek legal advice.

Email involving other Provincial government employees

[81] The information withheld under s. 14 also includes an email exchange between a Ministry employee and two employees from Government Communications and Public Engagement (Government Comms), the Province's communications division. Government Comms provides communications services to all provincial ministries.[78] In the particular email exchange at issue, Government Comms and Ministry employees discuss legal advice provided to Ministry employees by Ministry lawyers.

[82] While the Ministry does not make specific submissions respecting this email exchange, I understand from the general tenor of the Ministry's evidence that the Ministry claims that legal advice privilege applies to this email because Government Comms was not an outsider to the solicitor client relationship between the Ministry and LSB. Instead, the Ministry's submissions and evidence suggests that Government Comms was a joint client, or part of a single client – the Province. For example, I note that the lawyer deposes that "[t]he Province sought legal advice from various lawyers within [LSB] on matters relating to the investigation including the actions taken by the Province."[79] The lawyer also says that Government Comms obtains legal advice from LSB lawyers regarding media communications.[80]

[83] The evidence before me shows that Government Comms provides communication services to all provincial ministries, including the Ministry. Additionally, *Misfire* says that Government Comms and the Ministry discussed legal advice about the internal investigation with one another.[81] On the basis of this evidence, I conclude that Government Comms and the Ministry were either joint clients or part of a single client (I do not find it necessary to determine

[76] Order F17-23, 2017 BCIPC 24 at paras. 46-50; Order F16-26, 2016 BCIPC 28 at para. 32.
[77] Lawyer's affidavit at para. 19.
[78] *Ibid* at para. 25.
[79] *Ibid* at para. 8.
[80] *Ibid* at para. 25.
[81] *Misfire*, *supra* note 14 at p. VI.

which). In any event, I do not view Government Comms as a third party given the evidence I have just described. With this in mind, I am satisfied that legal advice privilege applies to this email exchange because it would reveal a confidential communication that the Ministry had with its lawyers about legal advice.

Email attachments

[84] Some of the emails withheld under s. 14 include email attachments. These emails consist of communications between the Ministry and its lawyers as well as internal Ministry communications. The Ministry's uncontested evidence satisfies me that all the attachments pertain to the investigation and either:[82]

- comprise documents the Ministry asked its lawyers to provide legal advice about;
- explicitly contain legal advice; or
- describe legal advice the Ministry had received, or intended to seek and ultimately sought.

As such, I am satisfied that legal advice privilege applies to all the attachments in this case.

Ministry employee notes

[85] In two instances, the Ministry applied s. 14 to notes written by Ministry employees. The Ministry's evidence indicates that the information in these employee notes would reveal privileged communications the Ministry had with its lawyers. Given this, I find that the notes are protected by legal advice privilege.

Waiver

[86] For waiver to occur, the evidence must establish that the possessor of the privilege: *(a)* knows of the existence of the privilege; and *(b)* voluntarily evinces an intention to waive that privilege.[83] Waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.[84] Additionally, in certain cases, intention may be implied.[85]

[87] For the purposes of this discussion, I have assumed that the information withheld under s. 14 was provided to the Ombudsperson. In my view, this does not constitute waiver given the circumstances. The evidence demonstrates that the Province provided privileged records to the Ombudsperson after the Select

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[82] Lawyer's affidavit at paras. 20-22 and 32-34.
[83] *R. v. Campbell*, 1999 CanLII 676 (SCC) at paras. 67-68 and *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) at paras. 6 and 10 [*S. & K.*].
[84] *S. & K., ibid* at para. 6.
[85] *Ibid*.

Standing Committee required it to do so, and only on the terms set out in a letter from the Deputy Attorney General to the Ombudsperson and in a Memorandum of Understanding between the Ombudsperson and the Attorney General.[86] These two documents make it clear that disclosure of privileged material to the Ombudsperson is not intended to be a general waiver of privilege. They also indicate that the Ombudsperson will keep all disclosed material confidential. The courts have said there is no waiver when a privileged document is provided to an outside party on the understanding that it will be held in confidence and not disclosed to others.[87]

[88] Given these facts, I find that the Ministry did not voluntarily evince an intention to waive privilege. On the contrary, the terms under which the Province provided privileged records explicitly state the disclosure is not intended to be a waiver of privilege, and that the Ombudsperson will keep all disclosed material confidential. Furthermore, nothing in this case suggests to me that fairness or consistency require waiver. As a result, I find that waiver did not occur when the Province provided privileged documents to the Ombudsperson.

[89] I will now address the applicant's s. 14 submissions.

The applicant's submissions on s. 14

[90] The applicant does not dispute that legal advice privilege applies to the information in dispute. Instead, she expresses the view that the public interest would be best served if the legal advice contained in the records were revealed to her in an unredacted form. The applicant says legal advice privilege is not sacrosanct.

[91] Contrary to the applicant's position, Canadian courts have long held that legal advice privilege is sacrosanct.[88] FIPPA's stated purpose of making public bodies more accountable by providing the public with the right of access to information has not changed this.[89] The applicant's submissions about the public interest have not persuaded me that an incursion into solicitor client privilege is required or permitted in this case. Additionally, for the reasons set out above, I

[86] Lawyer's affidavit at paras. 44-48 and Exhibits D and E.
[87] *Malimon v. Kwok*, 2019 BCSC 1972 at para. 21.
[88] In *C.B. Constantini Ltd. v. Slozka*, 2008 BCSC 872 at para. 11, Justice Grauer says that legal advice privilege "is one of the most sacrosanct principles of our system of justice". Similarly, in *Guttmann v. Halpern*, 2011 ONSC 7158 at para. 3, the Court states: "It is trite law that solicitor/client privilege is sacrosanct." See also *Brown v. Clark Wilson LLP*, 2014 BCCA 185 at para. 24; *Dudley v. British Columbia,* 2016 BCCA 328 at para. 77; *Xentel v. Schroder*, 2008 CanLII 2759 (ON SC) at para. 10; *Smigelski v. Smigelski*, 2015 ABQB 689 at para. 15; and *Brass v. Canada*, 2011 FC 1102 at para. 66.
[89] *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 35, quoting with approval from *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996) 1996 CanLII 1780 (BC SC) at paras. 25-26.

have found that s. 25(1)(b) does not apply to the information in dispute in this case, including the information withheld under s. 14.

[92] I will now turn to a discussion of s. 22.

UNREASONABLE INVASION OF THIRD PARTY PRIVACY – SECTION 22

[93] Section 22 requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party's personal privacy.

Personal information

[94] Section 22 only applies to personal information. Therefore, the first step in any s. 22 analysis is to determine whether the information in dispute qualifies as personal information.

[95] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[90] Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.[91] The term "mosaic effect" is sometimes used to describe the process by which seemingly innocuous information is linked with other already available information to yield information exempted from disclosure under FIPPA.[92]

[96] The Ministry says that seemingly non-personal information in the records is actually personal information because of the mosaic effect.[93] The Ministry asserts that the "risk of re-identification is not a theoretical risk in this case, considering the applicant's knowledge of the matters investigated, and the depth of media reporting and other publicly available information about the investigations."[94]

[97] Having reviewed the information in dispute, I find much of it clearly meets the definition of personal information. This includes information about what easily identifiable individuals (including the applicant) wrote, said, experienced and did. Much of this obviously personal information relates to two groups of individuals:

- The subjects of the internal investigation (Subjects); and

[90] Schedule 1 of FIPPA contains its definitions.
[91] For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.
[92] Order 01-01, 2001 CanLII 21555 (BC IPC) at para. 40.
[93] Ministry's initial submission at paras. 110-113.
[94] *Ibid* at para. 113.

- The government employees (including the complainant)[95] who worked on, supported, contributed to, oversaw, or approved the internal investigation in some way. For convenience, I will refer to the individuals in this group as "investigators".

[98] There is also some information that I find would allow the applicant, through the mosaic effect, to identify who is being discussed, so it is also personal information. For example, in the circumstances of this case, I find that the names of research programs, companies and contracts qualify as personal information because I find it more likely than not that the applicant knows who the specific individuals associated with these programs, companies and contracts are.

[99] However, I find that the balance of the information withheld under s. 22 is not personal information. I have considered what the Ministry says and whether the mosaic effect applies to this information, but I am not persuaded that it does. The only illustration the Ministry provides of the application of the mosaic effect to the records is to say, "where a particular contract is referred to in an email, knowing who approved the contract, would lead to the accurate inference that those individuals' [*sic*] were implicated by the email."[96] The Ministry did not identify any specific examples in the thousands of pages with information exempted under s. 22, so I cannot identify where precisely it believes the mosaic effect is operating. Based on my review, it is not apparent to me.

[100] In summary, I find the Ministry's evidence is not sufficiently detailed to satisfactorily establish that the following types of material reveal information about identifiable individuals, either alone or through the mosaic effect:

- letterhead and footers;
- dollar values of contracts;
- generic contractual terms, such as termination clauses;
- the dates of emails;
- template information in grant applications and other forms;
- generic headings in documents; and
- generic subject lines of emails.

Contact information

[101] The definition of personal information explicitly excludes contact information. FIPPA defines contact information as information to enable an individual at a place of business to be contacted. This includes an individual's name, position or title, and their business telephone number, address, email or

[95] I say this because of what I can see in the records. See also, *Misfire*, *supra* note 14 at p. VIII.
[96] Ministry's initial submission at para. 112.

fax number. Determining whether information qualifies as contact information requires a contextual approach.[97]

[102] I find that some information in dispute is contact information. This information consists of names, job titles, and business phone numbers, email and mailing addresses in emails about mundane work matters unrelated to the internal investigation. It is obvious that this information is being exchanged in order to enable the individuals involved to contact each other for business purposes. Nothing in the evidence suggests that this information is about the Subjects or witnesses in the internal investigation or the Ombudsperson investigation. I find that this information is contact information. As such, it does not qualify as personal information, so s. 22 does not apply. The Ministry may not refuse access to this information under s. 22.

[103] However, I find that some names, job titles, and business telephone numbers and addresses in grant applications, email signature blocks and the sender/recipient lines in emails is not contact information. I make this finding because, considered in context, this information reveals the identity of the Subjects of a workplace investigation. Therefore, this is personal information.

Not an unreasonable invasion of privacy – section 22(4)

[104] Next, I will determine if any personal information falls into the types listed in s. 22(4). If it does, disclosure is not an unreasonable invasion of personal privacy.

[105] I find ss. 22(4)(a), (f) and (e) applicable here and will discuss each in turn.

Third party consent – s. 22(4)(a)

[106] Section 22(4)(a) says that if a third party consents to or requests disclosure in writing, then disclosure is not an unreasonable invasion of that third party's personal privacy.

[107] Eleven individuals provided written consent for the release of their personal information to the applicant as follows:[98]

- Five individuals consented to the release of their personal information in respect of all three files.

[97] Order F08-03, 2008 CanLII 13321 at para. 82; Order F14-45, 2014 BCIPC 48 at para. 41.
[98] Ministry's reply submission at para. 21; Paralegal's affidavit at exhibits A-P.

- Five individuals consented to the release of their personal information in respect of the first 2014 file. One of these individuals also consented to the release of information about his company.[99]
- One individual consented to the release of his personal information in respect of the 2012 file and the second 2014 file.

I will refer to these individuals collectively as the consenting individuals.

[108] The applicant requests the release of all the consenting individuals' personal information.[100] The Ministry says it has disclosed all the consenting individuals' personal information unless it is intertwined with the personal information of non-consenting third parties.[101]

[109] Based on my review of the records, I conclude that the Ministry did not take s. 22(4)(a) quite far enough. In many instances, I find that the personal information of non-consenting third parties is not so intertwined with that of consenting individuals that it cannot be reasonably severed, so the rest can be disclosed to the applicant as required under s. 4(2).[102] For example, the Ministry withheld entire emails and summaries of emails that involve one or more consenting individuals as well as a non-consenting third party or parties. Most of the time, I find that any identifying information about the non-consenting third parties can reasonably be severed from the information about the consenting third parties, which can then be disclosed.[103]

[110] I also note that the responsive records for each file contain a significant amount of duplicated information. This means that sometimes information that s. 22(4)(a) applies to in one file has been withheld in another.

[111] All three files and their respective records are being dealt with in this single inquiry. Therefore, I find it appropriate to consider the records holistically. As a result, if s. 22(4)(a) applies to information in one file, I find that it also applies to any duplicate information in the other files.

[112] In short, I find that s. 22(4)(a) applies to a sizeable portion of the information in dispute. Therefore, the Ministry must disclose this information to the applicant.

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[99] Paralegal's affidavit at exhibit H.
[100] Applicant's response submission at para. 51.
[101] Ministry's initial submission at para. 120.
[102] Section 4(2) gives individuals the right to access all the information in a record that can reasonably be severed from information exempted from disclosure under FIPPA.
[103] For example, pp. 7-9 of the records package the Ministry will receive with this order.

Details of contracts – s. 22(4)(f)

[113] Under s. 22(4)(f), the disclosure of personal information that reveals financial and other details of a contract to supply goods or services to a public body is not an unreasonable invasion of third party personal privacy.

[114] The Ministry acknowledges that the information in dispute includes summaries of various contracts but submits that s. 22(4)(f) does not apply. The Ministry says the investigator's analysis of the contracts discussed in the records is unreliable and is "not the sort of objective information captured by s. 22(4)(f)."[104] I disagree.

[115] Based on my review, I find that some of the disputed information is personal information that reveals financial or other details of contracts to supply goods or services to the Ministry. For example, the disputed information includes:

- the names of contracts, contractors and subcontractors;
- the names of contract signees;
- the names of individuals provided with data access under a contract;
- the names of individuals who managed specific contracts;
- the dollar amounts individuals received under specific contracts; and
- details about contract amendments that involved specific individuals, such as when the amendments occurred and what they entailed.

[116] In my view, all this personal information qualifies as financial or other details of contracts between the Ministry and others. It comprises objective, factual personal information. Nothing in the evidence before me indicates that these basic facts are incorrect. The conclusions in *Misfire* about the errors made in the internal investigation do not change this. I find that s. 22(4)(f) applies to this personal information, meaning that its disclosure does not constitute an unreasonable invasion of third party privacy.

Position, function or remuneration – s. 22(4)(e)

[117] Under s. 22(4)(e), the disclosure of personal information about a third party's "position, functions, or remuneration" as an officer, employee or member of a public body or a member of a minister's staff is not an unreasonable invasion of personal privacy. Past orders have held that s. 22(4)(e) applies to personal information about an employee's job duties in the normal course of work-related activities, such as objective factual information about what employees said or did in the normal course of doing their jobs, but not qualitative assessments or

[104] Ministry's initial submission at para. 129.

evaluations of such actions.[105] The names of a public body's employees also generally fall under s. 22(4)(e).[106]

[118] The Ministry contends that s. 22(4)(e) does not apply to any of the information in dispute because it is either:[107]

- about external researchers, not public body employees; or
- about the employment history of third parties.

I will address each argument in turn.

External researchers

[119] The Ministry asserts: "[m]uch of the information in dispute is the personal information of external researchers, not public body employees, and on that basis, s. 22(4)(e) does not apply."[108] I reject this argument.

[120] It is not entirely clear what the Ministry means by "external researchers". However, having reviewed the information in dispute, I find that the vast majority of it is about internal Ministry employees or contractors.[109] Under FIPPA, the definition of "employee" includes a person retained under contract to perform services for the public body.[110] Given this, s. 22(4)(e) applies to personal information that relates to an internal employee's and a contractor's position, function and remuneration.

[121] In addition, some of the information in dispute is about employees of public bodies other than the Ministry, such as professors and other employees of the University of Victoria (UVic) and the University of BC (UBC), which are both public bodies under FIPPA.[111] Information about the position, function and remuneration of these individuals also falls under s. 22(4)(e). I say this because

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[105] Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 40-41.
[106] Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 35; and Order 04-20, 2004 CanLII 45530 (BC IPC) at para. 18. The BC Supreme Court found this interpretation of s. 22(4)(e) reasonable in *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128 at paras. 70-71.
[107] Ministry's initial submission at paras. 121-128.
[108] *Ibid* at para. 122.
[109] This makes sense considering that the investigation centred around Ministry employees and contractors. As noted, the actions the Ministry took during the investigation included firing employees, suspending the data access of employees and contractors, and terminating contracts. It comes as no surprise that the records responsive to the applicant's three access requests contain ample information about internal Ministry employees and Ministry contractors.
[110] See FIPPA Schedule 1, definitions of "employee" and "service provider". For a similar finding, see Order F20-45, 2020 BCIPC 54 at para. 77.
[111] See FIPPA Schedule 1, definitions of "public body", "local public body" and "educational body" as well as the definition of "university" in the *University Act*, R.S.B.C. 1996, c. 468, ss. 1 and 3(1).

s. 22(4)(e) reads: "the information is about the third party's position, functions or remuneration as an officer, employee or member of **a** public body…"[112] The use of the general "a" (instead of the specific "the") indicates that the Legislature intended s. 22(4)(e) to apply to *any* public body employee. This includes researchers (and others) working at UVic and UBC.

[122] The information in dispute also includes a very small amount of personal information about researchers working for universities outside British Columbia. These individuals do not qualify as public body employees under FIPPA.

[123] For all these reasons, I reject the Ministry's claim that "much of the information" in dispute is about external researchers, not public body employees. Instead, I find that most of the information in dispute is about public body employees as defined in FIPPA. Therefore, the next question I must answer is whether the disputed information relates to these employees' job duties in the normal course of work-related activities. Is the information in dispute objective factual information about what employees said or did in the normal course of doing their jobs? This leads me to the Ministry's second line of argument.

Information about employment history

[124] The Ministry argues that s. 22(4)(e) does not apply because all the information in dispute "appears in the context of workplace investigations, either the original internal investigation, or the subsequent Ombudsperson investigation."[113] According to the Ministry, the disputed information is "no longer about the day-to-day job functions" of employees "because the records were all gathered for the purpose of investigating misconduct". Therefore, the Ministry contends that *Misfire* "tainted" all the records "such that they should be considered part of the third parties' employment history under s. 22(3)(d)." Under s. 22(3)(d), disclosure of information about a third party's employment, occupational or educational history presumptively constitutes an unreasonable invasion of third party personal privacy.

[125] Numerous decisions have addressed the distinction between information about the position, functions or remuneration of a public body employee (s. 22(4)(e)), and information that relates to employment history (s. 22(3)(d)).[114] Previous orders have held that information about specific employees' behaviour in the context of workplace investigations does not generally fall within s. 22(4)(e), but instead relates to employment history under s. 22(3)(d). That

[112] Emphasis added.
[113] All the quotations in this paragraph come from the Ministry's initial submission at para. 128.
[114] For examples, see Order No. 97-1996 (online at: https://www.oipc.bc.ca/orders/278); Order 00-53, 2000 CanLII 14418 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); and Order F05-32, 2005 CanLII 39586 (BC IPC).

said, previous orders have found that s. 22(4)(e) can still apply even in the context of a workplace investigation or performance review, depending on the facts of the case.[115]

[126] I do not agree that *Misfire*, or the Ministry's internal investigation, "tainted" all the records. On its own, the mere fact that records were gathered for an investigation does not remove the possibility that s. 22(4)(e) may apply to some information in those records. I am reminded here that former Commissioner Loukidelis said:

> The disputed records enjoy no greater protection under the Act because they are the product of a workplace investigation… the issue of whether information can or must be withheld has to be addressed on an exception-by-exception basis in the circumstances of each case… Although I am alive to the sensitivity of investigation reports and related records, the same principles apply in these cases as apply in other cases.[116]

[127] With this in mind, I have looked at each specific piece of information in dispute to determine whether s. 22(4)(e) or s. 22(3)(d) applies to it. Having done so, I find that the content of the records varies too much to take the type of blanket approach advocated by the Ministry.

[128] Furthermore, I note that the Ministry's own severing decisions are inconsistent with the assertion that *Misfire* "tainted" all the records. I say this because I find it clear that the Ministry decided – correctly, in my view – to disclose information that s. 22(4)(e) obviously applies to, such as emails sent between investigators about document preparation, scheduling meetings, and other routine administrative aspects of the investigators' work.

[129] On my review of the records, I find that some of the information in dispute relates to the routine work of public body employees whose actions were not the subject matter of either investigation. This information relates to the normal work functions and activities of employees doing routine administrative tasks. For example, the Ministry withheld emails about the coordination of paperwork related to contract signings and extensions, including the names of the employees engaged in that type of routine, administrative work. I find that s. 22(4)(e) applies to this type of information, so its disclosure does not constitute an unreasonable invasion of third party personal privacy.[117]

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[115] For examples, see Order F08-04, 2008 CanLII 13322 (BC IPC) at para. 27; Order 00-53, 2000 CanLII 14418 (BC IPC) at p. 7; and Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40.
[116] Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 8.
[117] For similar reasoning, see Order F17-01, 2017 BCIPC 1 at para. 53.

Presumed unreasonable invasion of privacy – section 22(3)

[130] Next, I will decide whether any of the presumptions in s. 22(3) apply to the remaining personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to constitute an unreasonable invasion of third party personal privacy.

[131] For the reasons that follow, I find that the presumptions in ss. 22(3)(d) and (g) apply to some of the disputed information, but not the presumption in s. 22(3)(h).

Employment history – s. 22(3)(d)

[132] As described above, s. 22(3)(d) creates a presumption against releasing personal information related to a third party's employment, educational or occupational history. Past orders have held that s. 22(3)(d) applies to information and allegations of wrongdoing in the workplace and an investigator's observations or findings about an employee's workplace behaviour or actions.[118]

[133] As described above, the Ministry argues that *Misfire* tainted all of the records, such that they should be considered part of the third parties' employment history under s. 22(3)(d). I have rejected this argument. Records do not necessarily attract s. 22(3)(d) simply because they were part of a workplace investigation. For example, former Commissioner Loukidelis held that emails retrieved during a disciplinary investigation in the workplace were not subject to s. 22(3)(d) because the *content* of the particular emails did not itself relate to employment, occupational or educational history.[119]

[134] Turning to the content of the specific information that remains in issue, I find that some of it comprises:

- allegations of wrongdoing in the workplace, including the complainant's original and related complaints and discussions of those complaints;
- investigators' suspicions and conclusions about the workplace behaviour and actions of identifiable individuals; and
- things identifiable individuals said about others in investigation interviews.

In my view, s. 22(3)(d) applies to this information.

[135] The information in dispute also includes grant applications that contain:

- the names of grant applicants;

[118] Order 01-53, 2001 CanLII 21607 (BC IPC) paras. 32-36.
[119] Order No. 330-1999, 1999 CanLII 4600 (BC IPC) at pp. 12-13.

- the educational and professional background of identifiable individuals;
- information about specific named students, including what degree they were pursuing and what work they were doing; and
- details about third parties' career delays, such as maternity leaves.

[136] I also find that s. 22(3)(d) applies to this information because it relates to the employment and educational history of identifiable individuals. The applicant argues that professionals writing grant applications do not generally consider this type of information to be confidential , noting that "most academics post detailed CVs on their professional web pages."[120] This may be the case, but the specific information in dispute is not on a professional's web page, it is in grant applications. Additionally, the question I must answer at this stage of the analysis is not whether the individuals who wrote the applications considered them to be confidential, but whether the information relates to the employment and educational history of the individuals mentioned in the applications. I find that it does, so s. 22(3)(d) applies.

[137] Lastly, I also find that s. 22(3)(d) applies to information that clearly reveals the identity of Subjects and/or witnesses interviewed as part of the internal investigation. I also find it applies, given the workplace investigation context, to what the Subjects and witnesses said to investigators about the role they and others played (i.e., what they said and did) in the matter under investigation. That said, I conclude that several of the Subjects/interviewees provided written consent for disclosure under s. 22(4)(a). To be clear, none of the s. 22(3) presumptions apply to the personal information the consenting individuals consented to the applicant having.

Personal evaluations – s. 22(3)(g)

[138] Section 22(3)(g) creates a presumption against releasing personal information that consists of "personal recommendations or evaluations, character references or personnel evaluations" about a third party. Past orders have interpreted this section as referring to formal performance reviews, job or academic references, or to comments and views of investigators about an employee's workplace performance and behaviour in the context of a workplace investigation.[121] For example, s. 22(3)(g) will apply to an investigator's evaluative comments about employees in the context of a formal workplace investigation.[122] However, past orders have said that s. 22(3)(g) does not apply to witness or complainant statements in workplace investigations, or to employees' comments or complaints about each other's workplace attitudes or behaviour.[123]

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[120] Applicant's additional response submission at para. 4.
[121] Order F05-30, 2005 CanLII 32547 at para. 41.
[122] Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 21.
[123] *Ibid*; Order F05-30, *supra* note 121 at para. 42.

[139] I find that a relatively small amount of the information in dispute comprises the investigators' evaluative comments about how non-consenting third party employees carried out their duties. This information appears in various versions of the draft investigative reports as well as a few emails between investigators. It consists of the investigators' conclusions about whether and how certain employees violated the public service Standards of Conduct or otherwise engaged in misconduct. I find that s. 22(3)(g) applies to this type of information because it comprises the investigators' formal assessments and evaluations about how individuals performed their employment duties.[124]

[140] However, the presumption in s. 22(3)(g) does not apply to witness statements from interviews during the investigation or the complainant's complaints and allegations about identifiable individuals. I have found s. 22(3)(d) applies to this information, but I make the opposite finding when it comes to s. 22(3)(g). Complainants' allegations and witness statements in workplace investigations do not qualify as "personal recommendations or evaluations" as these terms have been interpreted in past orders.

Personal evaluation when applicant knows evaluator – s. 22(3)(h)

[141] Section 22(3)(h) says that disclosure is presumed to be an unreasonable invasion of third party personal privacy if it could reasonably be expected to reveal the content of a personal recommendation or evaluation, a character reference or a personnel evaluation supplied by the third party in confidence and the applicant could reasonably be expected to know the identity of the third party. Section 22(3)(h) exists to protect the identity of those who confidentially provide the type of evaluative material described in s. 22(3)(g).[125]

[142] Past orders have found that s. 22(3)(h) applies to formal performance reviews, job or academic references, and the evaluative comments or views of an investigator in a workplace complaint investigation.[126] Conversely, s. 22(3)(h) does not apply to:[127]

- one employee's allegations about another;
- employee comments or complaints about others' workplace attitudes and behaviour; or
- employee feedback and opinions about other employees.

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[124] For similar reasoning, see Order F19-19, 2019 BCIPC 21 at para. 44.
[125] Order F05-30, *supra* note 121 at para. 42.
[126] Order F06-11, 2006 CanLII 25571 at para. 53; Order F05-30, *supra* note 121 at paras. 41-42; Order 01-07, 2001 CanLII 21561 at para. 21.
[127] Order F06-11, *ibid* at paras. 52-54; Order 01-07, *ibid* at paras. 21-22; Order F05-30, *supra* note 121 at paras. 41-42; Order F10-08, 2010 BCIPC 12 at paras. 33-35.

[143] The Ministry submits that s. 22(3)(h) applies where the Ministry withheld the identity of a specific person who provided evaluative comments. The Ministry says that the applicant could likely identify this individual "if her comments are disclosed because they worked together in the past."[128] The Ministry says it withheld this person's identity throughout the records where she provides "evaluative comments or investigative material."[129] The Ministry refers me to a specific page as an example.

[144] Having reviewed this page, I am not satisfied that it contains a "personal recommendation or evaluation, a character reference or a personnel evaluation" as those terms have been interpreted in previous orders.[130] Instead, I find that it comprises one employee's allegations about others. As described above, s. 22(3)(h) does not apply to an employee's allegations about others, even in the context of workplace investigations.[131] Additionally, nothing in the Ministry's submissions or the records themselves clearly indicates to me that these allegations were made "in confidence" as required by s. 22(3)(h). Taking all this into account, I am not satisfied that s. 22(3)(h) applies to the example referred to by the Ministry. I make the same finding for the same reasons when it comes to all the other times this individual "provides evaluative comments or investigative material" (to use the Ministry's phrasing). However, I find that s. 22(3)(d) applies to these types of evaluative comments, as described above.

[145] In short, I find that the presumption in s. 22(3)(h) does not apply.

[146] I have also considered the other presumptions in s. 22(3). In my view, none of them apply to the information that remains in dispute.

Relevant circumstances – section 22(2)

[147] The last step in the s. 22 analysis requires a consideration of all the relevant circumstances to determine whether disclosure of the personal information at issue would constitute an unreasonable invasion of personal privacy. The relevant circumstances might rebut the s. 22(3)(d) and (g) presumptions discussed above.

[148] Section 22(2) lists some relevant circumstances to consider at this stage. Taken together, the parties' submissions address or allude to the potential applicability of ss. 22(2)(a)-(b) and (e)-(i). The parties also make submissions about other potentially relevant circumstances. I will begin with the circumstances listed in s. 22(2), then turn to those that are not listed in FIPPA.

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[128] Ministry's initial submission at para. 133.
[129] Ministry's initial submission at footnote 75.
[130] For similar reasoning, see Order 01-07, 2001 CanLII 21561 (BC IPC) at paras. 21-22.
[131] Order F10-08, 2010 BCIPC 12 at para. 34.

Disclosure desirable for public scrutiny – section 22(2)(a)

[149] Section 22(2)(a) asks whether disclosure of personal information is desirable for the purpose of subjecting the activities of a public body to public scrutiny. In doing so, this section highlights the importance of fostering accountability.[132]

[150] The applicant argues that s. 22(2)(a) weighs in favour of disclosure because it would foster better accountability if the public knew everything about:[133]

- The false and unfounded allegations leveled against her and others;
- The actions of the employees who leveled or accepted those allegations without evidence; and
- The actions of employees who approved acting on those allegations.

[151] The applicant contends that government employees involved in illegal or unethical conduct while being paid with public funds do not deserve, and should not expect, to have their misconduct kept secret because of FIPPA. This, she says, would thwart the primary purpose of the legislation.

[152] The Ministry takes the position that s. 22(2)(a) does not weigh in favour of disclosure because the government has already been subjected to an unprecedented amount of transparency and accountability. [134] The Ministry says disclosure would not foster further accountability.

[153] I find that s. 22(2)(a) does not weigh in favour of disclosure given the specific personal information in dispute. I have reviewed this information carefully. Almost all of it relates to the individuals wronged by the internal investigation, not the individuals who performed the investigation. It does not show precisely who made, accepted, approved, or supported the allegations, which is what the applicant suggests is a missing piece in all the public disclosure regarding this matter.

[154] I do not see how disclosing any of the disputed personal information would foster government accountability in the circumstances. The disputed information reveals no smoking gun about the internal investigators' behaviour, as the applicant seems to think. How the internal investigators carried out their duties has already been scrutinized extensively, as the evidence reveals. As described

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[132] Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.
[133] The information summarized in this paragraph comes from the applicant's response submission at paras. 49, 52, 55 and the applicant's additional response submission at para. 6.
[134] The information summarized in this paragraph comes from the Ministry's initial submission at paras. 135-136.

above, two distinct, independent investigators looked into what took place and reported publicly on their findings. They released two public reports related to the Ministry's decisions and actions. Both reports recommended that the government take specific actions to repair the damage done and prevent future occurrences. The government accepted and has implemented all these recommendations. In these unique circumstances, the disclosure of the specific personal information in dispute would do nothing more to subject the activities of the government to public scrutiny.

[155] I find that s. 22(2)(a) does not weigh in favour of disclosure in this case.

Promotion of public health – section 22(2)(b)

[156] Section 22(2)(b) asks whether disclosure of the personal information at issue would likely promote public health and safety. The applicant contends that the internal investigation and firings probably caused many deaths because they involved the termination of drug safety research and surveillance.[135] The applicant submits that the termination of these programs has endangered public health. I take these submissions as arguments that s. 22(2)(b) weighs in favour of disclosure.

[157] I kept the applicant's submissions about public health in mind when reviewing the personal information in dispute. Having done so, I find that s. 22(2)(b) is not a relevant circumstance in this case. I do not see how disclosure of the specific personal information withheld under s. 22 would promote public health.

Unfair harm, unfair reputational damage, and unreliable information – sections 22(2)(e), (g) and (h)

[158] Both parties make submissions about ss. 22(2)(e), (g) and (h).

[159] Section 22(2)(e) asks whether disclosure will unfairly expose a third party to financial or other harm. Past orders have interpreted "other harm" as serious mental distress, anguish, or harassment.[136] For mental harm to fit within the meaning of "other harm," it must go beyond embarrassment, upset, or a negative reaction.[137] Section 22(2)(h) asks whether disclosure may unfairly damage the reputation of a person referred to in the records. Section 22(2)(g) asks whether the personal information at issue is likely to be inaccurate or unreliable.

[135] Applicant's response submission at paras. 36-37.
[136] Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 42.
[137] Order 01-15, *supra* note 106 at paras. 49-50.

[160] I will discuss the Subjects and the internal investigators separately here.

The Subjects – ss. 22(2)(e), (g) and (h)

[161] The Ministry says *Misfire* did not name all the Subjects, and the level of detail contained in the records goes beyond what *Misfire* disclosed publicly.[138] As such, the Ministry argues that disclosure of the Subjects' personal information could cause them unfair reputational harm and mental distress. Thus, the Ministry says ss. 22(2)(e) and (h) weigh in favour of withholding the Subjects' personal information. The Ministry also says s. 22(2)(g) favours withholding the Subjects' personal information because the Ombudsperson found "much of the information" inaccurate.[139]

[162] The applicant also draws my attention to *Misfire*, arguing that it exonerated all the Subjects and laid bare the falsity of the allegations against them.[140] Therefore, the applicant submits there is no risk of further defamation or harm for those falsely accused. She says:

> There will probably be negative allegations about fired and impacted employees and contractors, and possibly others who were investigated, in the requested materials. Most or all of these negative allegations have already been made public (repeatedly) by government, and **all** were fully refuted in Misfire, which exonerated **all** of those falsely accused. It seems doubtful that any further harm can come to anyone's reputation from negative allegations being seen, in context.[141]

[163] I understand this as an argument that disclosure of the Subjects' personal information would not harm them or led to reputational damage because *Misfire* has set the public record straight, regardless of what the information in dispute says or whether it is unreliable or inaccurate.

[164] I agree with the applicant. Any unfair damage to the Subjects' reputations and any unfair mental distress or anguish suffered has, unfortunately, already occurred. *Misfire* makes this abundantly clear.[142] *Misfire* also clarifies that this unfair damage and harm arose as a result of government misconduct, not the Subjects' actions. With this context in mind, I find that ss. 22(2)(e), (g) and (h) do not weigh in favour of withholding the Subjects' personal information.

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[138] The information summarized in this paragraph comes from the Ministry's initial submission at paras. 142-144.
[139] *Ibid* at para. 144.
[140] Applicant's response submission at para. 50; Applicant's additional response submission at para. 7.
[141] Applicant's additional response submission at para. 7. Emphasis in original.
[142] *Misfire*, *supra* note 14 at p. XIV.

The internal investigators – ss. 22(2)(e) and (h)

[165] The Ministry acknowledges that the internal investigation was flawed and has been discredited.[143] Given this, the Ministry argues that it is not something anyone would want to be publicly associated with. The Ministry says being publicly associated with a flawed, discredited investigation could harm people's careers. The Ministry says *Misfire* did not name most of the investigators, so the Ministry is concerned that disclosure of the investigators' personal information could result in mental distress, retribution and/or damage to the investigators' reputations. According to the Ministry, any such harm or reputational damage would be unfair because "it is fair to conclude" that the investigators "had a genuine, albeit mistaken, suspicion that wrongdoing had occurred and they believed they were carrying out their job duties".[144]

[166] The applicant says the Ministry's claim about unfairness is "possibly the most ridiculous claim of unfairness that I have ever seen."[145] She asks: "How is it unfair to reveal what employees actually did, in their official capacities, while being paid with public money?"

[167] I am not persuaded by the Ministry's arguments about the internal investigators. First and most importantly, I note that the Ministry already chose to disclose the names of the internal investigators to the applicant many times throughout the records. So while *Misfire* may not have named most of these individuals publicly, I find that the Ministry's disclosure has effectively done so.

[168] Furthermore, I do not agree with the Ministry's arguments about unfairness in the circumstances. As the Ministry itself admits, the internal investigation was flawed and discredited. According to *Misfire*, the investigators erred in their judgments and actions. For example, *Misfire* found that the investigators did not approach certain parts of their investigative work with "suitably open minds" and instead appeared "focused on trying to build a case and were not engaged in a neutral fact-finding exercise."[146] Before the Ombudsperson came to these conclusions, I find it reasonable to infer that most (if not all) of the internal investigators were offered an opportunity to attend a witness interview to tell their side of the story.[147] With all this in mind, I am not satisfied that any reputational damage or other harm caused by disclosure of the

[143] Both quotations in this paragraph come from the applicant's response submission at para. 144.
[144] *Ibid* at para. 141.
[145] Applicant's response submission at para. 45.
[146] *Misfire*, *supra* note 14 at pp. IX and X.
[147] Collectively, 130 individuals were interviewed during the Ombudsperson's investigation (*Misfire*, *supra* note 14 at p. 15). Additionally, *Misfire* makes it clear that the Ombudsperson heard evidence from the internal investigators (see p. 350).

investigators' personal information would be unfair as required by ss. 22(2)(e) and (h).

[169] Furthermore, the Ministry proffers no evidence to support its claim that disclosure will expose investigators to the type or level of harm required by s. 22(2)(e). As described above, this section requires serious mental distress or anguish that goes beyond embarrassment, upset, or a negative reaction. While I accept that people may not wish to be publicly associated with a flawed, discredited investigation, without evidence to show otherwise, this strikes me as nothing more than embarrassment or a negative reaction. More is needed to engage s. 22(2)(e).[148]

[170] For these reasons, I find that ss. 22(2)(e) and (h) do not weigh in favour of withholding the investigators' personal information.

Supplied in confidence – section 22(2)(f)

[171] Section 22(2)(f) asks whether the personal information at issue was supplied in confidence.

[172] The Ministry says s. 22(2)(f) is a relevant factor that favours withholding the information.[149] To support its position, the Ministry quotes from Order F16-33, which said: "personal information about matters related to workplace complaints and concerns are invariably considered – by those who provide them and by those who receive them – to be sensitive personal information that is supplied in confidence."[150] The Ministry says the records in dispute were all gathered in the course of the internal investigation and the Ombudsperson's investigation, so the reasoning in Order F16-33 applies.

[173] The applicant counters the Ministry's argument by pointing out that the government did not actually treat personal information related to the internal investigation as though it was sensitive personal information supplied in confidence.[151] On the contrary, she says the government repeatedly released damaging information concerning all those investigated and wrongfully accused and/or fired "in lurid detail" in government media releases and interviews by

[148] In coming to this conclusion, I note that p. 350 of *Misfire* summarizes some negative impacts the specific members of the Ministry's investigative team have experienced. I have considered this aspect of *Misfire* and find that it does not describe the type of mental distress or anguish required by s. 22(2)(e).
[149] The information summarized in this paragraph comes from the Ministry's initial submission at para. 145; and the Ministry's additional initial submission at para. 28.
[150] Order F16-33, 2016 BCIPC 37 at para. 34.
[151] The information summarized in this paragraph comes from the applicant's response submission at paras. 46-48.

Ministers.[152] According to the applicant, the government repeatedly publicized the names of fired employees and numerous false allegations about them from 2012 to 2016. The applicant also claims that the government leaked a now-discredited report[153] to the media in 2016, which publicly smeared several of the fired employees further. The applicant says *Misfire* recommended additional remedial actions and payments because of this unauthorized leak.[154]

[174] With some exceptions, I am not satisfied that s. 22(2)(f) weighs in favour of withholding all the information in dispute.

[175] In effect, the Ministry submits that the information in dispute was supplied in confidence within the meaning of s. 22(2)(f) because it was all gathered in the course of two workplace investigations. This submission is akin to the Ministry's argument that *Misfire* tainted all the records (discussed in paragraphs 124, 126, 127 and 133 above). I reject it for the same reasons. The mere fact that records were gathered for an investigation does not, on its own, mean all the personal information in them was "supplied in confidence" as required by s. 22(2)(f).

[176] Furthermore, I do not agree that Order F16-33 supports a finding that all the information in dispute in this case was supplied in confidence. In that order, the adjudicator considered whether information about eleven specific grievances in a one-page record was supplied in confidence within the meaning of s. 22(2)(f). The full paragraph that the Ministry quotes from states (emphasis added):

> In my view, personal information about matters related to workplace complaints and concerns are invariably considered - by those who provide them and by those who receive them - to be sensitive personal information that is supplied in confidence. **There is nothing here to suggest that it is otherwise with respect to these grievances**. Therefore, I am satisfied that the grievors' identities and the nature of their complaints/grievances would have been supplied by the grievors and their union to the Ministry in confidence during the grievance process.[155]

[177] Unlike in Order F16-33, there **is** something here to suggest that some of the personal information related to the internal investigation was not considered or treated by the Ministry as sensitive personal information supplied in confidence. The information in dispute and the context of this case is markedly

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[152] *Ibid* at para. 46.

[153] This particular report was from an investigation conducted by the Office of the Comptroller General, which the Ombudsperson also found flawed. This investigation related to the same matters as the Ministry's internal investigation. The Ombudsperson found that the leaked report contained a number of inaccuracies and unsupported findings and inferences. See *Misfire*, *supra* note 14, p. 370.

[154] *Misfire*, *supra* note 14, p. 370, recommendations 12, 13 and 14.

[155] *Supra* note 150.

different than Order F16-33. Here, I am considering information on thousands of pages, much of which does not directly identify the Subjects, or the nature of the suspicions investigators had about them. Additionally, as the applicant has pointed out, the context here is one in which the Ministry itself made certain aspects of the internal investigation public.[156]

[178] In short, I am not persuaded that all the information in dispute was supplied in confidence as suggested by the Ministry. Instead, I have considered the specific information in dispute discretely on a line-by-line basis with the context of the Ministry's internal investigation and the Ombudsperson's investigation in mind to determine whether it was supplied in confidence. Having taken this approach, I am satisfied that a portion of the information in dispute was supplied in confidence. For example, I find it clear that the evaluative material discussed in paragraph 139 was supplied in confidence. I make the same finding when it comes to the notes from witness and Subject interviews, and the complainant's original complaint since it was made anonymously.

[179] Conversely, some of the personal information at issue consists of emails sent between Subjects and other individuals as well as summaries of those emails. Nothing in the evidence indicates that the individuals who authored these emails supplied the personal information in them in confidence. As I see it, this is not the type of personal information commonly seen in workplace investigations, such as complainant and witness interviews, or emails that actually discuss the investigation itself. I am not satisfied that s. 22(2)(f) applies to this type of information.

[180] To summarize, I have made mixed findings with respect to s. 22(2)(f). I find that it weighs in favour of withholding some, but not all, of the disputed information.

Disclosure about a deceased person – s. 22(2)(i)

[181] Section 22(2)(i) asks whether the personal information at issue relates to a deceased person and, if so, whether the length of time the person has been deceased indicates that disclosure is not an unreasonable invasion of privacy.

[156] For example, in September of 2012, the Ministry issued a news release and held a press conference announcing the existence of an investigation of inappropriate conduct. The Ministry announced that four dismissals had taken place and that three other individuals had been suspended. While the news release did not contain individuals' names, the identity of the fired and suspended employees soon became publicly known and, importantly, *before* the news release and press conference occurred, the Ministry had been advised that this would likely occur. The news release also stated that the RCMP had been asked to investigate and had been provided with interim results of the investigation. *Misfire* found that including this reference to the RCMP was misleading. See *Misfire*, *supra* note 14 at pp. XI, 200-206 and 208.

[182] FIPPA does not specify a set number of years after which a deceased third party's personal information may be disclosed. However, previous orders have noted that in most Canadian jurisdictions, the law provides that disclosing information about someone who died at least 20 to 30 years ago is not an unreasonable invasion of their privacy.[157] Previous orders have also said that an individual's personal privacy rights are likely to continue for at least 20 years.[158]

[183] The applicant submits that s. 22(2)(i) weighs in favour of disclosing personal information that relates to her former colleague who committed suicide. She says *Misfire* exonerated him completely and no further harm can be done to him.[159]

[184] The Ministry submits that not enough time has elapsed since this individual's passing to weigh in favour of disclosing his personal information.[160] I agree.

[185] In this case, the applicant's former colleague passed away less than ten years ago. Therefore, I find that s. 22(2)(i) does not weigh in favour of disclosing the information about this individual.

[186] Now I will discuss relevant circumstances that are not listed in s. 22(2).

Public knowledge

[187] Previous orders have found that public knowledge is a relevant circumstance that may weigh in favour of disclosure.[161] As previously mentioned, I have found that the body of publicly available information respecting the internal investigation and Ministry firings is vast and substantial. It includes the 500-page *Misfire*, which the Ministry and the applicant put before me in their submissions.

[188] I have carefully reviewed the information in dispute with *Misfire* in mind. Having done so, I find that *Misfire* explicitly contains or would allow accurate inferences about a substantial amount of the information in dispute. For example, *Misfire* publicly and repeatedly names most of the central Subjects of the investigation, their program areas, and contracts or projects they worked on. It discusses these named individuals at length and includes extensive details about their professional and educational backgrounds, things they did, emails they sent (including direct quotations from those emails, which I note the Ministry has

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[157] Order F14-09, 2014 BCIPC 11 at para. 33.
[158] *Ibid* at para. 30; see also Order F18-08, 2018 BCIPC 10 at para. 32.
[159] Applicant's response submission at para. 53.
[160] The Ministry's reply submission at para. 30.
[161] For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 77; and Order F08-20, 2008 CanLII 66914 (BC IPC) at paras. 40-43.

withheld under s. 22)[162] and so on. It also contains an entire chapter about the individual who committed suicide after being fired by the Ministry.[163] *Misfire* names this person and provides extensive details about what happened to him, yet the Ministry has withheld basic details about this individual such as his name and the date he died.

[189] In my view, if the information in dispute is publicly available in *Misfire*, then its disclosure does not constitute an unreasonable invasion of third party privacy. It simply does not make sense to me to continue to withhold information that has already been disclosed in such a well-known public report, even if that information is subject to one of the presumptions discussed above.

[190] Furthermore, public knowledge extends beyond the contents of *Misfire* itself. For example, while *Misfire* did not name the complainant, the media did.[164] In fact, the complainant spoke openly on the record with at least one reporter about the internal investigation.[165] From this, I find it reasonable to infer that the complainant herself is not opposed to the public knowing her name, or the role she played in the internal investigation. Given this, I do not see how disclosing information about the complainant, including her name and her involvement with the internal investigation, would constitute an unreasonable invasion of her personal privacy in the circumstances.

[191] To summarize, I find that public knowledge weighs so heavily in favour of disclosure of some of the personal information in this case that it rebuts the presumptions in ss. 22(3)(d) and (g) (when it comes to the publicly known information).

Applicant's existing knowledge

[192] I also find that the applicant's pre-existing knowledge weighs in favour of disclosure of some of the information in dispute. Previous orders have found that the fact that an applicant already knows the third party personal information in dispute is a relevant circumstance that may weigh in favour of disclosure.[166]

[193] Here, the Ministry withheld information from emails the applicant wrote or received, and information from the notes of her interview with internal investigators. The applicant already knows what was said in these emails and in her own interview, and – importantly – I find that the content of this material is not sensitive. For example, the Ministry withheld an email in which a person (publicly

[162] For example, see *Misfire*, *supra* note 14 at p. 320.
[163] *Misfire*, *supra* note 14 chapter 15.
[164] Applicant's response submission, appendices 4 and 5.
[165] *Ibid*, appendix 5.
[166] For example, see Order F17-02, 2017 BCIPC 2 at paras. 28-30; Order 03-24, 2005 CanLII 11964 (BC IPC) at para. 36; and Order F15-14, 2015 BCIPC 14 at paras. 72-74.

named in *Misfire*) thanked the applicant for her help. I cannot fathom how the disclosure of this information to the applicant would be an unreasonable invasion of third party privacy.

Information already released

[194] Lastly, I note that in several instances, the Ministry released information in one or more places in the records, but withheld that exact same information elsewhere. The Ministry provides no explanation for this inconsistent severing.

[195] Despite the workplace investigation context, I find that this already-released information is not highly sensitive, private information. It does not contain the type of evaluative material that I found s. 22(3)(g) applies to, nor does it comprise allegations about Ministry employees (which I found s. 22(3)(d) applies to). Instead, I find the already-released information to be relatively innocuous. For example, in a few places the Ministry released the names of some individuals included in a particular working group. Elsewhere, the Ministry withheld this information.

[196] In my view, the nature of this information, paired with the fact that the Ministry already disclosed it to the applicant, is a relevant circumstance that weighs in favour of its disclosure.[167]

Conclusion – section 22

[197] I find that some of the information withheld under s. 22(1) is third party personal information. However, other information withheld under s. 22(1) is contact information or information that is not about identifiable individuals.

[198] Some of the personal information at issue fits within the meaning of ss. 22(4)(a), (e) and (f), so its disclosure does not constitute an unreasonable invasion of third party privacy.

[199] The ss. 22(3)(d) and (g) presumptions against releasing personal information related to employment or educational history, and evaluative material apply to some, but not all, of the information in dispute. The presumption in s. 22(3)(h) does not apply.

[200] I am not satisfied that any relevant circumstances weigh significantly in favour of withholding all the information in dispute, although I have found that some of the information was supplied in confidence.

[167] I also note, in passing, that I find it highly likely that the applicant already knew this information (even if the Ministry had not already disclosed it) given her position and experience at the Ministry.

[201] However, I am satisfied that public knowledge weighs heavily in favour of the disclosure of a significant portion of the information in dispute. I also find that the applicant's pre-existing knowledge weighs in favour of releasing some of the information in dispute. I find that these two circumstances rebut the ss. 22(3)(d) and (g) presumptions when it comes to much of the information in dispute.

[202] In short, I find that s. 22(1) requires the Ministry to withhold only some of the information in dispute. The Ministry must disclose the rest to the applicant. I have highlighted all the information that the Ministry must release to the applicant in the copy of the records the Ministry will receive with this order.

CONCLUSION

[203] For the reasons given above, under s. 58 of FIPPA:

1) I confirm the Ministry's decision that s. 25(1)(b) does not apply to the information in dispute.

2) I confirm the Ministry's decision to refuse to disclose information to the applicant under s. 3(1)(c).

3) I confirm the Ministry's decision to refuse to disclose information to the applicant under s. 14.

4) Subject to item 5 below, I confirm, in part, the Ministry's decision to refuse to disclose to the applicant some of the information withheld under s. 22(1).

5) The Ministry is not required under s. 22(1) to refuse to disclose the highlighted information in the copy of the records it receives with this order.

Pursuant to s. 59(1), the Ministry must give the applicant access to the highlighted information by April 14, 2021. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 1, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator