Order F22-11

MINISTRY OF HEALTH

Elizabeth Barker
Director of Adjudication

February 23, 2022

CanLII Cite: 2022 BCIPC 11
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 11

Summary: The applicant requested the Ministry of Health provide access to Medical Services Commission meeting minutes for a two-year period. The Ministry refused access under multiple *Freedom of Information and Protection of Privacy Act* exceptions to disclosure. The adjudicator found that ss. 13(1) (policy advice or recommendations), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of third party's personal privacy) applied to some of the information in dispute but s. 21(1) (harm to third party's business interests) did not apply at all. The adjudicator ordered the Ministry to disclose the information it was not required or authorized to refuse to disclose under ss. 13, 21(1) and 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 13(1), 13(2)(k), 13(2)(l), 13(2)(m), 13(2)(n), 13(3), 14, 21(1)(a), 21(1)(b), 21(1)(c), 22(1), 22(2)(h), 22(3)(a), 22(3)(b), 22(3)(d), 22(4)(f) and 74.

INTRODUCTION

[1] The applicant requested the Ministry of Health (Ministry) provide him with the Medical Services Commission's meeting minutes for a two-year period. The Ministry provided records but withheld some information pursuant to ss. 13(1) (policy advice or recommendations), 14 (solicitor client privilege), 17(1) (harm to financial or economic interests), 21(1) (harm to third party's business interests) and 22(1) (unreasonable invasion of third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter and the applicant requested that it proceed to an inquiry.

Preliminary Matters

Section 17

[3] During the inquiry, the Ministry said it is no longer relying on s. 17 to refuse access to the records, so that FIPPA exception is no longer an issue in the inquiry.

Section 74

[4] In his response submission, the respondent alleges that the Ministry, MSC and lawyers with the Ministry of Attorney General's Legal Services Branch have committed offences under s. 74 of FIPPA.[1] (Section 74 was recently repealed and replaced by s. 65.2, which contains the same offence provision, although the wording differs somewhat).

[5] Section 74 said that it is an offence to willfully make a false statement, mislead, attempt to mislead or obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner under FIPPA. The Attorney General is responsible for prosecuting, and the courts for deciding, those matters.

[6] If the commissioner believes that an offence has been committed, the commissioner may refer the matter to the Attorney General. That is not the case here. Nothing in the applicant's submission leads me to think that s. 74 (now s. 65.2) is even remotely engaged.

ISSUES

[7] The issues to be decided in this inquiry are the following:

1. Is the Ministry authorized to refuse to disclose the information at issue under ss. 13(1), 14 and 15(1) of FIPPA?

2. Is the Ministry required to refuse to disclose the information at issue under ss. 21(1) and 22(1) of FIPPA?

[8] Section 57 of FIPPA sets out the burden of proof. The Ministry has the burden of proving that ss. 13(1), 14, 15(1) and 21(1) apply. The applicant has the burden of proving disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).[2]

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[1] Applicant's submission at p. 33.

[2] However, the public body has the initial burden of proving the information is personal information; Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

DISCUSSION

Background[3]

[9] The Medical Services Commission (MSC) is established under the *Medicare Protection Act* and it manages the Medical Services Plan (MSP) on behalf of the Government of British Columbia in accordance with the *Medicare Protection Act* and Regulations.[4] The MSC reports directly to the Minister of Health.

[10] The MSC has nine members made up of three representatives from government, three representatives from the Doctors of BC and three members from the public. The public members are nominated by the Doctors of BC and government to represent MSP beneficiaries.

[11] The MSC is authorized to delegate some powers and duties to special committees, advisory committees and hearing panels established to assist the MSC in effectively carrying out its function. The MSC remains the decision-making body for these committees.

[12] Although the access request was for the MSC's meeting minutes, and the Ministry and the MSC are separate public bodies under FIPPA, the Ministry is named as the responsible public body in this case. That is because the applicant's access request was addressed to the Ministry, and the Ministry explains that it held copies of the requested records, so it processed and responded to the request.[5] Thus, it is the Ministry's decision that is under review.

Records at Issue

[13] There are 16 records at issue and they are all titled "Records of Decisions". They are, in essence, the minutes of the MSC board's monthly meetings for the time period requested by the applicant.[6] The greater part of the records have been disclosed to the applicant.

Solicitor-client privilege, s. 14

[14] Most of the information in dispute has been withheld under s. 14 of FIPPA. Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal

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[3] This information comes from the applicant's submission at p. 7 citing the MSC's website as well as from the affidavit of JG, a lawyer with Ministry of Attorney General's Legal Services Branch (LSB) and a June 21, 2021 affidavit of SB, the Ministry's Senior Manager, Beneficiary and Diagnostic Services Branch.
[4] *Medicare Protection Act*, RSBC 1996, c. 286, s. 3.
[5] Ministry's January 12, 2022 letter to the OIPC.
[6] January 18, 2017 to December 5, 2018. There are 120 pages in total.

advice privilege and litigation privilege.[7] Based on its submissions, I conclude the Ministry is only claiming legal advice privilege.

[15] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[8] The test for legal advice privilege has been expressed in various ways, but the essential elements are that there must be:

- a communication between solicitor and client (or their agent);
- that entails seeking or providing legal advice; and
- that is intended by the solicitor and client to be confidential.[9]

[16] Not every communication between a solicitor and their client is privileged, however, if the conditions above are satisfied, then legal advice privilege applies.[10]

Evidentiary basis for solicitor-client privilege

[17] The Ministry did not provide me with access to the information it is withholding under s. 14. The Ministry relies on affidavit evidence to support its claim that the information withheld under s. 14 is protected by solicitor-client privilege.[11]

[18] The applicant says that the Ministry should be made to produce the records for my review and the failure to do so "even *in camera*, is obtuse in the least."[12]

[19] Section 44(1) gives me the power to order production of records so I may review them during the inquiry. However, in order to minimally infringe on solicitor-client privilege, I would only order production of records being withheld under s. 14 when absolutely necessary to adjudicate the issues. That is due to the importance of solicitor-client privilege to the proper functioning of the legal system.

[20] In this case, after reviewing the Ministry's submissions and affidavit evidence, I determined that I did not have enough information to decide if s. 14 applied to some of the information in dispute. I assessed that the appropriate

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[7] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[8] *College, ibid* at para. 31.
[9] *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837; *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.
[10] See also *Solosky, ibid,* at p. 829.
[11] Ministry's initial submission at para. 17. In support, it cites *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.
[12] Applicant's June 27, 2021 submission at p. 30.

course was to offer the Ministry an opportunity to provide additional evidence. The Ministry responded with an explanatory cover letter and two more affidavits.[13] Based on that additional information, I concluded I had sufficient detail to make an informed decision and it was not necessary to order production of the records, as the applicant suggested.

[21] Further, in response to my letter, the Ministry provided a less redacted version of the records. It explained that pages 28 and 73 of the records originally sent for my review in the inquiry had been more extensively redacted under s. 14 than the Ministry intended due to a technological error. I have based my decision on this less redacted version of the records.

Public body's submission

[22] The Ministry says that the client in this case is "Her Majesty the Queen in right of British Columbia, also known as the government of British Columbia, as represented by the various government employees including employees of the Ministry and MSC members."[14] The Ministry also says, "While the MSC and the Ministry are different organizations within the government of British Columbia, they do not have any independent legal personality for civil law purposes."[15]

[23] The Ministry says that solicitors in this case are lawyers with the Ministry of Attorney General's Legal Services Branch (LSB), who provide legal advice to the Ministry, including the MSC.[16]

[24] The Ministry provides an affidavit from an LSB solicitor (JG) who was MSC's solicitor for some of the time covered by the requested records. When JG left, she says that another LSB solicitor (RA) took over the same role.

[25] JG provides evidence about the relationship between the MSC and the Ministry. She says that the MSC does not have the separate corporate status of a crown corporation and the *Financial Administration Act* applies to the MSC as though it were a division of the Ministry. She says, "Ministry employees are employed in the administration of the MSP. As such, LSB counsel provide legal services to both the Ministry and the MSC in respect of which LSB counsel is in a solicitor-client relationship."[17]

[26] JG says that she provided the MSC with legal advice on discreet legal issues. She also attended monthly MSC board meetings in her capacity as MSC's solicitor so she could receive any requests for legal advice made at the

[13] Ministry's letter and affidavits dated January 7, 2022. The applicant received this information and provided a response on January 9, 2022.
[14] Ministry's initial submission at para. 70.
[15] Ministry's initial submission at para. 73.
[16] Ministry's initial submission at para. 71.
[17] JG's affidavit at para. 5.

meetings and provide legal advice and updates on legal services that other LSB solicitors were providing to the MSC.[18] JG says:

> The individuals who typically attended the MSC meetings were members of the MSC or the Ministry of Health and therefore had a need to know about the legal advice the MSC sought and received from LSB legal counsel, including myself. From time to time, the MSC would invite guests to MSC meetings, but no legal advice would be given or discussed in the presence of a guest.[19]

[27] JG also says that, to the best of her knowledge, there has been no intentional or unintentional waiver of privilege with respect to the information in dispute in this inquiry.[20] She says that she always intended her legal advice to be confidential and she believes that all members of the MSC understood that her legal advice was not to be shared with any person or entity outside the government. She says that this is evident on the face of some of the records, which are marked "CONFIDENTIAL". Even when the records are not so marked, she believes that members of the MSC understood that the information being withheld under s. 14 was confidential in its entirety. She says she has no reason to believe that MSC treated her legal advice as anything other than confidential.

[28] The Ministry also provides an affidavit from KD who is the supervising solicitor with LSB's Justice Health and Revenue Group, which provides legal services to the employees of the Ministry and the MSC.[21] KD says that she has reviewed the records withheld under s. 14 and she has discussed them with the LSB solicitors responsible for providing legal services to the Ministry and the MSC.

[29] KD says that the information withheld under s. 14 "reflects legal advice provided to the MSC in the context of LSB legal counsel's solicitor-client relationship with MSC."[22] More specifically, she says that the information is as follows:

> a. legal advice provided by LSB legal counsel;
> b. substantive discussions of legal advice amongst the MSC;
> c. requests for legal advice from the MSC to LSB legal counsel;
> d. updates and litigation strategy from LSB legal counsel to the MSC respecting ongoing litigation where the MSC is a party to the litigation and LSB legal counsel is representing the MSC in the litigation;

[18] JG's affidavit at para. 7.
[19] JG's affidavit at para. 10.
[20] JG's affidavit at para. 11.
[21] KD's affidavit includes a table describing the information severed under s. 14 (Section 14 Table).
[22] KD's affidavit at para. 7.

e. updates and strategy from LSB legal counsel to the MSC respecting ongoing administrative tribunal files where the MSC is a party and LSB legal counsel is representing the MSC before the tribunal;
f. requests from the MSC to LSB legal counsel for legal advice in the form of drafting letters on the MSC's behalf;
g. provision of factual information from the MSC to LSB legal counsel that LSB legal counsel requires in order to continue providing legal advice to the MSC on certain subject matters; and
h. discussion of factual information amongst the MSC that is relevant to matters where LSB legal counsel are providing legal advice to the MSC.[23]

[30] KD's affidavit also includes a Section 14 Table of Records that provides a description of each specific redaction under s. 14. The following are a few examples:

- "MSC discusses two items on which legal advice was being provided by LSB lawyers to the MSC."
- "LSB legal counsel provided an update respecting a legal opinion completed by LSB for the MSC."
- "The MSC discusses legal advice and discusses obtaining legal advice from LSB."
- "The MSC discusses an issue on which it requires legal advice. LSB legal counsel discuss forthcoming legal advice."

[31] The Ministry also provides affidavit evidence from the Ministry's Senior Manager of Diagnostic Services Branch (SB). SB was the MSC Secretariat for part of the time covered by the records, and in her present role, she continues to support the MSC and the MSC Secretariat.

[32] SB says that the MSC board meetings are closed and one must be invited to attend by the MSC. The individuals present at the meetings are the MSC members, one MSC administrator, one employee from the Branch of the Ministry that supports the MSC, LSB legal counsel and invited guests.[24]

[33] SB says that it is the practice of the MSC to exclude guests from any portion of the MSC meetings where the MSC is seeking legal advice, discussing legal advice or receiving legal advice from LSB lawyers.[25] SB says that at every meeting she attended, guests were excluded from the portions of the meeting where legal advice was sought by the MSC or given by LSB lawyers.[26]

[23] KD's affidavit at para. 10.
[24] SB's July 16, 2021 affidavit at para. 3.
[25] SB's January 7, 2022 affidavit at para. 3.
[26] SB's January 7, 2022 affidavit at para. 4.

Applicant's submission

[34] The applicant submits that s. 14 does not apply because the communications were not confidential; he says MSC meetings are supposed to be open to the public. This is evident, he says, by the fact that the MSC board members include representatives from the Doctors of BC and the general public and members of the MSC's and the Ministry's advisory committees.[27] He also cites 2016 MSC Hearing Rules that say that oral hearings under the *Medicare Protection Act* must be open to the public but the hearing panel has the discretion to receive evidence in confidence.[28]

[35] The applicant also alleges that privilege does not apply because the crime-fraud exception to privilege applies and because the Ministry waived privilege. I will address those arguments in more detail below.

Who is the client?

[36] For the reasons that follow, I find that both the MSC and the Ministry were the "clients" with respect to the specific communications at issue.

[37] I accept the Ministry's evidence about the relationship between the MSC, the Ministry and LSB solicitors. The MSC manages MSP on behalf of the government of British Columbia and it reports directly to the Minister of Health.[29] The MSC does not have separate corporate status as a crown corporation and the *Financial Administration Act* applies to the MSC as though it were a division of the Ministry. Further, the MSC's mandate and relationship to the Ministry under the *Medicare Protection Act* indicate that the MSC and the Ministry are operationally intertwined and have a shared interest in the matters the MSC is responsible for deciding. The parts of the records I can see also reveal the MSC's and the Ministry's close mutual interest in the issues being discussed at the meetings.

[38] In addition, I accept JG's evidence about her role as solicitor for the MSC and the Ministry. She says that she worked as a solicitor providing legal advice to both the MSC and the Ministry and that included attending the MSC's board meetings. She says that the individuals who attended the MSC meetings typically included members of the Ministry who had a need to know about the legal advice the MSC sought and received from its solicitors. RA, the lawyer whose name also appears in the records, took over JG's role when she left. KD's evidence echoes what JG says, in that the solicitors in LSB's Justice, Health and Revenue Group provide legal advice to both the MSC and the Ministry.

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[27] Applicant's June 27, 2021 submission at p. 20.
[28] Applicant's June 27, 2021 submission at Exhibit H.
[29] *Medicare Protection Act*, s. 3.

Nature of the communications

[39] I accept JG's evidence and what she says about the general nature of the MSC's board meetings and the type of information summarized in its Records of Decision. JG attended monthly MSC board meetings in her capacity as MSC's solicitor in order to respond to requests for legal advice, provide legal advice and give updates on legal services that other LSB solicitors were providing to the MSC. When JG left that job, RA took over that same role, and I can see in the records which lawyer attended which meeting.

[40] I also find KD's evidence to be persuasive. She is a lawyer, and she supervises and oversees the LSB solicitors who provide legal services to the MSC and the Ministry. She has reviewed the records, and she has discussed the s. 14 information with the LSB solicitors who provide legal services to the MSC and the Ministry. KD provides detail about the disputed information, and her Section 14 Table of Records describes each specific redaction. KD's evidence demonstrates that the disputed information summarizes the meeting attendees' discussions about legal advice and legal services being sought and provided by LSB solicitors.

[41] Further, the portions of the records that I can see support what JG and KD say about the nature and content of the disputed information. For instance, a large part of the severed information falls under the heading "Extra Billing/Legal Updates". There are also notations in the margins next to some of the redactions stating that "action" on that item will be taken by the solicitors, JG and RA.

[42] Therefore, I am satisfied that the disputed information reveals communication between client and solicitor and the communication entails the seeking and giving of legal advice.

Confidentiality

[43] I am also persuaded that these communications were intended to be confidential. I accept JG, KD and SB's evidence in that regard. They all depose that it is MSC's practice to exclude guests from any portion of the meetings where the MSC is seeking, discussing or receiving legal advice. In particular, SB says that at every meeting she attended, guests were excluded from the portions of the meeting where legal advice was sought or given. I can see in the records themselves that SB was present at the meetings that guests attended.[30]

[44] I also do not agree with the applicant that what was said at the meetings was not confidential because members of the MSC's various advisory committees were in attendance. The *Medicare Protection Act* gives the MSC the power to establish advisory committees to advise and assist the MSC in

[30] Pages 24, 49, 56 and 64 of the Records.

exercising its powers, functions and duties.[31] I find that the members of the advisory committees are part of the MSC, thus part of the "client" for the purposes of these solicitor-client privilege communications.

[45] The applicant also says that the MSC's board meetings cannot be confidential because he believes the meetings are supposed to be open to the public. His evidence in support of that is not cogent as it relates to panel hearings, not board meetings. Also, how board meetings are *supposed* to be conducted is not the question here. I am considering what the Records of Decision reveal about what actually took place at the meetings in question. For that reason, I prefer the evidence of JG, KD and SB about the confidentiality of the specific communications at issue. The MSC has satisfactorily established that what was said at the meetings about legal advice was intended to be confidential solicitor-client communication.

Crime-fraud exception to privilege

[46] The applicant invokes the crime-fraud exception to privilege. That exception holds that communications between a client and their solicitor that are criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime or fraud cannot be privileged.[32] The rationale for the exception is that facilitating wrongful conduct does not come within the scope of a lawyer's professional employment.[33] The client's intention to commit a crime or fraud is the pivotal consideration, and it is immaterial whether the lawyer was an unwilling dupe or a knowing participant.[34]

[47] In order to invoke the exception, the applicant must make out a *prima facie* case.[35] More than a mere assertion or allegation is required; there must be clear and convincing evidence and something to give colour to the charge, in light of all the evidence and the surrounding circumstances.[36] Where the applicant establishes a *prima facie* case, the decision-maker must then review the documents in question to ascertain whether the exception applies or whether the asserted privilege properly exists.[37]

[48] The applicant's submission about this exception is as follows:

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[31] *Medicare Protection Act* s. 5(1)(o).
[32] *Descôteaux v. Mierzwinski,* 1982 CanLII 22 (SCC) at p. 27; *Solosky, supra* note 9 at pp. 835-836; *R. v. Campbell*, 1999 CanLII 676 (SCC) [*Campbell*] at paras. 55-63.
[33] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 (CanLII) [*Huang*] at para. 174.
[34] *Huang*, *ibid* at para. 174, citing *Campbell*, *supra* note 32 at paras. 55-56.
[35] C*amp Development Corporation v. South Coast Greater Vancouver Transportation Authority,* 2011 BCSC 88 [*Camp*] at para. 24.
[36] *Huang, supra* note 33 at para. 180; *McDermott v. McDermott*, 2014 BCSC 534 (CanLII) [*McDermott*] at para. 77.
[37] *Huang, supra* note 33 at para 180; *McDermott, ibid* at para. 78; *Camp, supra* note 35 at para. 24.

> I must raise another issue however that would deny client-solicitor privilege in any regard and that is the likelihood and the need to explore the furtherance that the Medical Services Commission, Billing Integrity Program, Audit and Inspection Committee, supporting solicitors, and other affiliates could have potentially promoted fraud, potential extortion, and several other criminal abuses (breach of privacy, perjury, malicious prosecution, among others). These issues relate to the manner in which accounting was applied to many deliberations whether for individual practitioners or clinics proper including private surgical clinics. It has become duly credible that exaggerated claims were made by the Government parties in these regards and repetitiously so and with the guise to extract large sums of monies in the actions. When there is a reasonable likelihood that a lawyer has participated in a criminal activity, that correspondence leading to the criminal activity must be released.
> …
> As for violations of law, the MSC's own accounting foundations are ripe for legal review and indeed potential fraud, extortion, and money laundering. Any such potential waives the redaction of such records. [38]

[49] The Ministry denies that anything withheld under s. 14 was created for an improper or illegal purpose. The Ministry says that the applicant's allegation is untrue, unsupported in fact, and insufficient to repudiate the application of solicitor-client privilege.[39]

[50] I am not persuaded by what the applicant says about "fraud, potential extortion, and several other criminal abuses (breach of privacy, perjury, malicious prosecution, among others)". He refers only broadly to audit and accounting processes that he believes are wrong or biased but, in my view, this is not sufficient to give colour to his allegations. He also does not show any connection between his allegations of wrongdoing and the actual information in the records at issue here.

[51] What the applicant says about the crime-fraud exception to solicitor-client privilege, in my view, is mere allegation, unsupported by clear and convincing evidence. He has not established a *prima facie* case that the specific communications at issue in this case are themselves unlawful or seek to advance conduct which the Ministry or MSC knew or ought to have known was unlawful.

Waiver of privilege

[52] The applicant also argues that the Ministry cannot refuse him access to the information under s. 14 because the Ministry has waived privilege.

[38] Applicant's submission at pp. 23 and 28.
[39] Ministry's reply at para. 11.

[53] The following statement from *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd*. is the most often cited test for waiver:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost…[40]

[54] Solicitor-client privilege is a right that belongs to, and can only be waived by, the client.[41] The party seeking to displace privilege has the burden of showing it has been waived.[42] Given the importance of solicitor client privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.[43]

[55] The applicant's argument is that the Ministry has already disclosed some privileged information, so it should be required to disclose all the information withheld under s. 14.[44] The applicant identifies the information that he believes is privileged information that has already been disclosed.[45] For instance, he says the following sentence in MSC's 2018-2019 Strategic Plan discloses privileged communication: "Presentation by Legal Counsel [RA] October 24/18 providing overview of roles and responsibilities."[46] He also identifies excerpts from the Records of Decisions, which he says disclose privileged communications, for example: "[The chair] informed the MSC that the [name] class action lawsuit against the MSC has concluded as all claims have been disbursed."[47] The applicant also points to bullet lists where some bullets are disclosed while others are withheld under s. 14.

[56] The Ministry disputes the applicant's claim that there has been a waiver of privilege. It says, if there has been an overlap between publicly available

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[40] *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd*. 1983 CanLII 407 (BC SC) at para. 6.
[41] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 39.
[42] *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc*., 2007 BCSC 1420 at para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 [*Maximum*] at para. 40.
[43] *Maximum, ibid,* at para. 40.
[44] Applicant's June 27, 2021 submission at p. 8.
[45] Applicant's June 27, 2021 submission at p. 8, 19-20.
[46] Applicant's submission at pp. 9 and 23 and Exhibit G.
[47] Page 35 of the records. He also identifies portions of pp. 39, 69, 94, 96-97, 99, 100 in the records.

information and privileged information, any partial disclosure does not mandate full disclosure.[48]

[57] I am not persuaded that there was any waiver of privilege when the Ministry disclosed the information the applicant points to. The information the applicant identifies shows only that certain topics were discussed, but it does not reveal the substance of what was said about legal advice.

[58] Further, it is not apparent that the disclosed information is even about the same matters as the information withheld under s. 14. Regarding the bullet lists in the records, for instance, I cannot see how the disclosed bullets reveal anything about the withheld bullets, other than the fact that they are both about the list's general subject matter. While the applicant singles-out information the Ministry previously disclosed, he fails to plausibly explain how it reveals anything about the specific information the Ministry is withholding under s. 14.

[59] In conclusion, the applicant has not established that the Ministry waived privilege.

Summary, s. 14

[60] The Ministry has proven that all of the information it withheld under s. 14 is protected by legal advice privilege, and it may be withheld on that basis. The applicant has not proven that the future crime-fraud exception or waiver of privilege apply.

Advice and recommendations, s. 13

[61] There was some overlap between the Ministry's application of ss. 13 and 14 to the records. I will only consider below the information that I have not already found may be withheld under s. 14.

[62] Section 13(1) says that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[49]

[63] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate

[48] Ministry's reply at para. 10.
[49] *John Doe v. Ontario (Finance*), 2014 SCC 36 [*John Doe*] at paras. 45-51.

inferences about the advice or recommendations.[50] In addition, the term "advice" includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact," including "expert opinion on matters of fact on which a public body must make a decision for future action."[51] Advice also includes a public servant's view of policy options and alternative courses of action to be accepted or rejected in relation to a pending decision.[52] Further, advice or recommendations do not have to actually be communicated to the decision-maker in order for s. 13(1) to apply.[53]

[64] The first step in the s. 13 analysis is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must decide if ss. 13(2) or (3) apply to the information. If they apply, the public body must not refuse to disclose the information under s. 13(1).

Is the information advice or recommendations?

[65] The Ministry submits that the disclosure of the information severed under s. 13 "would reveal advice and recommendations developed by and/or for a public body, either expressly or by implication." [54] The Ministry says that the records "reflect guidance provided to the MSC by its advisory committees respecting the best option available to the MSC when the MSC is engaged in its decision-making process."[55] More specifically, the Ministry's evidence is that the information withheld under s. 13 is recommendations and discussions of options regarding matters requiring a decision by the MSC, as well as discussions about policy relevant to the MSC that the Ministry is developing.[56]

[66] The applicant says that the Ministry has already publicly and openly disclosed the advice and recommendations in the records and elsewhere, so it is blocked from refusing access under s. 13.[57] He calls this a "waiver". He identifies information in the records and in the MSC Strategic Plans where he believes the Ministry has disclosed the advice and recommendations.[58]

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[50] Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).
[51] *College, supra* note 7 at para. 113.
[52] *John Doe, supra* note 49 at paras. 25-27.
[53] *John Doe, supra* note 49 at paras. 48-51.
[54] Ministry's initial submission at para. 41.
[55] Ministry's initial submission at para. 40; SB's affidavit at paras. 8-10.
[56] Ministry's initial submission at para.39; SB's affidavit at para. 9.
[57] Applicant's June 27, 2021 submission at pp. 10-11.
[58] Applicant's submission at p. 11.

Finding

[67] I find that some of the information at issue does not reveal advice or recommendations, so the Ministry is not authorized to refuse access to it under s. 13(1). It is information that reveals:

- what was decided;
- what actions/steps are underway or soon to be commenced;
- the topic being discussed; or
- a summary of what was said about a topic but not advice or recommendations about the topic.

[68] However, the balance of the information withheld under s. 13(1) does reveal advice or recommendations developed by and for the MSC.[59] The information lays out policy options and recommendations for decisions the MSC is considering.

[69] I do not accept the applicant's argument that the Ministry has already openly and publicly disclosed the advice and recommendations, so it cannot refuse access to the rest (i.e., his waiver argument). He does not identify where in the OIPC's extensive s. 13 caselaw the concept of a waiver was ever said to apply, and I do not think it is applicable. The concept of waiver relates to information that is protected by privilege and s. 13(1) is not about that kind of information. Further, I am not persuaded that the information withheld under s. 13(1) was disclosed elsewhere. I have looked at the information the applicant identifies as being disclosed advice and recommendations and disagree with his characterization of it. It is not advice or recommendations; rather, it is priorities, goals, background and actions underway.

Section 13(2)

[70] Next, I will consider if s. 13(2) applies to the information that reveals advice and recommendations. Section 13(2) lists types of information and records that a public body must not refuse to disclose under s. 13(1). The following provisions are raised in this case:

> 13 (2) The head of a public body must not refuse to disclose under subsection (1)
>
> …
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

[59] That information is on pp. 15, 23, 25, 27, 36, 46, 54, 70, 96, 115 and 116 of the records.

> (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
>
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[71] The Ministry submits that s. 13(2) does not apply. The applicant cites ss. 13(2)(k), (l), (m) and (n), but he does not explain how they apply in this case.[60]

[72] I find that ss. 13(2)(k), (l) and (n) do not apply because the advice and recommendations in the records are not a report, a plan or proposal to establish a new program or activity or to change a program or activity, a decision or decision reasons. Also, s. 13(2)(m) does not apply because there is nothing in the parties' submissions or the records to show the advice and recommendations were cited publicly as the basis for making a decision or formulating a policy.

Section 13(3)

[73] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for ten or more years. In this case the records are not that old, so s. 13(3) is not called into play.

Summary – s. 13(1)

[74] In summary, I find that the Ministry has established that disclosing some of the information it withheld under s. 13(1) would reveal advice or recommendations developed by or for the MSC. Section 13(2) and (3) do not apply to that information, so the Ministry may withhold it under s. 13(1). There are, however, some instances where I find that the information may not be withheld under s. 13(1) because disclosure would not reveal any advice or recommendations.[61]

Disclosure harmful to law enforcement, s. 15

[75] All of the information the Ministry withheld under s. 15 was also withheld under s. 14. I found that s. 14 applies to all of that information, so it is not necessary to consider if s. 15 applies as well.

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[60] Applicant's June 27, 2021 submission at p. 11.

[61] I have highlighted the information that may not be withheld under s. 13(1) in a copy of pp. 2, 7, 23, 25, 54, 70, 96, 115, 116 and 117 of the records that are sent to the Ministry with this order.

Harm to Third Party Business Interests, s. 21(1)

[76] Section 21(1) requires a public body to withhold information if its disclosure could reasonably be expected to harm the business interests of a third party.[62] The following parts of s. 21(1) are relevant in this case:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> …

[77] The principles for applying s. 21(1), which I will apply, are well established. All three of the following criteria must be met in order for s. 21(1) to apply:

- Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and
- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

[78] The Ministry submits that s. 21(1) requires it to refuse access to two short sentences on page 68 of the records. The two sentences are in an otherwise completely-disclosed paragraph about a company's online resource related to medical clinic wait times. The applicant disputes that s. 21(1) applies.

Parties' submissions

[79] The Ministry submits that the information withheld under s. 21(1): "may reveal Third Party commercial or financial information in that it relates to the

[62] In relation to an access request under FIPPA, a "third party" is any person, group of persons or organization other than the person who made the request or a public body. See Schedule 1 of FIPPA for definitions.

Third Party's exchange of goods and services".[63] The Ministry's evidence about s. 21(1) is brief and is provided by SB. She says:

> I have reviewed the information that has been severed from the Records under section 21 of FOIPPA.
>
> I believe that the MSC received the third party's information in confidence. The third party would not have anticipated that in providing this information to the MSC, the information would be disclosed publicly.
>
> Releasing the information may harm the third party competitively if another similar business were to use this information to their own competitive advantage. Further, in my view, disclosing this information may result in the MSC not receiving information like this in the future from this third party or other similar third parties. It is in the best interest of public and the MSC to receive information like this, so the MSC can understand and evaluate the business model of businesses like this, and ensure the model is in line with the *Medicare Protection Act.* [64]

[80] The Ministry said that if the OIPC does not except the Ministry's evidence that s. 21(1) applies, it should give the third party an opportunity to make a submission.[65]

[81] The OIPC reached out to the third party on two occasions during the course of the inquiry to ask if it wanted to provide a submission. The third party did not provide a submission.

Findings, s. 21(1)

[82] I find that the two severed sentences contain information about the third party's business activities, so it is "commercial" information about the third party.

[83] I also find that the information was "supplied" by the third party to the MSC during the course of the meeting. Based on the surrounding and already-disclosed information, it is clear that the co-founder was a guest at the meeting and the two sentences summarize what he said to the meeting attendees.

[84] However, SB's evidence that the information was supplied "in confidence" is not at all persuasive. It is not evident how SB could possibly know what the third party's intentions were regarding the confidentiality of the information revealed by those two sentences. She does not explain. Further, there is nothing in the records or SB's affidavit to explain why the two sentences would be confidential when the surrounding, disclosed sentences were not confidential. In

[63] Ministry's initial submission at para. 97.
[64] SB's June 21, 2021 affidavit at paras. 12-14.
[65] Ministry's initial submissions at paras. 97-100, footnotes omitted.

my view, the two sentences reveal only innocuous and obvious details given the context provided by what has already been disclosed.

[85] I am also not persuaded by the Ministry's evidence of harm. As with its claims of confidentiality, the Ministry makes assertions but does not elaborate or back them up with concrete explanatory evidence.

[86] In summary, I find that the Ministry has established that s. 21(1)(a) applies to the two sentences but not ss. 21(1)(b) and (c). The Ministry is not required or authorized, therefore, to refuse to disclose the two sentences under s. 21(1).

Unreasonable invasion of a third party's personal privacy, s. 22

[87] There was some overlap between the Ministry's application of ss. 14 and 22 to the records. Below, I will only consider the information that I have not already found may be withheld under s. 14.[66]

Personal Information

[88] Section 22 only applies to personal information, so the first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information." Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[67]

[89] I find that most of the information withheld under s. 22 is about identifiable individuals, so it is personal information. All of the personal information is about third parties. There is some information on pages 32-33 of the records, however, that is not personal information because it is so generic one simply cannot identify who it is about.

Not an unreasonable invasion, s. 22(4)

[90] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If s. 22(4) applies, disclosure would not be an unreasonable invasion of a third party's personal privacy. The s. 22(4) provisions raised in this case are as follows:

[66] The information I am considering under s. 22 is on pp. 32, 33, 49, 82, 100 and 113 of the records.
[67] See Schedule 1 of FIPPA for the definitions of personal information and contact information. There is no contact information in the records.

> 22 (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> …
> (c) an enactment of British Columbia or Canada authorizes the disclosure,
> …
> (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

[91] The Ministry submits that s. 22(4) does not apply. The applicant says that s. 22(4)(c) applies, but he does not identify what enactment he thinks authorizes disclosure, and I am not aware of any that do. The applicant also says that s. 22(4)(f) applies, but I can see that the personal information is not about the matters in s. 22(4)(f). Therefore, I find s. 22(4) does not apply in this case.

Presumptions, s. 22(3)

[92] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosure is presumed to be an unreasonable invasion of third-party personal privacy. The following parts of section 22(3) are relevant here:

> 22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
> …
> (d) the personal information relates to employment, occupational or educational history,
> …

[93] The Ministry submits that s. 22(3)(a) and (b) apply.

[94] I find that ss. 22(3)(a) and 22(3)(d) apply to a small amount of personal information about an individual's medical leave from work.[68]

[95] However, the Ministry's submission about s. 22(3)(b) is very general and seems to be about the information that I have already concluded may be withheld under s. 14 (and not considering here under s. 22). While I have considered what the Ministry says, the Ministry does not reference the specific pages or personal

[68] The information that s. 22(3)(a) and (d) apply to is on pp. 49 and 82 of the records.

information. Based on my review of the personal information at issue, I cannot see how it is about an investigation into a possible violation of the law, so I find that s. 22(3)(b) does not apply.

Relevant circumstances, s. 22(2)

[96] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2).[69] It is at this step that the s. 22(3) presumptions may be rebutted.

[97] The applicant says he does not want any particular patient's medical information and generic medical information should be disclosed. He also says that s. 22(1) cannot apply because MSC has already disclosed third-party personal information and "breached privacy".[70]

[98] The Ministry says that disclosure of the personal information "could unnecessarily expose the individuals to reputational harm, given that disclosure of information in response to an information access is disclosure unto the world at large."[71]

[99] I find that s. 22(2)(h), which is about unfair damage to reputation, is a relevant circumstance regarding a small amount of personal information on page 113, which is about whether to refer a named physician to the College of Physicians and Surgeons. In my view, disclosing that information may unfairly damage the physician's reputation because it implies negative things about professional disciplinary matters and there is no additional detail to provide context or the physician's side of the story.

[100] I have also considered whether any of the personal information is sensitive, and where it is, I find that factor weighs against disclosure. I find the information to which ss. 22(3)(a) and (d) apply is sensitive because it references the individual's medical situation. It is not "generic" medical information, which the applicant says should be disclosed. Also, the information on page 113, about whether to refer a named physician to the College of Physicians and Surgeons, is sensitive given what it implies about professional disciplinary matters. However, there is one short sentence on page 100 about an individual's work-related communications with the MSC that I do not think is sensitive.

[101] I have thought about the applicant's submission that the records contain already-disclosed personal information. Based on my review of the records, I do not agree that the withheld personal information has been disclosed elsewhere.

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[69] The parties do not mention any specific s. 22(2) provision.
[70] Applicant's June 27, 2021 submission at p. 28.
[71] Ministry's initial submission at para. 115.

[102] Finally, I have considered the fact that none of the personal information is about the applicant and there is no indication that he knows any of the withheld third-party personal information. In my view, those two circumstances weigh against disclosure.

Summary, s. 22

[103] Most of the information withheld under s. 22 is personal information of third parties and none of it is the applicant's personal information. However, there is some information on pages 32-33 of the records that is not personal information because it is so generic it is not about any identifiable individual.

[104] Section 22(4) does not apply to any of the personal information.

[105] The ss. 22(3)(a) and (d) presumptions apply to some of the personal information about an individual's medical leave from work, and there are no circumstances that weigh in favour of disclosing that information. I find that disclosing that information would be an unreasonable invasion of personal privacy under s. 22(1).

[106] I find that all relevant circumstances weigh against disclosing the identity of the of the physician on page 113 because it may unfairly damage their reputation and it is sensitive information. I also find that there are no circumstances that weigh in favour of disclosing the identity of the individual mentioned on page 100. However, additional severing of those pages is reasonable. Once the individuals' names are redacted, the balance of the information is not about identifiable individuals, so it is not personal information and s. 22(1) does not apply.

[107] In conclusion, I find that disclosure of only some of the information in dispute under s. 22(1) would be an unreasonable invasion of third-party personal privacy. I have highlighted the information where I find s. 22(1) does not apply in a copy of the relevant pages that are sent to the Ministry with this order.

CONCLUSION

[108] For the reasons given above, I make the following order pursuant to s. 58 of FIPPA:

1. The Ministry is authorized to refuse access to the information it severed under s. 14.

2. The Ministry is authorized to refuse access to some of the information it severed under s. 13(1), subject to item 5 below.

3. The Ministry is not required to refuse access to the information it severed under s. 21(1).

4. The Ministry is required to refuse access to some of the information it severed under s. 22(1), subject to item 5 below.

5. The Ministry is not authorized or required by s. 13(1), 21(1) or 22(1) to refuse access to the information I have highlighted in a copy of the following pages of the records which are sent to the Ministry with this order: pages 2, 7, 23, 25, 32, 33, 54, 68, 70, 96, 100, 113, 115, 116 and 117.

6. The Ministry is required to give the applicant access to the information described in item 5 above.

[109] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by April 6, 2022.

February 23, 2022

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F19-80933