Order F21-32

COMMUNITY LIVING BRITISH COLUMBIA

Laylí Antinuk
Adjudicator

July 28, 2021

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Summary: The applicant, the Garth Homer Society, requested information about itself from Community Living British Columbia (CLBC). CLBC provided some information in response, but withheld other information pursuant to several provisions of the *Freedom of Information and Protection of Privacy Act* (FIPPA) as well as s. 46 of the *Adult Guardianship Act* (AGA). This order deals with CLBC's decision to refuse access to information pursuant to ss. 3(1)(c) (out of scope), 13(1) (advice and recommendations), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of third-party privacy) of FIPPA and s. 46 (no disclosure of person who reports abuse) of the AGA. The adjudicator found that, taken together, ss. 3(1)(c), 13(1), 14 and 22(1) of FIPPA and s. 46 of the AGA authorized or required CLBC to withhold much of the information in dispute. However, the adjudicator also decided ss. 13(1) and 22(1) did not apply to some of the information CLBC withheld under those sections and ordered CLBC to disclose this information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), 13(1), 13(2), 13(3), 14, 22(1), 22(2)(a), 22(2)(c), 22(2)(f), 22(2)(h), 22(2)(i), 22(3)(a), 22(3)(d), 22(4)(e), 79 and Sch. 1; *Adult Guardianship Act*, ss. 46(1) and 46(2).

INTRODUCTION

[1] The applicant, the Garth Homer Society (Society),[1] requested a variety of information about itself from Community Living British Columbia (CLBC).[2] CLBC provided some information in response, but withheld other information under several sections of the *Freedom of Information and Protection of Privacy Act* (FIPPA), as well as s. 46 of the *Adult Guardianship Act* (AGA). This order

[1] I will use the terms "applicant" and "Society" interchangeably to refer to the applicant throughout this order.
[2] CLBC is a public body under FIPPA as per the definition of "local public body" at (b.1) and the definition of "social services body". Schedule 1 of FIPPA contains its definitions.

considers CLBC's decision to withhold information under ss. 3(1)(c) (out of scope), 13(1) (advice and recommendations), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of third-party privacy) of FIPPA, and s. 46 (no disclosure of person who reports abuse) of the AGA.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review CLBC's decision to withhold information. Mediation at the OIPC did not resolve the dispute between the parties, and it proceeded to inquiry.

[3] During the inquiry process, the OIPC invited the Representative for Children and Youth (Representative) to participate as a party regarding the s. 3(1)(c) issue. The Representative decided to participate in the inquiry and made submissions.[3] The Ombudsperson also was informed about the inquiry, but decided not to participate.[4]

Preliminary matters

[4] The evidence before me shows that the applicant and CLBC disagree about several significant issues that are outside the scope of this inquiry. The applicant in particular provides extensive affidavit evidence and submissions respecting the deterioration of its relationship with CLBC. I acknowledge that these issues are vitally important to both parties and have carefully read all the material before me. However, my role in this inquiry is restricted to deciding the inquiry issues, all of which relate exclusively to CLBC's decision to withhold information in response to the applicant's access request. As such, I will discuss the relationship between the applicant and CLBC only to the extent necessary to address the inquiry issues.

ISSUES

[5] In this inquiry, I will decide the following issues:

1) Does s. 3(1)(c) exclude certain records from the scope of FIPPA?
2) Do ss. 13(1) or 14 of FIPPA authorize CLBC to withhold the information in dispute under those sections?
3) Does s. 22(1) of FIPPA require CLBC to withhold the information in dispute under that section?
4) Does s. 46 of the AGA prohibit CLBC from disclosing the information withheld under that section?

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[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] CLBC's initial submission at para. 8.

[6] CLBC bears the burden of proving that the applicant has no right to access the information withheld under ss. 3(1)(c)[5], 13(1) and 14.[6] CLBC also must prove that the information withheld under s. 22(1) is personal information.[7]

[7] 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 under s. 22(1).

[8] When it comes to s. 46 of the AGA, FIPPA and the AGA are silent with regard to which party has the burden of proof. CLBC submits that previous orders do not discuss the burden of proof in inquiries respecting the AGA, but notes that past orders have said that in the absence of a statutory burden of proof, both parties should provide arguments and evidence to support their positions. I acknowledge that several past OIPC orders have come to this conclusion.

[9] However, I prefer Adjudicator Davis' reasoning in Order F20-50. He explained that the approach taken by former orders "does not satisfactorily answer the question of burden in the context of an OIPC inquiry, where it is in the interests of both parties to present argument and evidence in support of their positions whether or not they have the burden of proof."[8] He then concluded that the public body had the burden of proof in his case because, in general, it is for the party claiming the benefit of a legislative provision to show that it is entitled to rely on that provision.[9] I find that this general rule applies here. CLBC claims the benefit of s. 46(2) of the AGA, so it should have the burden to prove that that section applies.[10]

[10] Furthermore, s. 46 of the AGA demands that the identity of individuals who report abuse or neglect to designated agencies must never be disclosed. CLBC is a designated agency that received s. 46 reports and now says it must withhold information because disclosure would identify a reporter of abuse. Given the nature of s. 46 and CLBC's role as a designated agency, I consider it reasonable and fair for CLBC to bear the burden of proving that s. 46 applies. CLBC is the only party in this inquiry that holds the information necessary to prove that reports under s. 46 were made. Taking all this into account, I find that CLBC bears the burden of proof when it comes to s. 46 of the AGA.

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[5] Order F16-15, 2016 BCIPC 17 at para. 8.
[6] Section 57 of FIPPA governs the burden of proof in inquires.
[7] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.
[8] Order F20-50, 2020 BCIPC 59 at para. 4.
[9] *Québec v. (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3 at p. 15. See also e.g. *Smith v. Nevins*, [1925] S.C.R. 619.
[10] I say CLBC receives the "benefit" of s. 46 because, due to the operation of s. 46(2), CLBC has reduced access to information obligations under FIPPA when it comes to information that could reveal the identity of a reporter under s. 46(1).

DISCUSSION

Background

[11] CLBC is a crown corporation that funds supports and services provided by service providers to adults with developmental disabilities and their families. The Society delivers various services for adults with developmental disabilities, including community inclusion services and employment programs, some of which are funded under contract with CLBC.

[12] In 2015, the Society, which had previously only provided day services, began providing residential services in five Society-staffed residences under contract with CLBC for 10 individuals with highly complex needs. In January 2018, CLBC initiated a review (the Review) of the Society's residential services because of concerns regarding the Society's delivery of those services. At the end of the Review, CLBC terminated its contract with the Society and transitioned the residential services to another provider. A few months later, the Society made the access request at issue in this inquiry. Specifically, the Society requested all documents related to itself that had been created or obtained by CLBC for the previous three years, including a report CLBC prepared as a result of the Review.

[13] CLBC continues to contract with the Society to deliver other services to adults with disabilities and their families.

Records at issue

[14] The records at issue total 3,161 pages and consist of a wide variety of documents. The vast majority of the records comprise emails (with and without attachments) most of which were either internal to CLBC or sent between CLBC and the Society. The remaining records comprise:

- briefing and issues notes;
- handwritten and typewritten notes;
- letters and text messages;
- union funding templates and CLBC forms;
- medical documents, such as prescriptions and test results;
- case manager notes and summaries of critical client incidents;
- the terms of reference for the Review;
- various reports, including the draft Review report;
- communications materials;
- documents related to the College of Registered Nurses of BC;
- spreadsheets containing information about the Society's clients; and
- documents related to an Island Health inspection of one of the residences run and staffed by the Society.

[15] CLBC provided some, but not all, of the information in dispute for my review in this inquiry. Specifically, CLBC provided me with copies of the information it withheld under ss. 13(1) and 22(1). However, when it comes to the information withheld under the AGA and ss. 3(1)(c) and 14 of FIPPA, CLBC chose not to provide me with the disputed information. Instead, CLBC relies on affidavit evidence from its Executive Director of Quality Assurance and three of its lawyers, as well as affidavit evidence provided by the Representative.

[16] The Society submits that the evidence provided by CLBC does not satisfactorily discharge its burden of proof and draws my attention to the Commissioner's power to order production under s. 44(1).[11] I have decided that I have sufficient evidence to make my findings with respect to the inquiry issues and do not consider it necessary to order production under s. 44(1) of any of the disputed information that was not provided for my review.

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

[17] Section 3(1)(c) says that FIPPA does not apply to records created by or for an officer of the Legislature 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.[12] It does this by excluding certain records from FIPPA's scope.

[18] CLBC submits that s. 3(1)(c) applies to 57 pages of records that involve either the Representative or the Ombudsperson. For convenience, I will call these the Representative records and the Ombudsperson records. As noted above, CLBC did not provide copies of the records it says s. 3(1)(c) applies to. Instead, CLBC relies on affidavit evidence from: (a) its Executive Director of Quality Assurance; and (b) the Representative's Executive Director for Advocacy and Youth Engagement.

[19] For s. 3(1)(c) to apply, the following three criteria must be met:[13]

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.

[11] Applicant's response submission at paras. 50, 52, 58 and 71.
[12] Order 01-43, 2001 CanLII 21597 (BC IPC) at para. 25; Order F16-07, 2016 BCIPC 9 at para. 9.
[13] Order 01-43, *ibid* at para. 9.

[20] In discussing the third criterion above, past decisions of the BC Supreme Court and the OIPC have drawn a distinction between the administrative and operational records of an officer.[14] 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.[15]

[21] Operational records include case-specific records received or created during the course of opening, processing, investigating, mediating, settling, inquiring into, considering taking action on, or deciding a case.[16] 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.[17] For instance, a previous OIPC order found that job descriptions for jobs with Elections BC were administrative records that FIPPA applied to.[18]

Analysis and findings on s. 3(1)(c)

[22] Beginning with the first criterion, FIPPA's definition of "officer of the Legislature" includes the Representative and the Ombudsperson.[19] Therefore, both the Representative and the Ombudsperson (collectively, the two Officers) meet the first criterion under s. 3(1)(c). The applicant does not dispute this.[20]

[23] I will discuss the next two s. 3(1)(c) criteria for each of the Officers individually, starting with the Representative. Taken together, these two criteria require that the records at issue were created by or for the officer (or are in the officer's custody or control) in relation to the officer's statutory functions.

The Representative records

[24] The evidence shows that the Representative records consist of:

1. Various email strings (one with an attachment) that originated from or were sent to the Representative (the Representative communications).[21]

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[14] Order 01-43, *supra* note 12 at paras. 28-30.
[15] 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.
[16] Adjudication Order No.17, *ibid* at para. 22.
[17] 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).
[18] Order F16-07, 2016 BCIPC 9 at para. 22.
[19] Schedule 1 of FIPPA contains its definitions.
[20] Applicant's response submission at paras. 50 and 52.
[21] Representative initial submission at para. 39; Representative's Executive Director affidavit at para. 6.

2. Internal CLBC emails that discuss how to address or respond to an issue that relates directly to the Representative.[22]
3. A draft letter from CLBC to a third party intended to be copied to the Representative.[23]

4. I will begin by discussing the Representative communications and then turn to a discussion of items 2 and 3 above, which I will call the CLBC communications.

Representative communications

[25] The Representative's affidavit evidence establishes that the Representative communications form part of an advocacy file the Representative created.[24] As noted, all the Representative communications were either written by or sent to the Representative. Accordingly, I have no hesitation in concluding that the Representative communications were created by or for the Representative and are in the Representative's custody and control, so they meet the second criterion for s. 3(1)(c) to apply.

[26] I also find that the Representative communications relate to the exercise of the Representative's advocacy functions under the *Representative for Children and Youth Act*. Under that Act, the Representative bears the responsibility for advocating on behalf of children and young adults and assisting them to become effective self-advocates.[25] To fulfill this statutory mandate, the Representative opens and works on advocacy files.

[27] As noted, the evidence shows that the Representative communications form part of an advocacy case file. This case file centred on the Society's delivery of community living services under a CLBC contract to a vulnerable young adult. Initially, the Representative's objective with this file was to advocate for the young adult to be placed in appropriate housing with suitable supports. As the file unfolded, further advocacy objectives arose such as helping the parties negotiate written terms on which they could agree to reasonably and civilly engage with one another. With this evidence in mind, I find that the Representative communications comprise operational records that relate to the exercise of the Representative's statutory functions.

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[22] CLBC Executive Director's affidavit at para. 24.
[23] CLBC Executive Director's affidavit at para. 24.
[24] The information discussed in this paragraph comes from the Representative's Executive Director affidavit at paras. 6-8; and the Representative's initial submission at para. 19.
[25] The information discussed in this paragraph and the one that follows comes from the Representative's Executive Director affidavit at paras. 6-8 and 12; and the Representative's initial submission at para. 19.

[28] Taking all this into account, I find that the Representative communications meet all three criteria for s. 3(1)(c) to apply, so CLBC is authorized to withhold them.

CLBC communications

[29] I am also satisfied that the CLBC communications meet the second and third criteria for s. 3(1)(c) to apply. Previous OIPC orders have clarified that s. 3(1)(c) does not require records to actually be sent to or from an officer in order to satisfy the test. A public body's internal records created as a result of an officer's involvement in a matter, such as internal memoranda or emails, also fit within the meaning of s. 3(1)(c).[26] Here, CLBC has applied s. 3(1)(c) to internal emails that discuss how to address or respond to issues directly related to the Representative and a draft letter that would be copied to the Representative once finalized. In my view, these records meet the second criterion for s. 3(1)(c) to apply because they arose as a direct result of the Representative's involvement with CLBC respecting specific issues. Additionally, I find it more likely than not that the CLBC communications would allow accurate inferences about the Representative communications.

[30] Furthermore, CLBC's affidavit evidence establishes that these communications address or respond to issues directly related to the Representative's advocacy functions. CLBC's evidence also shows that the Representative's involvement in these records is consistent with an Advocacy Protocol between the Representative and CLBC. The two parties entered into the Protocol to ensure that the Representative can exercise her advocacy function effectively. With all this evidence in mind, I am satisfied that the CLBC communications relate to the exercise of the Representative's statutory functions.

[31] Given all this, I find that the CLBC communications meet all three criteria necessary for the application of s. 3(1)(c). Therefore, they do not fall within FIPPA's scope and CLBC can withhold them.

Ombudsperson records

[32] According to CLBC's affidavit evidence, the Ombudsperson records consist of three types of emails:[27]

1. Emails sent by the Ombudsperson to CLBC (the initiating emails);
2. Internal CLBC emails sent as a result of the Ombudsperson emails; and
3. An email sent by CLBC to its legal counsel.

[26] For example, see Decision F13-01, 2013 BCIPC 13 at para. 15 and Decision F06-06 at para. 14.

[27] The information in this paragraph comes from the CLBC Executive Director's affidavit at paras. 28-31.

I will call the emails described at items 2 and 3 above the subsequent emails.

[33] All the subsequent emails came into existence as a result of the initiating emails, in which an Ombudsperson employee informed CLBC of a complaint the Ombudsperson was investigating. CLBC employees wrote the subsequent emails in order to:

- Discuss how to address the issue raised by the Ombudsperson;
- Discuss how to respond to the Ombudsperson;
- Discuss matters relating to the Ombudsperson's investigation; or
- Seek legal advice about how to respond to the Ombudsperson.

In my view and for the reasons that follow, CLBC's evidence satisfactorily demonstrates that the Ombudsperson records were created by or for the Ombudsperson in relation to the Ombudsperson's statutory functions.

[34] Starting with the initiating emails, I find it clear that these records were created by the Ombudsperson, so they meet the second criterion for s. 3(1)(c) to apply. Furthermore, the Ombudsperson has the statutory responsibility to investigate certain types of complaints under the *Ombudsperson Act*.[28] The initiating emails all refer to the Ombudsperson's statutory investigatory authority and describe a complaint the Ombudsperson is investigating pursuant to that authority. Therefore, I am satisfied that the initiating emails all relate to the exercise of the Ombudsperson's statutory functions.

[35] I am also satisfied that the subsequent emails were created for the Ombudsperson for the same reasons set out in paragraph 29 above. The subsequent emails all discuss how to address or respond to issues directly related to the Ombudsperson's investigation. Therefore, as I see it, the subsequent emails meet the second criterion for s. 3(1)(c) to apply because they arose as a direct result of the Ombudsperson's investigation. In addition, I find that the subsequent emails all explicitly discuss the Ombudsperson's investigation, which I have found was conducted pursuant to its statutory mandate. Given this, I conclude that these emails all relate to the exercise of the Ombudsperson's statutory functions.

[36] To summarize, I find that the Ombudsperson records meet the s. 3(1)(c) criteria. As such, they do not fall within FIPPA's scope and CLBC can withhold them.

[28] *Ombudsperson Act*, RSBC c. 340 s. 10.

Applicant's arguments about s. 3(1)(c)

[37] The applicant does not explicitly deny that s. 3(1)(c) applies to the records withheld under it. Rather, the applicant submits that CLBC has provided insufficient information for me to evaluate and conclude that CLBC applied s. 3(1)(c) appropriately.[29] I disagree. For the reasons described in detail above, I find that CLBC and the Representative have provided sufficient evidence, including two sworn or affirmed affidavits, which contain the evidence necessary to establish that s. 3(1)(c) removes the Representative and Ombudsperson records from the scope of FIPPA.

[38] I will now turn to a discussion of s. 13.

ADVICE AND RECOMMENDATIONS – SECTION 13

[39] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. Section 13(1) protects a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.[30] Section 13(1) applies both to information that explicitly contains advice and recommendations, and to information that would enable an individual to make accurate inferences about underlying advice or recommendations.[31]

[40] The s. 13 analysis involves two steps.[32] First, I must determine if disclosure of the information in dispute would reveal advice or recommendations developed by or for the public body or a minister. If it would, then I must determine whether the information falls into any of the categories listed in ss. 13(2) or 13(3). If it does, the public body cannot refuse to disclose it.

[41] Section 13(2) lists categories of information that public bodies cannot withhold under s. 13(1). For example, s. 13(2)(a) says that public bodies cannot withhold factual material under s. 13(1). Section 13(3) says that public bodies cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

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[29] Applicant's response submission at paras. 50-52.
[30] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 65.
[31] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135; Order F15-12, 2015 BCIPC 12 at para. 42; and Order F16-28, 2016 BCIPC 30 at para. 22.
[32] For examples, see Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 18 and Order F17-01, 2017 BCIPC 01 at para. 14.

Parties' positions

[42] CLBC submits that the information withheld under s. 13(1) would directly or indirectly reveal advice and recommendations prepared for the Province in response to the Society's correspondence or concerns.[33] If disclosed, CLBC says, this information would reveal advice or recommendations about topics such as the Review and CLBC's contract termination with the Society.

[43] CLBC says that any factual information included in the disputed information is inextricably interwoven with, and integral to, the advice and recommendations, so s. 13(2)(a) does not apply. CLBC also argues that none of the other parts of s. 13(2) apply. In addition, CLBC says 13(3) does not apply because the records have not been in existence for 10 years.

[44] The applicant contends that CLBC has taken an overly broad approach to the application of s. 13(1).[34] The applicant also submits that several of the categories listed in s. 13(2) may apply to the disputed information. Specifically, the applicant points to ss. 13(2)(a) (factual material), 13(2)(k) (report of a task force), 13(2)(l) (plan to establish or change a program), 13(2)(m) (information cited publicly), and 13(2)(n) (discretionary or adjudicative decision).

Analysis and findings

[45] Having reviewed the information withheld under s. 13(1), I find that most of it would reveal advice and recommendations developed by or for CLBC or the Minister of Social Development and Poverty Reduction (the Minister). It includes recommendations and advice about:

- How, when and what to communicate to the Society about the Review;
- What should be changed in draft documents, discussed or shown using the comment and track changes function in Microsoft Word;
- What wording should be used in proposed public statements about the Review by the Minister and CLBC; and
- What CLBC should say to clients of the Society upon contract termination.

In my view, all the above clearly fits within the meaning of advice or recommendations under s. 13(1).

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[33] The information summarized in this paragraph and the one that follows comes from CLBC's initial submission at para. 125; and the CLBC Executive Director's affidavit at para. 33.
[34] The information summarized in this paragraph and the one that follows comes from the applicant's response submission at paras. 64-66.

[46] However, I find that s. 13(1) does not apply to a small amount of the information in dispute. Specifically, I find that the following types of information do not reveal advice or recommendations:

- statements contained in draft versions of the Review report that do not reveal advice or recommendations;[35]
- basic factual information related to CLBC's work and interactions, such as information about work certain people have done or will do and details about what will happen when;[36]
- page numbers and generic headings; and
- a draft checklist setting out the necessary steps to take when a contract termination is being considered.[37]

In my opinion, s. 13(1) does not apply to this information, so I will not consider it further. Previous orders have come to the same conclusions regarding this type of information.[38]

Exceptions – sections 13(2) and 13(3)

[47] The applicant says that several of the categories of information listed in s. 13(2) apply to the disputed information, but does not explain how. On my review, I find it clear that nothing in s. 13(2) applies to the advice or recommendations in the records. For example, CLBC's affidavit evidence clarifies that CLBC did not create a task force, committee, council or any other similar body to conduct the Review,[39] so s. 13(2)(k) does not apply. Additionally, none of the records at issue comprise a plan or proposal to establish a new

[35] For example, at pp. 1576-1589 of the records. The draft material that I refer to here does not contain policy options, implications of options, expert opinions, or pros and cons for a decision maker to consider, nor does it contain editorial comments or track changes for drafters to consider. Previous orders establish that a document does not automatically contain advice simply because it is a draft. For example, see Order 00-27, 2000 CanLII 14392 (BC IPC) at p. 6. See also Order F14-44, 2014 BCIPC 47 at para. 32; Order 03-37, 2003 CanLII 49216 (BC IPC) at paras. 59-61; Order F18-38, 2018 BCIPC 41 at para. 17; Order F17-39, 2017 BCIPC 43 at para. 37; and Order F17-13, 2017 BCIPC 14 at para. 24.

[36] For example, at pp.1027, 1593, 2315, 2389 and 2923-2924 of the records. Basic factual information does not fit within the meaning of advice or recommendations under s. 13(1). See Order F17-08, 2017 BCIPC 9 at para. 23; Order F17-03, 2017 BCIPC 3 at para. 29; Order F15-60, 2015 BCIPC 64 at para. 16; and Order F15-59, 2015 BCIPC 62 at para. 32.

[37] At pp. 1590-1592 of the records. This checklist is akin to the type of information one could find in an employee manual. As stated in previous OIPC orders, s. 13 does not typically capture material in manuals because a manual is a record of a public body's settled policy or position about how to approach an issue, not advice or recommendations. A manual typically does not give its users (typically employees) the latitude to accept or reject its contents, as required by s. 13. For example, see Order F14-34, 2014 BCIPC 37 at paras. 18-19. Also, as stated in footnote 35, a document does not automatically contain advice simply because it is a draft.

[38] Please see the three preceding footnotes.

[39] CLBC Executive Director's affidavit #2 at para. 6.

program or activity or to change a program or activity, so s. 13(2)(l) does not apply. Furthermore, nothing in the evidence before me indicates that any of the information in dispute was cited publicly by the head of the public body as a basis for making a decision or formulating a policy, so s. 13(2)(m) also does not apply. Lastly, s. 13(2)(n) does not apply because the records at issue do not contain a decision made in the exercise of a discretionary power or adjudicative function.

[48] I also find that the records have not been in existence for 10 or more years. The oldest records at issue were created in 2015. Consequently, s. 13(3) does not apply.

[49] Given my findings respecting ss. 13(2) and (3), I conclude that s. 13(1) authorizes CLBC to withhold the information that I have found reveals advice or recommendations.[40]

Exercise of discretion

[50] FIPPA contains both mandatory and discretionary exceptions to access. Section 13 is a discretionary exception.

[51] Past orders have said that public bodies must exercise their discretion under FIPPA upon proper considerations.[41] Proper considerations typically include factors such as the general purposes of FIPPA, the nature and sensitivity of the disputed record(s), the public interest in disclosure, and the age of the disputed record(s).[42] Public bodies must be able to establish that they have considered, in all the circumstances, whether they should release information even though a discretionary exemption applies.[43]

[52] If a public body has failed to properly exercise its discretion, the Commissioner can require it to do so, or to reconsider its exercise of discretion where the decision to withhold information was made in bad faith, or for an improper purpose, or without taking the appropriate considerations into account.

[53] The applicant argues that CLBC exercised its discretion to withhold information under s. 13(1) in bad faith, for an improper purpose, or without taking the appropriate considerations into account. To support this argument, the applicant provides extensive submissions and evidence respecting the deterioration of its relationship with CLBC and the lack of trust it has in CLBC. The applicant argues that CLBC's behaviour has been characterized by a pattern

[40] I have highlighted the information that s. 13(1) does not apply to in a copy of the records that CLBC will receive with this order.
[41] For example, see Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144.
[42] For example, see Order F20-29, 2020 BCIPC 35 at para. 69; and see Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 149, for a full list of non-exhaustive factors that a public body may consider in exercising its discretion
[43] Order F20-29, 2020 BCIPC 35 at para. 67.

of false assurances, contradictory behaviour, and misrepresentations. Accordingly, the applicant submits that it has a reasonable basis to believe that CLBC exercised its discretion improperly or in bad faith.

[54] CLBC submits that it properly exercised its discretion to withhold information under s. 13(1).[44] It notes that it reconsidered its decision about s. 13(1) prior to making its inquiry submissions and released a considerable amount of information to the applicant that it had previously withheld under s. 13(1). Additionally, CLBC's affidavit evidence indicates that its Chief Executive Officer considered the following factors when exercising his discretion to withhold information under ss. 13(1) and 14:

- The general purposes of FIPPA, including making information available to the public to ensure accountability;
- The wording of the sections and the interests of all parties;
- The historical practice of CLBC (i.e. whether similar types of records have been disclosed in the past);
- The harm to CLBC if the information is disclosed;
- The age of the requested records;
- The need for CLBC's executive and the Minister to receive and consider fulsome opinions and advice from CLBC employees in order to make decisions about the daily operations of CLBC;
- The nature of the records and the extent to which they are significant and/or sensitive to CLBC; and
- The relevance of the information to the applicant's access request.[45]

[55] In my view, CLBC's evidence satisfactorily establishes that it exercised its discretion under FIPPA upon proper considerations. While I understand the applicant does not trust CLBC because of their shared history, nothing in the evidence before me suggests that CLBC exercised its discretion under s. 13(1) in bad faith or for an improper purpose. On the contrary, the fact that CLBC reconsidered its s. 13(1) decision and released additional information to the applicant suggests to me that CLBC was making good faith efforts to provide the applicant with more, rather than less, information in response to its access request.[46] Additionally, CLBC's affidavit evidence demonstrates that it took appropriate considerations into account when exercising its discretion to withhold information under FIPPA. As such, I see no reason to order CLBC to reconsider its exercise of discretion in this case and I decline to do so.

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

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[44] The information summarized in this paragraph comes from CLBC's initial submission at paras. 145-146.
[45] CLBC Executive Director's affidavit at para. 57.
[46] For similar reasoning, see Order F19-28, 2019 BCIPC 30 at para. 58.

SOLICITOR CLIENT PRIVILEGE – SECTION 14

[57] 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.[47] Legal advice privilege protects communications between a solicitor and client made for the purpose of obtaining and giving legal advice; litigation privilege applies to materials gathered or prepared for the dominant purpose of litigation.[48]

[58] CLBC claims legal advice privilege over all the information in dispute under s. 14 and says litigation privilege also applies to some of this information.[49] Given my findings respecting legal advice privilege (set out below), I do not consider it necessary for me to make a decision about litigation privilege.

[59] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to a communication, 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.[50]

[60] 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."[51] Legal advice privilege also extends to internal client communications that discuss legal advice and its implications.[52]

Parties' positions

[61] As noted, CLBC submits that legal advice privilege applies to all the information withheld under s. 14.[53] CLBC argues that the "client" in this case is

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[47] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [*College of Physicians*].
[48] *Ibid.*
[49] CLBC's initial submission at para. 167.
[50] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837.
[51] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.
[52] *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.
[53] The information summarized in this paragraph comes from CLBC's initial submission at paras. 142, 144, 152, 161, 163, 171 and 163 (please note, there are two paragraphs numbered 163 in CLBC's initial submission. The paragraphs go up to number 174 and then drop inexplicably back down to 139).

itself and the government of BC, and contends that there was a common interest between itself and the government of BC with respect to the matters at issue in the records. CLBC also says that it is "for all purposes an agent of government".[54] According to CLBC, all the information withheld under s. 14 comprises or would reveal confidential communications it had with its lawyers about legal advice, or communications that would otherwise fall within the continuum of communications in which CLBC sought and received legal advice.

[62] In its submissions respecting s. 14, the applicant takes issue with the fact that: (a) CLBC withheld entire records under s. 14 rather than severing privileged information from records; and (b) CLBC did not provide any of the information in dispute under s. 14 for my review.[55] As mentioned previously, the applicant contends that I should order production of the s. 14 information in order to assess CLBC's claims respecting privilege.

Analysis and findings

[63] The information in dispute under s. 14 consists primarily of emails (some with attachments) sent between CLBC and its lawyers.[56] Some of these emails also include other Provincial government employees, such as employees of the Ministry of Finance and the Ministry of Attorney General.[57] The balance of the s. 14 information comprises internal CLBC emails and handwritten notes. I will begin by discussing the emails sent between CLBC and its lawyers.

[64] I will address the applicant's arguments respecting privilege at the end of my analysis since they do not relate to any specific records or the legal test for privilege.

Emails between CLBC and its lawyers

[65] CLBC provided affidavits from three of its lawyers. All the lawyers say they provided CLBC with legal advice concerning the Review, the cancellation of CLBC's contract with the Society and the transition of those services to another provider.[58]

[66] The evidence before me establishes that in the emails sent between CLBC and its lawyers, CLBC's lawyers provide CLBC with legal advice, and CLBC provides its lawyers with information relevant for the purposes of

[54] *Ibid* at para. 142.
[55] Applicant's response submission at paras. 70-71.
[56] CLBC has several lawyers, some who work for Legal Services Branch and others who work for a private law firm.
[57] Lawyer JS affidavit at para. 12; Lawyer KL affidavit at para. 12; Lawyer MS affidavit at para. 9.
[58] Lawyer JS affidavit at para. 7; Lawyer KL affidavit at para. 7; Lawyer MS affidavit at para. 5.

formulating legal advice.[59] Given this, I find that these emails are written communications between solicitor and client that entail the seeking and giving of legal advice.

[67] In addition, all three of CLBC's lawyers swear or affirm that they understood that their client was communicating with them on a confidential basis and that the matters they provided legal advice about were sensitive and required confidentiality and discretion.[60] In my view, this evidence satisfactorily establishes that CLBC and its lawyers intended these emails to be confidential. I make this finding despite the fact that some of these emails also included employees of other Provincial government ministries. In my view, the affidavit evidence from three lawyers directly involved in these communications is sufficient to establish confidentiality. The lawyers all depose that their client was both CLBC, an agent of the government of BC, as well as the government of BC as represented by the various ministries of government.[61] I note that the applicant did not raise any concerns respecting confidentiality and nothing in the evidence or submissions before me suggests that the presence of other government employees vitiates confidentiality in the circumstances. Given the lawyers' evidence, which the applicant did not contest or counter, I am satisfied that all the emails between CLBC and its lawyers, including those that involved employees of other Provincial government ministries, were intended to be confidential communications between solicitor and client.

[68] Taking all this into account, I find that these emails meet the test for legal advice privilege, so s. 14 applies.

[69] Some of the emails sent between CLBC and its lawyers contain attachments. CLBC's lawyers swear or affirm that they drafted some of these attachments and that all the attachments they sent or received were for the purpose of seeking, formulating or providing legal advice.[62] The lawyers also say that the attachments cannot be disclosed without risking revealing the specific subject matter or substance of the legal advice they provided.[63] This evidence satisfies me that legal advice privilege applies to all the email attachments sent between CLBC and its lawyers. Therefore, s. 14 authorizes CLBC to withhold these attachments.

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[59] Lawyer JS affidavit at paras. 20-22; Lawyer KL affidavit at paras. 20-22; Lawyer MS affidavit at paras. 12-14 and 20.
[60] Lawyer JS affidavit at para. 24; Lawyer KL affidavit at para. 24; Lawyer MS affidavit at paras. 15 and 21.
[61] Lawyer JS affidavit at para. 8; Lawyer KL affidavit at para. 8; Lawyer MS affidavit at para. 6.
[62] Lawyer JS affidavit at paras. 26-27; Lawyer KL affidavit at paras. 26-27; Lawyer MS affidavit at paras. 24-25.
[63] *Ibid*.

Internal CLBC emails

[70] CLBC also withheld internal CLBC emails under s. 14. In these internal emails, CLBC employees discuss seeking or obtaining legal advice, or forward, discuss and refer to legal advice they received from their lawyers.[64]

[71] The courts have consistently held that legal advice privilege extends to internal client communications that discuss legal advice and its implications.[65] Given this, I find that legal advice privilege applies to the internal CLBC emails that discuss previously received legal advice because they contain or would reveal privileged communications CLBC had with its lawyers.

[72] Some of the internal CLBC emails discuss the need to seek or obtain legal advice. Previous orders have held that a statement in a record about the intent or need to seek legal advice at some future date 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.[66] In this case, one of CLBC's lawyers swears that he provided legal advice on the issues discussed in the internal client emails.[67] This evidence leads me to conclude that privilege also applies to the internal client emails discussing the need to seek legal advice.

Handwritten notes

[73] CLBC also withheld handwritten notes under s. 14. According to the affidavit evidence, these notes refer to legal advice or the seeking of legal advice. CLBC's Executive Director deposes that the information withheld in the notes (and all the other s. 14 information) would disclose or lead to accurate inferences respecting the legal advice CLBC sought and received in relation to the termination of services provided by the Society and the dispute with the Society.[68]

[74] I find that legal advice privilege applies to the handwritten notes because they would reveal privileged communications CLBC had with its lawyers. Therefore, s. 14 applies to the handwritten notes.

[75] I will now address the applicant's submissions respecting privilege.

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[64] Lawyer JS affidavit at para. 25; Lawyer KL affidavit at para. 25; Lawyer MS affidavit at para. 16; CLBC Executive Director's affidavit at para. 44.
[65] *Supra* note 51.
[66] Order F17-23, 2017 BCIPC 24 at paras. 46-50; Order F16-26, 2016 BCIPC 28 at para. 32.
[67] Lawyer MS affidavit at para. 17.
[68] CLBC Executive Director's affidavit at paras. 46-47.

The applicant's submissions

[76] As described above, the applicant argues that I should order production of the records withheld under s. 14 in order to decide whether privilege applies. Under s. 44(1), I have the power to order production of records as the Commissioner's delegate in this inquiry. However, in order to minimally infringe legal advice privilege – which is vitally important to our justice system – I will order production only when absolutely necessary to adjudicate the inquiry issues.[69] I did not consider it necessary to order production in this case because I found CLBC's evidence sufficient to establish privilege. I have outlined the evidence I found persuasive in my reasons above.

[77] The applicant also takes issue with the fact that CLBC withheld entire records under s. 14.

[78] The courts have consistently taken a cautious approach when considering severing in the context of legal advice privilege. For example, the Supreme Court of Canada has said that if a communication is subject to legal advice privilege, the whole of the communication is normally privileged.[70] The BC Court of Appeal echoed this in the access to information context, saying that if a document is privileged, no part of it is subject to disclosure under FIPPA.[71] That same Court also held that "severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment."[72]

[79] Given these clear statements of the law, I have no concerns with CLBC's decision to withhold entire records under s. 14 because CLBC says that it withheld records in their entirety under s. 14 only when it would be inappropriate to sever those records.[73] I note that CLBC has severed privileged information and disclosed other portions of records where it says it was appropriate to do so.[74]

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

UNREASONABLE INVASION OF THIRD-PARTY PRIVACY – SECTION 22

[81] 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.

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[69] For similar reasoning, see Order F20-42, 2020 BCIPC 51 at para. 14.
[70] *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, 1982 CanLII 22 (SCC) at p. 892; Order F16-20, 2016 BCIPC 22 at para. 37.
[71] *College of Physicians*, *supra* note 46 at para. 69.
[72] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 40.
[73] CLBC's reply submission at para. 26.
[74] *Ibid*.

[82] The analysis under s. 22 involves four steps:[75]

1) Determine whether the information in dispute is personal information.
2) Determine whether any of the circumstances described in s. 22(4) apply. If they do, then disclosure is *not* an unreasonable invasion of personal privacy.
3) Determine whether any of the presumptions listed in s. 22(3) apply. If they do, disclosure is *presumed* to be an unreasonable invasion of personal privacy. Presumptions may be rebutted by considering all the relevant circumstances (the next step in the analysis).
4) Consider the impact that disclosure would have in light of all the relevant circumstances, including those listed in s. 22(2). Do the relevant circumstances weigh in favour of or against disclosure?

Personal information

[83] 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.

[84] FIPPA defines personal information as recorded information about an identifiable individual other than contact information. 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.

[85] Having reviewed the information in dispute under s. 22, I find that some of it clearly meets the definition of personal information. This includes information about what identifiable individuals wrote, said, experienced and did. Much of this personal information relates to clients of the Society and their family members.

[86] However, I find that some of the information withheld under s. 22 is not personal information. Specifically, I find that the following types of information are not about identifiable individuals, so s. 22 does not apply:

- letterhead, footers and logos;
- the dates of emails;
- template information in forms;[76]
- generic information in invoices;[77]

[75] For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.
[76] For example, at pp. 448-450, 830-832 of the records.
[77] For example, at pp. 481-484 of the records.

- information that relates to the Society's staffing models or the organizations that fund the Society's staffing;[78]
- generic headings;[79] and
- generic subject lines of emails and generic email content, such as pleasantries or information about how the email was sent.[80]

[87] As noted, 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 fax number. Determining whether information qualifies as contact information requires a contextual approach.

[88] I find that some information in dispute is contact information. This information consists of names, job titles, and business phone numbers (including cell phone numbers being used for business purposes[81]), email and mailing addresses in emails about work matters. It is obvious that this information is being exchanged in order to enable the individuals involved in these emails to contact each other for business purposes. I find that this information is contact information. As such, it does not qualify as personal information, so s. 22 does not apply.

[89] CLBC may not refuse access to the information that I have found does not qualify as personal information under s. 22. I will not discuss this information again.

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

[90] 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.

[91] CLBC argues that none of the subsections in s. 22(4) apply to the disputed information. However, I find that s. 22(4)(e) applies to some of the information in dispute.

[92] Section 22(4)(e) says that when personal information is about a third party's position, functions or remuneration as an employee of a public body, the disclosure of that information will not be an unreasonable invasion of personal privacy. Previous orders have held that the names of a public body's employees

[78] For example, at pp. 8 and 64 of the records.
[79] For example, at pp. 357-358 of the records.
[80] For example, at pp. 432 and 434 of the records.
[81] For example, at pp. 63 and 93 of the records.

fall under s. 22(4)(e).[82] Similarly, information that relates to an employee's job duties in the normal course of work-related activities also falls under s. 22(4)(e).[83]

[93] CLBC has withheld the names and factual information about the work-related actions of a few public body employees in some of the emails withheld in whole or in part under s. 22(1).[84] Section 22(4)(e) applies to this type of personal information. Disclosing the names and objective, factual statements about what various public body employees did in the normal course of discharging their job duties does not constitute an unreasonable invasion of the personal privacy of those individuals under s. 22(1). I will not consider this type of personal information any further.

[94] I have considered the other subsections of s. 22(4) and find none of them applicable here.

Presumed unreasonable invasion of privacy – section 22(3)

[95] 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.

[96] For the reasons that follow, I find that the presumptions in ss. 22(3)(a) and (d) apply to some of the disputed information.

Medical information – section 22(3)(a)

[97] Section 22(3)(a) creates a presumption against releasing personal information that relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Some of the information withheld under s. 22(1) relates to the medical conditions or treatment of identifiable individuals, including highly detailed, sensitive information about the health, developmental disabilities and medical needs of some of the Society's clients. This information clearly fits within the meaning of s. 22(3)(a), so its disclosure presumptively constitutes an unreasonable invasion of personal privacy.

Employment history – s. 22(3)(d)

[98] Section 22(3)(d) creates a presumption against releasing personal information related to a third party's employment, educational or occupational history. CLBC says that some of the disputed information relates to complaints

[82] Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 35; and Order 04-20, 2004 CanLII 45530 (BC IPC) at para. 18.
[83] Order 01-53, *supra* note 74 at para 40.
[84] For example, at pp. 97, 384, 426, 1001, 1200, 1430 of the records.

and evaluative information about Society and CLBC employees, some of which culminated in CLBC conducting the Review.[85] Having reviewed the information, I agree with CLBC's description and find that s. 22(3)(d) applies to information related to complaints and evaluations about the work performance of identifiable individuals.

[99] CLBC also submits that s. 22(3)(d) applies to information in the records about employee vacations and leave as well as information regarding changes to employment status.[86] I have no hesitation in concluding that information about changes to employment status – such as quitting a job or accepting a promotion – clearly relate to an individual's employment or occupational history. I agree that s. 22(3)(d) applies to this type of information.

[100] However, I am not persuaded by CLBC's arguments respecting s. 22(3)(d) and information about employee vacations. I recognize that some past OIPC orders from 2012, 2013 and 2015 have found that s. 22(3)(d) applied to information about employee leave.[87] However, more recently, Adjudicator Syrotuck drew a distinction between information about how an employee spent their vacation and employee leave entitlements when it comes to s. 22(3)(d). She explained:

> Past orders have found that information "about an employee's vacation" and information about "employees… on vacation leave" was related to those employees' employment history. I am not persuaded that these cases apply. There is not enough detail in the above cases for me to determine whether the facts are similar to the present case.
>
> Other past orders have found that information relating to an employee's leave entitlement is related to employment history under s. 22(3)(d).
>
> In this case, the information in dispute describes how an employee spent their vacation. It reveals nothing about their leave entitlements. The only association with that person's employment is that it was vacation from work. In my opinion, this is not sufficiently connected to a person's employment so as to constitute their employment history. I find that s. 22(3)(d) does not apply. [citations omitted][88]

[101] I agree with Adjudicator Syrotuck's reasoning and adopt it here. The disputed information in this case describes generic details about when various individuals went on vacation or were not in the office. It reveals nothing whatsoever about their leave entitlements. For example, CLBC has withheld details from emails in which employees say things similar to this: "I will be away

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[85] CLBC's initial submission at para. 193.
[86] *Ibid* at paras. 202-203 and 207.
[87] Order F12-01, 2012 BCIPC 1 at para. 36; Order F13-01, 2013 BCIPC 1 at para. 58; Order F15-63, 2015 BCIPC 69 at paras. 38-39.
[88] Order F20-20, 2020 BCIPC 23 at paras. 129-131.

on vacation next week, so please contact [named employee] if you need assistance."[89] Like Adjudicator Syrotuck, I find that this type of information is not sufficiently connected to a person's employment so as to constitute their employment history. Section 22(3)(d) does not apply to this type of information.

[102] I have considered the other presumptions in s. 22(3) and find none of them applicable here.

Relevant circumstances – section 22(2)

[103] 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 a third party's personal privacy. The relevant circumstances might rebut the s. 22(3)(d) and (g) presumptions discussed above.

[104] Section 22(2) lists some relevant circumstances to consider at this stage. Taken together, the parties' submissions address the potential applicability of ss. 22(2)(a), (c), (f), (h) and (i). CLBC also made submissions about one other potentially relevant circumstance – the applicant's pre-existing knowledge of some of the personal information in dispute. I will begin with the circumstances listed in s. 22(2).

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

[105] 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.[90]

[106] CLBC submits that disclosure of the personal information at issue would, at most, subject third parties to public scrutiny, rather than subjecting CLBC to public scrutiny.[91] The Society disagrees, saying that CLBC has treated the Society poorly and that "[i]t is certainly in the public interest to disclose information which speaks to the integrity of a public body, including its senior leadership, such as CLBC.[92]

[107] 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 individual clients of the Society and the

[89] Out of an abundance of caution, I have not quoted verbatim here. Instead, I have formulated an example based on the type of information I see in the records.
[90] Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.
[91] CLBC's initial submission at para. 211.
[92] Applicant's response submission at para. 80.

Society's employees, not CLBC's senior leadership. I do not see how disclosing any of the disputed personal information would foster public body accountability in the circumstances.

Fair determination of applicant's rights – section 22(2)(c)

[108] Section 22(2)(c) considers whether the personal information at issue is relevant to a fair determination of the applicant's rights. Past orders have said the following four criteria must be met in order for s. 22(2)(c) to apply:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[93]

[109] The applicant submits that there is a live dispute between it and CLBC and some of the information in dispute under s. 22 is likely necessary for a fair determination of the applicant's legal rights.[94] The applicant also says that the family of one of its clients has initiated proceedings against it. The applicant says disclosure of the information in dispute is warranted because the information is likely necessary for a fair determination of the applicant's legal rights in that proceeding.

[110] CLBC contends that the information withheld under s. 22 "would have a minimal bearing or significance on the Applicant's rights."[95] CLBC also submits that violating the privacy rights of various third parties whose personal information is highly confidential is a test that the applicant would not be able to meet.

[111] In my view, the applicant's evidence and argument does not satisfy the test for s. 22(2)(c). The applicant says there is a live dispute between it and CLBC, but it has not described which of its legal rights are (or would be) at issue in that dispute. The applicant also has not said, or provided evidence to show,

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[93] Order F19-02, 2019 BCIPC 02 at para. 57; Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31; Order F16-46, 2016 BCIPC 51 at para. 43.
[94] The information summarized in this paragraph comes from the applicant's response submission at paras. 81-82.
[95] The information summarized in this paragraph comes from CLBC's initial submission at para. 214.

that a proceeding related to those rights is under way or contemplated. I recognize that the applicant has said there is a live dispute between it and CLBC. However, the existence of a live dispute between parties does not necessarily mean that a proceeding respecting that dispute is under way or even being contemplated.

[112] When it comes to the legal proceeding initiated by the family of one of the applicant's former clients, the applicant has not provided any evidence about which of its legal rights relate to that proceeding. Furthermore, the applicant has not explained how the personal information it seeks has any bearing on, or significance for, a determination respecting the right(s) in question. The applicant also did not explain how disclosure of the personal information related to this former client is necessary in order to prepare for the proceeding or ensure a fair hearing.

[113] Taking all this in account, I find that the applicant's evidence and argument does not pass the test under s. 22(2)(c). Consequently, I find that s. 22(2)(c) does not weigh in favour of disclosure.

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

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

[115] CLBC submits that the personal information withheld under s. 22 was supplied in confidence, making s. 22(2)(f) a relevant factor weighing against disclosure in this case.[96] CLBC says the records in this inquiry include numerous instances where third parties provide highly sensitive personal information related to a member of their family and/or their quality of care. According to CLBC, the highly sensitive nature of this type of disputed information indicates that it was obviously supplied in confidence. CLBC also notes that some of the disputed information relates to an access request made by other applicants. CLBC says it treats the identity of access applicants as confidential, consistent with government and OIPC practice.

[116] The applicant did not make submissions about s. 22(2)(f).

[117] Having reviewed the information in dispute, I find it clear that some of it was supplied in confidence either explicitly or implicitly. I make this finding when it comes to the highly sensitive information that describes extremely personal details about the medical needs, conditions and behaviours of identifiable individuals. I also find that some of the disputed information comprises complaints made by family members of the Society's clients. In my view, the

[96] The information summarized in this paragraph comes from CLBC's initial submission at paras. 215, 218 and 220-221.

personal information contained in these complaints was also supplied in confidence.[97] My finding accords with previous OIPC orders.[98]

[118] However, I am not persuaded by CLBC's arguments respecting personal information in access requests. It may well be that CLBC (and the rest of the Provincial government) treats access requests as confidential, but I do not accept that this means all applicants supply their access requests in confidence. The question when it comes to s. 22(2)(f) is whether the *supplier* of the personal information at issue provided that information in confidence, not whether the *recipient* chose to treat it confidentially. Therefore, as I see it, whenever disputed information relates to an access request, the facts and circumstances surrounding that specific access request must be considered to determine whether that information was supplied in confidence.

[119] Previous orders have treated s. 22(2)(f) similarly when it comes to personal information in access requests. For example, in Order F05-31, Adjudicator Francis considered whether s. 22(1) applied to the name(s) of person(s) who had made an access request. In that case, a union had requested the name(s) of person(s) who had requested certain information about the union from the Vancouver School Board. Adjudicator Francis found that the original access request had been supplied in confidence in that case because: [99]

- The third party's original access request specifically asked that the Vancouver School Board keep the request confidential;
- The third party had written a letter to the OIPC during the inquiry requesting, among other things, that their name be held in complete confidence during the inquiry process; and
- In their inquiry submission, the third party again asked that their name be kept confidential.

Instead of making a blanket finding that information in access requests is automatically supplied in confidence, Adjudicator Francis carefully considered the specific facts before her in order to make a determination about s. 22(2)(f) in the case before her. I agree with this approach.

[120] In this case, I am not satisfied that the information CLBC says relates to an access request was supplied in confidence.[100] Having reviewed this information, I find that it is not actually a formal access request, but rather an email chain that begins with a journalist writing to a CLBC employee to ask where he can submit an FOI request. The CLBC employee writes back with instructions and then forwards the journalist's email on internally to provide

[97] For similar reasoning, see Order F16-19 at para. 33.
[98] For example, see Order F15-29, 2015 BCIPC 32 at para. 43.
[99] Order F05-31, 2005 CanLII 39585 (BC IPC) at paras. 52-54.
[100] At pp. 2894-2897 of the records.

advance notice that an access request from the journalist was imminent. Nothing in the journalist's email remotely suggests that he was writing CLBC in confidence. The topic of the email is not sensitive and the journalist wrote the email from his professional email account at a well-known local newspaper. I have difficulty accepting that the journalist – presumably making an access request in his professional role – supplied information related to that request in confidence. Taking all this into account, I find that the information in this email chain was not supplied in confidence.

[121] To summarize, I find that highly sensitive medical and behavioural information about identifiable individuals and information related to complaints made by family members of some Society clients was supplied in confidence. Section 22(2)(f) weighs in favour of withholding this information. However, I am not persuaded that information related to a journalist's desire to make an access request was supplied in confidence. Section 22(2)(f) does not weigh in favour of withholding this information.

Unfair reputational damage – section 22(2)(h)

[122] Section 22(2)(h) asks whether disclosure may unfairly damage the reputation of a person referred to in the records.

[123] CLBC contends that if it discloses certain third party personal information, the reputation of some individuals could be unfairly damaged because some of the information consists of negative commentary or evaluation relating to Society employees.[101] The Society argues that this type of negative commentary is what it seeks to obtain in order to assist its employees to exonerate themselves in an ongoing investigation being conducted by their professional governing body.[102] The Society says this investigation has already been influenced by false information contained in a draft copy of the Report which CLBC provided to the professional governing body.

[124] I am not persuaded that disclosure of the disputed information might unfairly damage the reputation of anyone referred to in the records. From what I can tell in the records themselves and the Society's affidavit evidence, the Society is already well aware of the negative commentary and evaluation of its employees discussed in the disputed information.[103] I say this because oftentimes the Society itself provided CLBC with complaints it received from families about Society employees, or Society employees were included in emails that contained negative commentary or evaluations, or CLBC informed the Society about this type of commentary after receiving it. In other words, I do not

[101] CLBC's initial submission at para. 222.
[102] Applicant's response submission at para. 83.
[103] Society CEO's affidavit at paras. 33-49.

see how disclosing this information, which the Society was often well aware of at the time, would have any impact on any Society employee's reputation.

[125] Furthermore, I accept the Society's submission that it seeks this type of information in order to exonerate its employees. The Society makes its position in relation to its own employees perfectly clear: it believes its employees provided excellent service and care.[104] In the circumstances, I fail to see how disclosing information to the Society about its own employees – who the Society clearly stands behind – would damage the reputation of those employees.

[126] For these reasons, I find that s. 22(2)(h) does not weigh in favour of withholding the information in dispute.

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

[127] 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 their personal privacy.

[128] 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.[105] Previous orders have also said that an individual's personal privacy rights are likely to continue for at least 20 years past their death.[106]

[129] CLBC submits that s. 22(2)(i) does not weigh in favour of disclosing personal information about two individuals who passed away within the last ten years.[107] I agree. In this case, some of the personal information at issue relates to an individual who passed away in 2014 and other information relates to an individual who passed away in 2018. Given the recency of these two deaths, I find that s. 22(2)(i) does not weigh in favour of disclosing the information about these two individuals.

[130] As mentioned previously, the Society argues that the family of one of these individuals has initiated legal proceedings against both CLBC and the Society, so it says disclosure of the information about this deceased individual is "certainly warranted notwithstanding the length of time since this individual's

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[104] In my view, this is clearly implied in the Society CEO's affidavit, for example at paras. 21-22, 26, 28-42, 46, 56, 64 and 69.
[105] Order F14-09, 2014 BCIPC 11 at para. 33.
[106] *Ibid* at para. 30; see also Order F18-08, 2018 BCIPC 10 at para. 32.
[107] CLBC's initial submission at para. 227.

death" because the information is likely necessary for a fair determination of the Society's legal rights in that proceeding.[108] For the reasons set out in paragraphs 111-113 above, I found that the Society's evidence falls short of establishing that the personal information at issue is necessary for a fair determination of its rights. Accordingly, I do not find the Society's arguments persuasive when it comes to s. 22(2)(i).

[131] Now I will discuss a relevant circumstance that CLBC made submissions about that is not listed in s. 22(2).

Applicant's existing knowledge

[132] I find that the applicant's pre-existing knowledge weighs in favour of disclosing 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.[109]

[133] As an organization with institutional knowledge, the applicant is already aware of and has access to much of the personal information at issue in this case. For example, the applicant knows the names, medical conditions, needs, treatments and daily routines of its former residential clients. The applicant also already knows details about the family members of some of its former clients, including their names, role in their adult children's care, and information about complaints they made respecting their adult children's care. Oftentimes, the applicant's own employees generated the very information in dispute in this inquiry by sending emails to CLBC respecting, for example, critical medical incidents that occurred with some of its clients, or meet-ups between potential future roommates.

[134] CLBC argues that the fact that the applicant has access to some of the personal information at issue because of its former capacity as a provider of residential services under contract with CLBC does not mean it is entitled to that information in the context of an access request under FIPPA.[110] CLBC says that its contract with the applicant demands that the applicant's confidentiality obligations survive contract termination. This means that the applicant must still treat information about its former clients received as a result of the now-terminated contract as confidential. However, CLBC says that if the applicant gains access to this information under FIPPA, it will not have any confidentiality obligations, since FIPPA places no limit on the dissemination of

[108] Applicant's response submission at para. 82.
[109] 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.
[110] The information summarized in this paragraph comes from CLBC's initial submission at paras. 229 and 232.

information obtained via access requests. Therefore, CLBC says the applicant's prior knowledge should not weigh in favour of disclosure in this case.

[135] CLBC draws my attention to Order F05-34, which it says supports its argument. CLBC says that in Order F05-34, the adjudicator held that the applicant's status as a former physician did not outweigh the third-party privacy interests. CLBC submits that "the approach taken in Order F05-34 is the correct approach. To hold otherwise would mean that any former employee (including service provider) of a public body would be able to access third party personal information on the basis that they previously had access to the personal information during the course of their employment."[111]

[136] I do not find CLBC's arguments persuasive. First, an applicant's previous knowledge of, or access to, the personal information at issue in any inquiry is merely one relevant circumstance to weigh in the balance when considering whether disclosure would constitute an unreasonable invasion of third-party privacy. Obviously, a finding that an applicant's previous knowledge of the information in dispute weighs in favour of disclosure does not automatically mean the applicant is entitled to access. All the relevant circumstances must be weighed in the balance and the presumptions in s. 22(3) must also be considered. Second, in Order F05-34, the adjudicator actually found that the applicant's previous knowledge weighed in favour of disclosure of much of the information in dispute. She wrote that she could not "overlook the fact that the applicant is aware of almost all of the withheld information about himself and others because he has already received it – albeit in other forms… In these circumstances, I have difficulty understanding how re-disclosure of the same third-party personal information would unreasonably invade third-party privacy."[112]

[137] I find that the applicant's prior knowledge of some of the information in dispute weighs in favour of disclosure.

Summary – section 22

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

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

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[111] CLBC's initial submission at para. 231.
[112] Order F05-34, 2005 CanLII 39588 (BC IPC) at paras. 67 and 69.

[140] The ss. 22(3)(a) and (d) presumptions against releasing medical information or information that relates to employment history apply to some, but not all, of the information in dispute.

[141] I have found that some of the information was supplied in confidence, which weighs against disclosure of that information. However, I have also found that the applicant's pre-existing knowledge weighs in favour of disclosure of some of the disputed information. In other words, one relevant circumstance weighs against disclosure and the other weighs in favour of disclosure. Given this, I am not satisfied that either of the applicable presumptions have been rebutted.

[142] In short, I find that s. 22(1) requires CLBC to withhold some, but not all, of the information in dispute. CLBC must disclose the rest to the applicant.[113]

ADULT GUARDIANSHIP ACT

[143] In addition to FIPPA exceptions to access, CLBC withheld information under s. 46 of the AGA. The relevant portions of s. 46 state:

> 46 (1) Anyone who has information indicating that an adult
>
> (a) is abused or neglected, and
>
> (b) is unable, for any of the reasons mentioned in section 44, to seek support and assistance,
>
> may report the circumstances to a designated agency.
>
> (2) Despite the *Freedom of Information and Protection of Privacy Act* and the *Personal Information Protection Act*, a person must not disclose or be compelled to disclose the identity of a person who makes a report under this section.

[144] Section 79 of FIPPA is also relevant here. It states:

> If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

[145] Given the clear language of s. 46(2) and s. 79, I find that the AGA prevails over FIPPA. Accordingly, when responding to a FIPPA access request, CLBC must not disclose or be compelled to disclose the identity of a person who makes a report under s. 46(1) of the AGA. Therefore, if CLBC's evidence establishes that the information at issue discloses the identity of someone who made a report under s. 46(1), then CLBC must withhold that information.

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[113] I have highlighted all the information that s. 22(1) does not apply to in a copy of the records that CLBC will receive with this order.

[146] As described above, CLBC did not provide me with copies of the information it withheld under s. 46 of the AGA. Instead, it provided affidavit evidence from one of its Executive Directors as well as submissions.

[147] In my view, in order to establish that it has correctly applied s. 46 of the AGA, CLBC's evidence must show that the requirements of that section have been met. Given the wording of the AGA, reports made under s. 46(1) have three requisite elements. The report must be:

- about an adult who is unable to seek support and assistance[114]
- about abuse or neglect of that adult; and
- made to a designated agency.

If the evidence establishes that all the elements of s. 46(1) have been met, then CLBC must also show that the disputed information would reveal the identity of the person who made the s. 46(1) report.

[148] CLBC's affidavit evidence establishes that it is a designated agency under the AGA.[115] CLBC's affidavit evidence also shows that it received written reports either directly or through another entity, which then provided the reports to CLBC. According to CLBC's affidavit evidence, these reports contain information about potential abuse or neglect of adults who were unable to seek support and assistance and who received services from the applicant. The applicant does not contest this evidence or provide any counter-evidence or argument about it. Therefore, based on the evidence before me, I find that the requirements of s. 46(1) have been met.

[149] CLBC says that all the information it withheld under s. 46(2) directly or indirectly discloses the identity of a person or persons (a reporter or reporters) who reported the abuse or neglect of an adult. CLBC's Executive Director deposes that, in her opinion, disclosure of the withheld information or any additional information about what CLBC has withheld would directly or indirectly disclose the identity of the reporters.[116] The applicant doubts this, saying: "The broad scope of what has been withheld in almost every instance where s. 79 has been applied suggests that there is, more likely than not, a significant volume of information which has been improperly withheld under the umbrella of the AGA."[117]

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[114] Under s. 44 of the AGA, the adult must be unable to seek support and assistance because of: (a) physical restraint; (b) a physical handicap that limits their ability to seek help; or (c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.
[115] The information in this paragraph comes from the CLBC Executive Director's affidavit at paras. 9 and 58-62.
[116] *Ibid* at para. 62.
[117] Applicant's response submission at para. 55.

[150] I am not persuaded by the applicant's arguments. The large volume of information withheld as a result of s. 46(2) does not raise any alarm bells for me, particularly in the unique circumstances of this case. First, I find it clear from CLBC's evidence that the records contain information about more than one report and reporter under s. 46(1). Additionally, and far more importantly, the applicant has a substantial amount of pre-existing knowledge about its current and former clients. From this it logically follows that a more sizeable portion of information could reveal the identity of a reporter than would be the case if, for example, the applicant had no such prior knowledge. Furthermore, I have no reason to doubt the veracity of CLBC's affiant who has affirmed that disclosure of the withheld information would disclose the identity of the reporters.

[151] Taking all this into account, I find that s. 46 of the AGA requires CLBC to withhold the information withheld under that section.

CONCLUSION

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

1. I confirm CLBC's decision to refuse to disclose information to the applicant under s. 3(1)(c).
2. I confirm CLBC's decision to refuse to disclose information to the applicant under s. 14.
3. Subject to item 4 below, I confirm, in part, CLBC's decision to refuse to disclose to the applicant some of the information withheld under ss. 13(1) and 22(1).
4. CLBC is not authorized under s. 13(1) or required under ss. 22(1) to refuse to disclose the highlighted information in the copy of the records it receives with this order. CLBC is required to disclose the highlighted information to the applicant. CLBC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

[153] Pursuant to s. 59(1), CLBC must give the applicant access to the highlighted information by September 10, 2021.

July 28, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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