Order F21-39

COMMUNITY LIVING BRITISH COLUMBIA

Laylí Antinuk
Adjudicator

September 2, 2021

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Summary: The applicant requested a variety of information 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 personal 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] This order is a companion to Order F21-32,[1] which I also decided and which involves the same applicant, the same public body, the same issues, some of the same information, and nearly identical arguments and evidence. The access request at issue in this inquiry is also very similar to that dealt with in Order F21-32. In both cases the applicant, the Garth Homer Society (Society),[2] essentially requested information about itself from CLBC. In both cases, CLBC provided some information in response, but withheld other information under

[1] 2021 BCIPC 40.
[2] I will use the terms "applicant" and "Society" interchangeably to refer to the applicant throughout this order.

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 and Order F21-32 both consider 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 personal privacy) of FIPPA, and s. 46 (no disclosure of person who reports abuse) of the AGA.

[2] Given the striking similarities between this inquiry and the inquiry that resulted in Order F21-32, the reasons set out below are very similar to those I wrote in Order F21-32. Where I considered it reasonable and expedient, I have simply referred to my reasoning in Order F21-32 to explain my findings here.

ISSUES

[3] 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?

[4] CLBC bears the burden of proving that the applicant has no right to access the information withheld under ss. 3(1)(c)[3], 13(1) and 14.[4] CLBC also must prove that the information withheld under s. 22(1) is personal information.[5] Additionally, in Order F21-32, I decided that CLBC bears the burden of proof when it comes to s. 46 of the AGA.[6] Without repeating my reasoning process, I will apply the same burden here.

[5] In my view, placing the burden of proof on the public body when it comes to its decision to withhold information pursuant to s. 46 of the AGA is consistent with s. 57(1) of FIPPA, which states:

> 57(1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

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[3] Order F16-15, 2016 BCIPC 17 at para. 8.
[4] Section 57 of FIPPA governs the burden of proof in inquires.
[5] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.
[6] *Supra* note 1 at paras. 8-10.

Here, CLBC made a decision to refuse access to information per s. 46 of the AGA, so it is up to CLBC to prove that the applicant has no right of access to that information.

[6] The applicant bears the burden of proving that disclosing any personal information at issue would not constitute an unreasonable invasion of a third party's personal privacy under s. 22(1).[7]

DISCUSSION

Background

[7] CLBC is a crown corporation that funds supports and services to adults with developmental disabilities and their families.[8] The Society delivers various services for adults with developmental disabilities, including community inclusion services, and learning, arts and employment programs, some of which are funded under contract with CLBC.

[8] In 2015, the Society 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. CLBC continues to contract with the Society to deliver other services to adults with disabilities and their families.

[9] One aspect of the applicant's access request relates to a development project known as the Nigel Valley Project. This project includes a plan to redevelop a nine-acre property into a multi-use site for social purposes, such as a mix of social and market housing. The Society and four other social housing and service agencies own the property.

Records at issue

[10] The records at issue total 1,057 pages and consist of communications in one form or another. The vast majority of the records comprise emails (with and without attachments).

[11] 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

[7] Section 57(2).
[8] The information summarized in this background section comes from CLBC's initial submission at paras. 38, 41-44 and 48 and the applicant's response submission at paras. 14-15, 17-19 and 22. These aspects of the parties' submissions are uncontested and I accept them as fact.

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, it relies on affidavit evidence from its Executive Director of Quality Assurance (Executive Director) and two of its lawyers.

[12] 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).[9] 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 of any of the disputed information.

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

[13] 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.[10] It does this by excluding certain records from FIPPA's scope.

[14] CLBC submits that s. 3(1)(c) applies to 15 pages of records (the Ombudsperson records) that involve the Ombudsperson. 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 its Executive Director.

[15] The applicant does not explicitly deny that s. 3(1)(c) applies. Rather, the applicant submits that CLBC has provided insufficient information for me to evaluate and conclude that CLBC applied s. 3(1)(c) appropriately.[11] I disagree. For the reasons described in detail below, I find that CLBC has provided sufficient affidavit evidence to establish that s. 3(1)(c) removes the Ombudsperson records from FIPPA's scope.

[16] For s. 3(1)(c) to apply, the following three criteria must be met:[12]

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

[9] Applicant's response submission at paras. 49, 58 and 71.
[10] Order 01-43, 2001 CanLII 21597 (BC IPC) at para. 25; Order F16-07, 2016 BCIPC 9 at para. 9.
[11] Applicant's response submission at para. 49.
[12] Order 01-43, *supra* note 10 at para. 9.

3) The records must relate to the exercise of the officer's functions under an Act.

Analysis and findings – section 3(1)(c)

[17] According to CLBC's affidavit evidence, the Ombudsperson records consist of three types of emails:[13]

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

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

[18] All the subsequent emails came into existence as a result of the initiating email, 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 or respond to the issue raised by the Ombudsperson;
- Discuss matters relating to the Ombudsperson's involvement; or
- Seek legal advice about the Ombudsperson investigation.

[19] Beginning with the first criterion, FIPPA's definition of "officer of the Legislature" includes the Ombudsperson.[14] Therefore, the Ombudsperson meets the first criterion under s. 3(1)(c). The applicant does not dispute this.[15]

[20] With regard to the second criteria, I find that the initiating email was created by the Ombudsperson, so it meets the second criterion for s. 3(1)(c) to apply.

[21] I am also satisfied that the subsequent emails meet the second criterion. Previous 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).[16] Here, CLBC has applied s. 3(1)(c) to internal emails that discuss how to address or respond to issues directly related to the Ombudsperson. In my view, these

[13] The information in this paragraph and the one that follows comes from the Executive Director's affidavit at paras. 28-31.
[14] Schedule 1 of FIPPA contains its definitions.
[15] Applicant's response submission at para. 49.
[16] For example, see Decision F13-01, 2013 BCIPC 13 at para. 15 and Decision F06-06 at para. 14.

records meet the second criterion for s. 3(1)(c) to apply because they arose as a direct result of the Ombudsperson's involvement with CLBC respecting specific issues. Additionally, I find it more likely than not that the subsequent emails would allow accurate inferences about the initiating email.

[22] In discussing the third criterion, past decisions of the BC Supreme Court and the OIPC have drawn a distinction between the administrative and operational records of an officer.[17] 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.[18]

[23] 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.[19] 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.[20]

[24] The Ombudsperson has the statutory responsibility to investigate certain types of complaints under the *Ombudsperson Act*.[21] The initiating email informs CLBC of a public complaint the Ombudsperson is investigating. I find it reasonable to infer that the Ombudsperson was carrying out this investigation pursuant to its statutory authority to investigate complaints. Therefore, I am satisfied that the initiating email relates to the exercise of the Ombudsperson's statutory functions.

[25] In addition, based on CLBC's affidavit evidence, 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 the subsequent emails all relate to the exercise of the Ombudsperson's statutory functions.

[26] For all these reasons, 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.

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[17] Order 01-43, *supra* note 10 at paras. 28-30.
[18] 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.
[19] Adjudication Order No.17, *ibid* at para. 22.
[20] 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).
[21] *Ombudsperson Act*, RSBC c. 340 s. 10.

ADVICE AND RECOMMENDATIONS – SECTION 13

[27] 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.[22] 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.[23]

[28] The s. 13 analysis involves two steps.[24] 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.

[29] 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.

Parties' positions

[30] 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.[25] If disclosed, CLBC says, this information would reveal advice or recommendations about topics such as the Review and the Society's delivery of services.

[31] CLBC says that any factual material 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.

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[22] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 65.
[23] 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.
[24] For examples, see Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 18 and Order F17-01, 2017 BCIPC 01 at para. 14.
[25] The information summarized in this paragraph and the one that follows comes from CLBC's initial submission at para. 124, 139-145; and the Executive Director's affidavit at para. 33.

[32] The applicant contends that CLBC has taken an overly broad approach to the application of s. 13(1).[26] 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 – advice and recommendations

[33] Having reviewed the information withheld under s. 13(1), I find that much 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;
- What CLBC should do given the results of the Review;
- How CLBC should respond to a third party's complaint about the Society; and
- How CLBC should respond to a time extension request from the Society respecting the contract termination.

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

[34] 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 a draft version of the Review report that do not reveal advice or recommendations (I discuss this further in paragraphs 35-36 below).[27]
- Basic factual information related to CLBC's work and interactions, such as information about work certain people have done or will do.[28] Past

[26] The information summarized in this paragraph comes from the applicant's response submission at paras. 64-66.
[27] For example, at pp. 190-191, 195-198, 200-202 of the records. Please note: I am referring to the primary package of records whenever I refer to page numbers in these footnotes, not the additional records.
[28] For example, at pp. 96, 98-99 and 370 of the records.

orders that have found that basic factual information does not fit within the meaning of advice or recommendations.[29]

- A brief statement that communicates a decision that has already been made.[30] Previous orders have said that information that communicates a decision does not qualify as advice or recommendations.[31]
- Short lines of computer code for formatting rendered in an email.[32]
- The to, from, date, generic subject lines, and signature blocks in an email chain.[33]

In my opinion, s. 13(1) does not apply to this information, so I will not consider it further. My findings accord with previous orders.[34]

[35] I recognize that when it comes to the information CLBC withheld in the draft report, CLBC submits that these withheld portions of the draft report "were subsequently not adopted in the final version of the report and consist of advice and recommendations regarding proposed wording and/or courses of action."[35] However, I am not persuaded that the fact that statements in a draft document did not end up in the final version means those statements reveal advice or recommendations.

[36] An author may remove or change wording in a draft document of their own accord, without receiving any advice from anyone else to do so. CLBC has not said, or provided evidence to show, that the author(s) of the report removed this information as a result of anyone's advice or recommendations. Additionally, previous orders have made it clear that a document does not automatically contain advice simply because it is a draft.[36] The withheld information in the draft report 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

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[29] 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.
[30] At p. 741 of the records.
[31] For example, see Order F15-33, 2015 BCIPC 36 at para. 25. For similar reasoning, see also Order F18-04, 2018 BCIPC 04 at para. 83. In that Order, Adjudicator Lott found that an insurance adjuster's assessment and decision about an individual's injuries did not qualify as advice or recommendations. See also Order F15-37, 2015 BCIPC 40 at para. 22 in which Adjudicator Alexander found that information related to decisions already made by a public body's staff did not qualify as advice provided by those staff members.
[32] At p. 377 of the records. For the same finding with respect to this type of information, see Order F21-16, 2021 BCIPC 21 at para. 22.
[33] At p. 670 of the records.
[34] Please see footnotes 29, 31, 32 and 36.
[35] CLBC's initial submission at para. 124(b).
[36] For examples, 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.

comments or track changes for the author(s) to consider. With all this in mind, I find that the information withheld under s. 13 in the draft report does not reveal advice or recommendations, so s. 13(1) does not apply.

Exceptions – sections 13(2) and 13(3)

[37] 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.

[38] 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,[37] so s. 13(2)(k) does not apply. Additionally, none of the information withheld under s. 13(1) comprises a plan or proposal to establish a new 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 under s. 13(1) 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 information withheld under s. 13(1) does not contain a decision made in the exercise of a discretionary power or adjudicative function.

[39] I also find that the records have not been in existence for 10 or more years. The oldest dated records at issue were created in 2017. Consequently, s. 13(3) does not apply.

[40] 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.[38]

Exercise of discretion

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

[42] Past orders have said that public bodies must exercise their discretion under FIPPA upon proper considerations.[39] 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

[37] Executive Director's affidavit at para. 14.
[38] 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.
[39] For example, see Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 144.

disputed record(s).[40] 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.[41]

[43] 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.

[44] 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.[42] To support this argument, the applicant provides extensive submissions and affidavit 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 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.

[45] CLBC submits that it properly exercised its discretion to withhold information under s. 13(1).[43] 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;

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[40] For example, see Order F20-29, 2020 BCIPC 35 at para. 69. For a full list of non-exhaustive factors that a public body may consider in exercising its discretion, see Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 149.
[41] Order F20-29, 2020 BCIPC 35 at para. 67.
[42] The information summarized in this paragraph comes from the applicant's response submission at paras. 65-66.
[43] The information summarized in this paragraph comes from CLBC's initial submission at para. 148.

- 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.[44]

[46] 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.[45] 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.

SOLICITOR-CLIENT PRIVILEGE – SECTION 14

[47] 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.[46] 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.[47]

[48] 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.[48] As I explain below, I find that legal advice privilege applies to all the information in dispute under s. 14. Given this finding, I do not consider it necessary to make a decision about litigation privilege.

[49] 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

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[44] Executive Director's affidavit at para. 60.
[45] For similar reasoning, see Order F19-28, 2019 BCIPC 30 at para. 58.
[46] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[47] *Ibid.*
[48] CLBC's August 9, 2021 email to the OIPC.

3) the parties must have intended it to be confidential.[49]

[50] 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."[50] Legal advice privilege also extends to internal client communications that discuss legal advice and its implications.[51]

Parties' positions

[51] As noted, CLBC submits that legal advice privilege applies to all the information withheld under s. 14.[52] CLBC argues that the "client" in this case is 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".[53] 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.

[52] The applicant submits that I should order production of the s. 14 information in order to assess CLBC's claims respecting privilege.[54] According to the applicant, CLBC has provided insufficient evidence to prove privilege.

Analysis and findings – privilege

[53] The information in dispute under s. 14 consists primarily of emails (some with attachments) sent between CLBC and its lawyers.[55] Some of these emails also include other Provincial government employees, such as employees of the Ministry of Finance and the Ministry of Attorney General.[56] 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.

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[49] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837.
[50] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.
[51] *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.
[52] The information summarized in this paragraph comes from CLBC's initial submission at paras. 174, 182, 184, 186 and 197.
[53] *Ibid* at para. 180.
[54] Applicant's response submission at para. 71.
[55] CLBC has several lawyers, some who work for Legal Services Branch and others who work for a private law firm.
[56] Lawyer KL affidavit at para. 12; Lawyer MS affidavit at para. 9.

[54] 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

[55] CLBC provided affidavits from two of its lawyers. Both lawyers say they provided CLBC with legal advice concerning the Review, the cancellation of CLBC's residential services contract with the Society and the transition of those services to another provider.[57]

[56] The evidence 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 formulating legal advice.[58] Given this, I find that these emails are written communications between solicitor and client that entail the seeking and giving of legal advice.

[57] In addition, both 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.[59] 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 two lawyers directly involved in many of these communications is sufficient to establish confidentiality. The lawyers depose that their client was CLBC, an agent of the government of BC, as well as the government of BC as represented by the various ministries of government.[60] Therefore, all the parties in the communications were either client representatives or their lawyers. 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.

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

[59] 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

[57] Lawyer KL affidavit at para. 7; Lawyer MS affidavit at para. 5.
[58] Lawyer KL affidavit at paras. 20-22; Lawyer MS affidavit at paras. 12-14 and 20.
[59] Lawyer KL affidavit at para. 25; Lawyer MS affidavit at paras. 15 and 21.
[60] Lawyer KL affidavit at para. 8; Lawyer MS affidavit at para. 6.

purpose of seeking, formulating or providing legal advice.[61] 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.[62] 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.

Internal CLBC emails

[60] 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.[63]

[61] The courts have consistently held that legal advice privilege extends to internal client communications that discuss legal advice and its implications.[64] 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.

[62] As noted, 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.[65] In this case, one of CLBC's lawyers swears that he provided legal advice on the issues discussed in the internal client emails.[66] This evidence leads me to conclude that privilege also applies to the internal client emails discussing the need to seek legal advice.

Handwritten notes

[63] 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

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[61] Lawyer KL affidavit at paras. 27-28; Lawyer MS affidavit at paras. 24-25.
[62] *Ibid*.
[63] Lawyer KL affidavit at para. 26; Lawyer MS affidavit at para. 16; Executive Director's affidavit at para. 48.
[64] *Supra* note 51.
[65] Order F17-23, 2017 BCIPC 24 at paras. 46-50; Order F16-26, 2016 BCIPC 28 at para. 32.
[66] Lawyer MS affidavit at para. 17.

Society.[67] With this evidence in mind, 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.

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

The applicant's submissions

[65] 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.

[66] 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 order production only when absolutely necessary to adjudicate the inquiry issues.[68] The applicant recognizes this in its submissions, but argues that CLBC failed to provide sufficient detail about each of the individual subject records, so it is necessary for me to order production.[69] I disagree.

[67] CLBC provided affidavit evidence from three individuals who were personally involved in most of the communications withheld under s. 14. Two of these individuals are lawyers and one is a client representative. In addition to this affidavit evidence, CLBC provided a table of records that provides details about each record withheld under s. 14. For example, the table includes the names of the individuals involved in the email communications withheld under s. 14, where those individuals work, and the date the emails were sent. In my view, this information paired with the affidavit evidence is sufficient to establish privilege.

UNREASONABLE INVASION OF PERSONAL PRIVACY – SECTION 22

[68] 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.

[69] The analysis under s. 22 involves four steps:[70]

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.

[67] Executive Director's affidavit at paras. 50-51.
[68] For similar reasoning, see Order F20-42, 2020 BCIPC 51 at para. 14.
[69] Applicant's response submission at para. 71.
[70] For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

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

[70] Section 22 only applies to personal information. Therefore, the first step in any s. 22 analysis is to determine whether the disputed information qualifies as personal information. CLBC bears the burden of proving that the information withheld under s. 22 qualifies as personal information.

[71] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[71] Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual on its own, or when combined with information from other available sources.

[72] 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 need, experienced, did, said and wrote. Much of this personal information relates to the Society's clients and their family members.

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

- Dates of emails and standard form language that follows signature blocks (e.g. confidentiality notices, CLBC's business motto, or phrases like "sent from my iPhone");
- Generic headings in documents and title bars in tables;[72]
- Photographs of inanimate objects that do not contain images of individuals or any items that are obviously connected to identifiable individuals;[73] and

[71] Schedule 1.
[72] For example, at pp. 56-62 of the records.
[73] At pp. 63-66 of the records. For example, these photographs include an image of a table and wall, an image of a partially opened bag, an image of an unidentifiable black surface with a paper clip on it, and an image of a surface that appears to be stained but I cannot determine what the surface is. CLBC merely identifies these records as "photographs" in its table of records and has

- Generic words or statements that do not relate to any identifiable individuals.[74]

[74] Additionally, as noted above, 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.

[75] I find that a small amount of the disputed information is contact information. This information consists of names, job titles, business phone numbers (including cell phone numbers being used for business purposes[75]), and email and mailing addresses in emails about work matters.[76] I find it 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.

[76] 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)

[77] 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.

[78] CLBC argues that none of the subsections in s. 22(4) apply to the disputed information.[77] However, I find that s. 22(4)(e) applies to a small amount of the disputed information.

[79] 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

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not explained how any of the inanimate objects in these photos fit within the meaning of personal information under FIPPA.

[74] For example, the information I have highlighted on p. 160 in the two emails from the individual not employed by CLBC, and pp. 341 and 356 (duplicate email repeated at 359 and 361) of the records.

[75] For example, at pp. 317, 336 and 353 of the records.

[76] For example, at p. 160-161 of the records. My finding relates only to the emails from the CLBC employee. The emails from the non-CLBC employee also contain what would generally be considered contact information in other contexts. However, the context and CLBC's *in camera* evidence (Executive Director's affidavit at para. 26), leads me to conclude that this information qualifies as personal information rather than contact information in the circumstances. Given the nature of the *in camera* evidence, I will not say more.

[77] CLBC's initial submission at para. 226.

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 generally fall under s. 22(4)(e).[78] 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).[79]

[80] CLBC says the records do not contain withheld information related to an employee's function in the normal course of their work-related activities.[80] I disagree. On my review, I find that CLBC has withheld the names and basic factual information about the work-related actions of two CLBC employees in two email chains withheld in their entirety under s. 22(1).[81] In my view, s. 22(4)(e) applies to almost all the information in these chains. The specific information I have found s. 22(4)(e) applies to is objective, factual statements about what public body employees said and did/will do in the normal course of their duties. It does not reveal personal information that relates to any complaints.

[81] I will not consider this personal information any further.

[82] 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)

[83] 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 presumptively constitutes an unreasonable invasion of a third party's personal privacy.

[84] 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)

[85] 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, physical and mental abilities, and medical needs of some of the Society's clients.

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[78] Order 01-15, 2001 CanLII 21569 (BC IPC) at para. 35; and Order 04-20, 2004 CanLII 45530 (BC IPC) at para. 18.
[79] Order 01-53, *supra* note 70 at para 40.
[80] CLBC's initial submission at para. 240
[81] Email chains at pp. 159-160 of the records (emails from CLBC employee) and pp. 741-742.

This information clearly fits within the meaning of s. 22(3)(a), so its disclosure presumptively constitutes an unreasonable invasion of personal privacy.

[86] In addition, a very small amount of information withheld under s. 22 relates to an identifiable individual's maternity leave. A past OIPC order found that s. 22(3)(a) applies to information respecting an individual's maternity leave.[82] I make the same finding here.

Employment history – s. 22(3)(d)

[87] 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 and evaluative information about Society and CLBC employees, some of which culminated in CLBC conducting the Review.[83] Having reviewed the information, I agree that some of it relates to complaints and evaluative information about the work performance of identifiable individuals. I find that s. 22(3)(d) applies to this type of information.

[88] CLBC also submits that s. 22(3)(d) applies to information in the records about employee leave, including employee vacations.[84]

[89] I am not persuaded by CLBC's arguments respecting s. 22(3)(d) when it comes to the disputed information related to employee vacations. This information is very general. For example, CLBC has withheld statements in emails that merely indicate that an employee is on vacation. In Order F21-32, I explained why s. 22(3)(d) does not apply to this type of information.[85] I will not repeat those reasons here. Suffice it to say, I find that this type of information is not sufficiently connected to a person's employment so as to constitute their employment history.

[90] That said, I find that the information related to an identifiable individual's maternity leave is sufficiently connected to this individual's employment and relates to their employment history.[86] As such, I find that two presumptions apply to the information about a third party's maternity leave.

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

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[82] Order F11-02, 2011 BCIPC 2 at para. 30.
[83] CLBC's initial submission at para. 234.
[84] *Ibid* at paras. 243-245.
[85] *Supra* note 1 at paras. 99-102.
[86] I came to the same conclusion recently in Order F21-08, 2021 BCIPC 12 at paras. 135-136.

Relevant circumstances – section 22(2)

[92] 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)(a) and (d) presumptions discussed above.

[93] 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)

[94] 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.[87]

[95] 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.[88] The Society disagrees, saying that CLBC has treated the Society poorly and that "[i]t is certainly in the public interest to then disclose information which speaks to the integrity of a public body, including its senior leadership, such as CLBC".[89]

[96] I find that s. 22(2)(a) does not weigh in favour of disclosure given the specific personal information in dispute, the vast majority of which does not relate to CLBC's senior leadership, but instead relates to the Society's employees, clients, and the families of clients. I do not see how disclosing any of the disputed personal information would foster the accountability of CLBC.

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

[97] 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:

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[87] Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.
[88] CLBC's initial submission at para. 251.
[89] Applicant's response submission at para. 80.

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.[90]

[98] 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.[91] The applicant also says that the family of one of its former 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.

[99] CLBC does not dispute that there is a live issue between the parties, but says it has already provided the applicant with considerable information (both in response to the access request at issue here and the request dealt with in Order F21-32).[92] CLBC contends that the information withheld under s. 22 "would have a minimal bearing or significance on the Applicant's rights."[93] CLBC also submits that violating the privacy rights of various third parties whose personal information is highly confidential is a test that the applicant cannot meet.

[100] As I see it, the applicant's evidence and argument does not meet the criteria for s. 22(2)(c). The applicant says there is a live dispute between it and CLBC, but it has not made submissions about which of its legal rights are (or would be) at issue in that dispute. Additionally, the applicant has not explained how the personal information at issue will have any bearing on, or significance for, a determination about the rights in question in any potentially contemplated proceeding. The applicant also did not explain how the personal information in dispute is necessary in order to prepare for any potentially contemplated proceeding or to ensure a fair hearing. As a result, I am not satisfied that all four of the s. 22(2)(c) criteria have been met when it comes to the dispute between CLBC and the applicant.

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[90] Order F19-02, 2019 BCIPC 02 at para. 57; Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31; and Order F16-46, 2016 BCIPC 51 at para. 43.
[91] The information summarized in this paragraph comes from the applicant's response submission at paras. 81-82.
[92] The information summarized in this paragraph comes from CLBC's initial submission at paras. 255- 257.
[93] *Ibid* at para. 257.

[101] 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 did not explain 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.

[102] Taking all this in account, I find that the applicant's evidence and argument does not meet the criteria 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)

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

[104] CLBC submits that some of the s. 22 information was supplied in confidence, so s. 22(2)(f) weighs against disclosure.[94] 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. According to CLBC, the highly sensitive nature of this type of disputed information shows that it was obviously supplied in confidence. CLBC's evidence also indicates that some of the disputed information relates to an access request made by a different access applicant.[95] CLBC says that it treats the identity of access applicants as confidential, consistent with government and OIPC practice.

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

[106] 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 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 personal information contained in these complaints was also supplied in confidence.[96] Previous OIPC orders have come to similar conclusions.[97]

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[94] The information summarized in this paragraph comes from CLBC's initial submission at paras. 258, 261 and 263.
[95] Executive Director's affidavit at para. 57(d).
[96] For similar reasoning, see Order F16-19, 2016 BCIPC 21 at para. 33.
[97] For example, see Order F15-29, 2015 BCIPC 32 at para. 43.

[107] However, I am not persuaded by CLBC's arguments respecting personal information in access requests. CLBC made identical arguments about the same record[98] in the inquiry that led to Order F21-32. I explained in detail why I do not find these aspects of CLBC's arguments persuasive in that Order and will not repeat myself here.[99] I find that the information in this particular record was not supplied in confidence, so s. 22(2)(f) does not weigh in favour of withholding it.

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

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

[109] CLBC contends that if it discloses certain 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.[100] 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.[101] 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.

[110] I am not persuaded that disclosure of the disputed information might unfairly damage the reputation of any Society employees 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.[102] I say this because, from what I have seen in the records responsive to this request and the records at issue in Order F21-32, I know that 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 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.

[111] 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

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[98] At pp. 741-742 of the records (the same email chain appears twice at pp. 2894-2897 of the records dealt with in Order F21-32, with one additional internal CLBC email sent July 7, 2018 at 9:54AM).
[99] *Supra* note 1 at paras. 118-120.
[100] CLBC's initial submission at para. 222.
[101] Applicant's response submission at para. 83.
[102] Society CEO's affidavit at paras. 33-49.

excellent service and care.[103] In the circumstances, I do not see how disclosing information to the Society about its own employees – who the Society clearly stands behind – would damage the reputation of those employees.

[112] 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)

[113] 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.

[114] 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.[104] Previous orders have also said that an individual's personal privacy rights are likely to continue for at least 20 years past their death.[105]

[115] CLBC submits that s. 22(2)(i) does not weigh in favour of disclosing personal information about an individual who passed away within the last five years.[106] I agree. Given the recency of this individual's passing, I find that s. 22(2)(i) does not weigh in favour of disclosing withheld information about this individual.

[116] The Society argues that the family of one deceased former client has initiated legal proceedings against both CLBC and the Society, so it says it believes disclosure is "certainly warranted, notwithstanding the length of time since this individual's death" because the information is likely necessary for a fair determination of the Society's legal rights in that proceeding.[107] Without confirming or denying the applicant's belief about the identity of the deceased individual whose information is contained in the records, I note that I have already found that the Society's evidence falls short of establishing that any of 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).

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[103] In my view, this is clearly implied in the Society CEO's affidavit, for example at paras. 22-23, 27, 37-40, 42-43, 46-47, 58, 66, 74, 83, 85-86, 87-89 and 93-97.
[104] Order F14-09, 2014 BCIPC 11 at para. 33.
[105] *Ibid* at para. 30; see also Order F18-08, 2018 BCIPC 10 at para. 32.
[106] CLBC's initial submission at para. 270.
[107] Applicant's response submission at para. 82.

[117] Now I will briefly discuss a relevant circumstance that is not listed in s. 22(2).

Applicant's existing knowledge

[118] In Order F21-32, I found that the applicant's prior knowledge of some of the information in dispute weighs in favour of disclosure. I make the same finding here for the same reasons provided in that Order, which I will not repeat.[108]

Summary – section 22

[119] 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.

[120] 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 any third party's personal privacy.

[121] 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.

[122] 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, with one exception, I find that the applicable presumptions must stand. However, when it comes to a small amount of information in the records that relates to two Society employees and their professional governing body,[109] I find that the applicant's pre-existing knowledge of this specific information rebuts the applicable s. 22(3)(d) presumption.[110]

[123] When it comes to the personal information that a presumption does not apply to, I find that the applicant's pre-existing knowledge of much of this information weighs in favour of disclosure. However, where I have found it clear that the information was supplied in confidence, I make the opposite finding.

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[108] *Supra* note 1 at paras. 132-137.
[109] For example, at pp. 163, 460 and 470-472 of the records.
[110] In my view, this information is not the type of personal information that the Society acquired during its contractual provision of residential services, so I do not find CLBC's arguments at para. 275 of its initial submissions applicable or persuasive here.

[124] 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 information that s. 22(1) does not apply to.[111]

ADULT GUARDIANSHIP ACT

[125] 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
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> (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.

[126] 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.

[127] Given the clear language of these legislative provisions, I find that the AGA prevails over FIPPA whenever there is any conflict between FIPPA and s. 46(2) of the AGA. 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 disputed information discloses the identity of someone who made a report under s. 46(1), then CLBC must withhold that information.

[128] As described above, CLBC did not provide me with copies of the information it withheld under s. 46 of the AGA. Instead, it provided submissions and affidavit evidence from the Executive Director.

[129] In Order F21-32, I said that to establish that it has correctly applied s. 46, CLBC's evidence must show that the requirements of that section have been met.[112] A report under s. 46(1) has three requisite elements. It must be:

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[111] 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.
[112] *Supra* note 1 at para. 147.

- about an adult who is unable to seek support and assistance;[113]
- 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.

[130] CLBC's affidavit evidence establishes that it is a designated agency under the AGA.[114] CLBC's affidavit evidence also shows that it received written s. 46(1) reports either directly or through another entity. 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. The Society 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.

[131] 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.[115] The Society 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."[116]

[132] I am not persuaded by this aspect of the Society's arguments and reiterate my findings in Order F21-32. The volume of information withheld as a result of s. 46(2) does not raise any alarm bells for me 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 Society 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 Society had no such prior knowledge.

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[113] 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.

[114] The information in this paragraph comes from the Executive Director's affidavit at paras. 9 and 61-64.

[115] *Ibid* at para. 65.

[116] Applicant's response submission at para. 53.

[133] The Society also makes an argument about Part 3 of the AGA, which it says expressly contemplates that alleged abuser/perpetrator of neglect can participate in the court process that allows a designated agency to obtain a support and assistance order from the court. The Society argues the Legislature intended that a "substantial portion of information, short of a reporter's identity" would be made available to the alleged abuser/perpetrator identified in a s. 46 report. The Society argues that the blanket fashion in which CLBC has applied s. 46 effectively strips away those procedural rights.[117]

[134] In addition, the Society contends that there was no legislative intent to prevent disclosure of any and all information which could remotely be used to identify a reporter. The Society says such an interpretation would be absurd because it would leave only a skeletal outline and no evidentiary record to support the designated agency obtaining the court order.[118]

[135] In reply, CLBC submits that the circumstances of disclosure and the content of the information differs between this inquiry and the court process contemplated under Part 3 of the AGA.[119] By way of example, CLBC says care can be taken with respect to the evidentiary record in the court process so as to present the information in a way that best protects the identity of a reporter while still disclosing a large amount of information. CLBC suggests that it is not necessarily the case that information about, or provided by, the reporter would be included in the evidentiary record. Besides, CLBC says, the records in dispute here were not created in contemplation that they may be disclosed in such a court process; therefore, they include additional information that could identify the reporter. Accordingly, CLBC says it had to withhold a large amount of information in order to protect the identity of the reporters.

[136] I agree with CLBC's submissions and am not persuaded by the Society's argument about Part 3 for the reasons that follow.

[137] Making a report under s. 46 is one of three ways to trigger Part 3 of the AGA.[120] As noted, a s. 46 report is made to a designated agency. The designated agency may subsequently initiate the process for obtaining a support and assistance order from the court.[121] That would require preparing a support and assistance plan and applying to the court for the order. With all this in mind, I find that designated agencies are well positioned to carefully craft the support and assistance court application outlined in Part 3 and curate the evidentiary record to ensure that no person discloses or is compelled to disclose the identity

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[117] Applicant's response submission at para. 56.
[118] *Ibid*.
[119] The information summarized in this paragraph comes from CLBC's reply submission at para. 15.
[120] AGA, s. 47(1).
[121] AGA, s. 54.

of a reporter. This is a vastly different situation than when a designated agency, such as CLBC, responds to an access request for pre-existing records and must determine what parts of those records would identify a reporter.

[138] The question here is whether the information in dispute under s. 46 would identify a reporter to the Society. In my view, CLBC's evidence satisfactorily establishes that it would. Consequently, I find that s. 46 of the AGA requires CLBC to withhold the information in dispute under that section.

CONCLUSION

[139] 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) I require CLBC to refuse to disclose information to the applicant under s. 79 of FIPPA and s. 46(2) of the AGA.
4) Subject to item 5 below, I confirm, in part, CLBC's decision to refuse to disclose the information withheld under ss. 13(1) and 22(1).
5) 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.

Pursuant to s. 59(1), CLBC must give the applicant access to the highlighted information by October 19, 2021.

September 2, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F19-79972