Order F23-65

THOMPSON RIVERS UNIVERSITY

Allison J. Shamas
August 16, 2023

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Summary: The applicant requested communications related to instructions and guidance given to a Thompson Rivers University (TRU) employee about responding to media inquiries that related to him personally. TRU disclosed responsive records but withheld some information and records under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined that TRU was authorized to withhold all the information it withheld under ss. 14 and some of the information it withheld under ss. 13(1) and 22(1) and ordered TRU to give the applicant access to the information it was not authorized or required to withhold under ss. 13(1) and 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165 ss. 4(2), 13(1), 13(2)(a), 13(2)(k), 13(2)(m), 14, 22(1), 22(2)(a), 22(2)(c), 22(3), 22(4), and 44(1).

INTRODUCTION

[1] The applicant requested communications related to instructions and guidance given to a Thompson Rivers University (TRU) employee about responding to media inquiries that related to him personally.

[2] TRU disclosed some of the responsive records but withheld some information and records under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review TRU's decision. Mediation did not resolve the matter and it proceeded to inquiry.

PRELIMINARY MATTERS

Expansion of s. 14 as a Basis for Withholding Information

[4] At the inquiry stage, TRU added s. 14 as a basis for withholding information that it had previously withheld under ss. 13(1) and 22(1).

[5] The applicant objected, arguing that the change amounted to adding a new issue at the inquiry stage and should not be permitted.

[6] TRU argued that as s. 14 was already in issue, its broader reliance on s. 14 did not amount to adding a new issue during the proceeding. It submitted that as the applicant had notice of the s. 14 issue and full opportunity to make submissions, there was no prejudice to the applicant in permitting TRU to add s. 14, whereas refusing to permit TRU to add s. 14 would result in significant prejudice to TRU as it would be unable to protect materials covered by solicitor-client privilege.

[7] The facts of this inquiry are distinguishable from those where a party seeks to add an entirely new issue during the inquiry. As both s. 14 and the affected information were in issue from the outset, TRU's decision to expand its application of s. 14 does not undermine the OIPC's processes in the same way as adding a new issue during the inquiry phase.

[8] In my view, there is no unfairness to the applicant in permitting TRU to expand its application of s. 14. As TRU identified its intention to expand its reliance on s. 14 in its initial submission, the applicant had notice of the change and an opportunity to respond, which he took. Furthermore, because TRU expanded its reliance on s. 14 in its initial submission, the expansion did not result in delay. Conversely, refusing to permit TRU to expand its application of s. 14 would deny it the right to assert solicitor-client privilege – a right the courts have recognized as "fundamental to the proper functioning of our legal system."[1] Finally, while I am not aware of any previous OIPC orders in which the OIPC refused to permit a party to expand its reliance on a FIPPA exception where both the information and FIPPA section were already in issue, the OIPC appears to have permitted public bodies to make similar amendments as a matter of course in past orders.[2]

[9] In the circumstances, I find that it is appropriate to permit TRU to add s. 14 as a basis for withholding additional information.

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[1] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII) at para 9.
[2] Order 123-1996, 1996 CanLII 499 (BC IPC) at para 1 and Order 00-11, 2000 CanLII 10554 (BC IPC) at page 8.

Approach to Evidence from Other OIPC Inquiries

[10] The applicant argued that I should approach TRU's evidence under s. 14 with caution because one of TRU's representatives made misrepresentations about s. 14 materials in a past OIPC inquiry.

[11] In response, TRU argued that the applicant's assertion should be disregarded because it was speculative, inaccurate, and not supported by the facts. Addressing the merits of the applicant's argument, TRU stated that the issue arose from an error, not dishonesty.

[12] While the applicant asserts that the representative had some involvement with the instant application, and that in his view other representatives from TRU were likely also aware of the misrepresentation, the impugned TRU representative did not give evidence in this inquiry.

[13] My responsibility is to assess the evidence in a fair and neutral manner. In my view, in the circumstances, considering evidence from the past OIPC inquiry to determine whether a TRU representative made a misrepresentation in the past will not assist me to fulfill my duty in this inquiry. Accordingly, I will not consider the parties' submissions about the past OIPC file in assessing whether TRU is authorized or required to withhold the information at issue in this inquiry.

Approach to TRU's Unsolicited Evidence

[14] Over the course of the inquiry, I offered TRU two opportunities to submit additional materials in support of its assertion of solicitor-client privilege.[3] In response, TRU filed additional affidavit evidence and submissions, and the applicant filed additional submissions in response.[4]

[15] Upon review of the additional materials, I wrote to the parties a third time to invite submissions on two narrow legal issues related to solicitor-client privilege.[5] TRU responded with submissions and a fourth affidavit in support of its assertion of solicitor-client privilege.[6]

[16] The applicant argued that my letter did not give TRU the opportunity to provide additional evidence.[7] TRU took the position that it should be permitted to submit additional evidence. It argued that my letter did not preclude the introduction of further evidence, and that in any event there was no basis to disregard evidence which, in its view, provided "incontrovertible proof" of

[3] See OIPC letters to parties dated March 27, 2023 and April 26, 2023.
[4] TRU's correspondence is dated April 26, 2023 and May 1, 2023. The applicant's correspondence is dated May 2, 2023.
[5] OIPC letter dated June 14, 2023.
[6] TRU letter dated June 29, 2023 and accompanying affidavit.
[7] Applicant letter dated July 7, 2023.

privilege. It also submitted that to ignore the evidence would be to abrogate a "constitutionally protected privilege", and that as the applicant had the opportunity to respond, there was no prejudice to the applicant in accepting the new evidence.[8] The applicant is correct that my letter did not invite additional evidence.

[17] The OIPC has a broad discretion to decide whether to admit evidence, subject to considerations of procedural fairness. In this case, I have no concerns about TRU's right to be heard – it had ample opportunity to lead evidence in support of its assertion of solicitor-client privilege, and offered no explanation as to why it did not provide the evidence earlier. However, as TRU notes, the new evidence concerns solicitor-client privilege, a right that is central to the proper functioning of the legal system. In addition, the applicant had an opportunity to respond to the new evidence, and as a result of the schedule for filing legal submissions, the additional evidence did not result in delay.

[18] I have serious concerns about TRU's failure to file the impugned evidence earlier. However, weighing the considerations above, I find that the proper approach in this case is to accept the unsolicited evidence.

ISSUES AND BURDEN OF PROOF

[19] The issues to be decided in this inquiry are:

1. Whether TRU is authorized to refuse to disclose the information at issue under ss. 13(1) and 14 of FIPPA.
2. Whether TRU is required to refuse to disclose the information at issue under s. 22(1) of FIPPA.

[20] Section 57(1) of FIPPA places the burden on TRU to prove that the applicant has no right of access to the information withheld under ss. 13(1) and 14. While under s. 22(1) TRU has the initial burden to establish that the information in dispute is personal information about a third party, s. 57(2) places the burden on the applicant to prove that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.

DISCUSSION

Background

[21] TRU is a university located in Kamloops, BC. The applicant is a faculty member at TRU and a member of the Thompson Rivers University Faculty Association (the Union).

[8] TRU letter dated July 6, 2023.

[22] It is clear from both parties' submissions that the applicant's relationship with TRU is strained, and that the applicant and TRU disagree about who is responsible for the conflict. As I do not have a full picture of the undoubtedly complex labour relations issues at play, what follows is limited both by the information provided to me by the parties, and by what is relevant to the FIPPA issues in this inquiry.

[23] In 2020 the applicant made public statements about an issue at TRU. The applicant's statements were reported in the media. Following a related investigation, TRU suspended him. The Union grieved the applicant's suspension and requested compensation and removal of the suspension from his record. In 2021, TRU issued the applicant a "final warning" about his conduct. Again, the Union grieved the warning letter and requested its removal from the applicant's file.

[24] Both the applicant's public statements and TRU's disciplinary responses generated considerable media attention. In this inquiry, the applicant seeks information related to TRU's internal discussions about instructions and guidance given to a TRU employee regarding how to respond to media inquiries about the applicant during the period from July 1, 2020 to February 1, 2021.

Records at Issue

[25] The responsive records consist of 62 pages. TRU severed some information from 34 pages and withheld the remaining 28 pages in their entirety. The records are email communications amongst TRU representatives, and often include the employee responsible for media inquiries (the Media Rep) and TRU's in-house lawyer (the Lawyer). They are internal discussions amongst various TRU employees and board members about the media attention on the applicant and TRU arising from the matters described above. TRU provided the records containing information withheld under ss. 13(1) and 22(1) for my review, but not the records and information withheld under s. 14.

Section 14 - Solicitor-Client Privilege

[26] Section 14 provides that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[9] TRU claims legal advice privilege applies to the withheld information.

Legal Advice Privilege

[27] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice,

[9] Order F22-64, 2022 BCIPC 72 (CanLII) at para 15.

opinion, or analysis.[10] For information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.[11]

[28] Not every communication between client and solicitor is protected by solicitor-client privilege. However, if the conditions set out above are satisfied, then legal advice privilege applies.[12]

[29] Legal advice privilege extends to more than the individual document that communicates or proffers legal advice. It includes communications that are "part of the continuum of information exchanged" [13] between the client and the lawyer in order to obtain or provide the legal advice. The "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[14] It also covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[15]

[30] In short, legal advice privilege applies both to actual legal advice exchanged between a solicitor and client, and to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged communications between a lawyer and their client.[16]

Evidentiary Basis for Solicitor-Client Privilege

[31] TRU severed information from seven records and withheld an additional six records in their entirety under s. 14. The information in dispute is found in email chains amongst TRU representatives that often include the Lawyer and the

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[10] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.
[11] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) [*Solosky*] at page 837, and *R. v. B.*, 1995 CanLII 2007 (BC SC) [*R v. B*] at para 22.
[12] *R. v. B, supra* note 10 at para 22; *Solosky*, *supra* note 11 at page 13; R. v. McClure, 2001 SCC 14 at para 36, *Festing v. Canada (Attorney General)*, 2001 BCCA 612 at para 92.
[13] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para 83. See also *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 40-46 [*Camp Developments*].
[14] *Camp Developments*, *supra* note 13 at para 40.
[15] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 at paras. 22-24.
[16] See for example Order F22-34, 2022 BCIPC 38 (CanLII), at para 41, Order F22-53, 2022 BCIPC 60 (CanLII), at para 13, and Order F23-07, 2023 BCIPC 8 (CanLII), at para 25.

Media Rep.

[32] TRU did not provide the information withheld under s. 14 for my review. Instead, in its initial submission it provided evidence from an administrative employee who supports TRU's privacy and access officer (the Privacy Assistant) and the Media Rep. In response to my letter inviting additional materials to support its assertion of solicitor-client privilege, TRU provided a third affidavit from the Lawyer. Finally, in response to my request for legal submissions on solicitor-client privilege, TRU provided a fourth affidavit from its in-house legal counsel and privacy and access officer (the Privacy Officer).

[33] I am satisfied that TRU's affidavit evidence provides a sufficient basis for me to assess its assertion of solicitor-client privilege.

TRU's Submission

[34] Referencing the BC Court of Appeal's oft-cited *British Columbia (Attorney General) v. Lee* [*Lee*],[17] TRU submits that solicitor-client privilege is a fundamental and substantive rule of law that attaches to all communications made within the framework of solicitor-client privilege.[18] It also asserts that severance is not appropriate unless there is *no* risk that doing so would erode the underlying privilege.[19]

[35] Relying on these principles, TRU asserts that solicitor-client privilege applies not only to the legal advice it received, but to all information shared between it and its lawyers related to the provision of legal advice. It argues that disclosure of this information would reveal or allow the applicant to draw inferences about what its lawyers knew and when, the information considered by those lawyers in providing legal advice to TRU, and the issues or subjects on which TRU sought legal advice. According to TRU, disclosure of such information is not consistent with the principle that solicitor-client privilege must be maintained as close to absolute as possible.[20]

[36] TRU asserts that the records are internal email communications that include legal advice and requests for legal advice from the Lawyer. It explains that it applied s. 14 on the basis that the withheld information and records either comprise communications directly seeking or providing legal advice or form part of the "continuum of communications" in which legal advice was provided by the Lawyer to TRU's senior executive.[21] On these bases TRU argues that its

[17] 2017 BCCA 219 [*Lee*] at paras 31 – 33.
[18] See TRU initial submissions at paras 17 – 25.
[19] TRU's letter dated June 29, 2023 at para 4.
[20] TRU's letter dated June 29, 2023 at para 11.
[21] See TRU's supplementary submission dated May 1, 2023 at page 2.

evidence satisfies the test for solicitor-client privilege.

[37] In reply to the applicant's assertion that the withheld information was business advice rather than legal advice, TRU asserts that it is "not unusual for communications personnel to seek legal advice about public relations matters, including matters such as whether a communication is defamatory, breaches privacy, or violates other statutory or legal obligations of an organization,"[22] and that the applicant's assertion is contradicted by TRU's witnesses' sworn evidence, and on this basis should be dismissed.

The Applicant's Submission

[38] The applicant submits that TRU has not met the onus to establish solicitor-client privilege.

[39] Referencing the evidence of the Privacy Assistant and the Media Rep he argues that bald assertions are not sufficient to establish privilege.

[40] Turning to the individual records, the applicant argues much of the withheld information – that related to managing the media – is unlikely to contain information that is subject to solicitor-client privilege, and is more likely "business advice," which is not protected. In support of his position, the applicant identifies specific information in the records that is, in his view, more likely business than legal. He notes that the issue of business advice frequently arises where, as in the instant inquiry, in-house counsel is involved. Finally, referring to the fact that the Lawyer is just one of many recipients in the email chains, he argues that information does not become privileged just because it is sent to a lawyer.
In one of the records the Media Rep sends two versions of information that she refers to as "draft media statements" and seeks feedback from other TRU representatives as to their preference. TRU withheld the draft statements and the ensuing discussion. Positing that at least one of the draft media statements was used, and thus made public, the applicant asserts that TRU waived privilege over at least one of the draft media statements. Continuing, the applicant argues that as TRU waived privilege over some information in this inquiry, it waived privilege over all materials.[23]

Findings and Analysis

Solicitor-Client Communications

[41] The first step in the test for legal advice privilege requires that the communications be between solicitor and client.

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[22] TRU supplementary submission dated May 1, 2023 at page 2.
[23] See page 1 of the applicant's supplementary submission dated May 2, 2023. In support of his assertion of a global waiver of privilege, the applicant relies on the court's comments in *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CanLII 34954 (ON SC).

[42] The Lawyer states that he is general counsel to TRU,[24] and that the email chains at issue contain legal advice, requests for legal advice, and references to legal advice that he provided to or received from TRU.[25] The Lawyer's evidence that he advised TRU on the matters at issue in the withheld information is corroborated by the Media Rep who deposes that the information withheld under s. 14 is, or flows from, her confidential communications with the Lawyer.[26]

[43] I am satisfied that there was a solicitor-client relationship between the Lawyer and TRU for the purpose of the communications at issue.

Communications that Entail the Seeking or Providing of Legal Advice

[44] The second step in the test for solicitor-client privilege requires that the communications entail the seeking or providing of legal advice. As set out above, information that falls within the "continuum of communications" is also protected.

[45] I have used the Lawyer's evidence to categorize the s. 14 information. However, in doing so, I have not accepted the Lawyer's evidence, but rather used it as guideposts to assess TRU's assertion of privilege. The Lawyer describes the withheld information as follows:

- Requests for and/or provision of legal advice;
- Other messages that form part of a chain in which legal advice was sought and received;
- Discussions about or references to legal advice;
- Attachments; and
- Information about which the Lawyer declined to provide evidence.

[46] I will address each category in turn.

Requests for and/or Provision of Legal Advice

[47] TRU asserts solicitor-client privilege over information in which, according to the Lawyer, a TRU representative requested and/or the Lawyer provided legal

[24] Affidavit of Lawyer at para 1.
[25] Affidavit of Lawyer at para 4.
[26] Affidavit of Media Rep at paras 9-10.

advice. The information is found in one severed email chain[27] and five email chains that TRU withheld in full.[28]

[48] The Lawyer describes the disputed information in the severed chain as a request for legal advice from the Media Rep to the Lawyer about the draft media statements. He says that he provided legal advice in response to the request. According to the Lawyer, disclosing the severed part of the chain would reveal a confidential communication sent to him for the purpose of seeking legal advice, and would reveal or allow third parties to draw accurate inferences about the legal advice he provided.[29]

[49] TRU disclosed the to, from, date, and subject lines, as well as some introductory remarks, from the severed chain. From the available information, I can see that the subject of the chain is "draft media statement – faculty issue," and in the chain the Media Rep sent draft media statements to the Lawyer and other TRU representatives and requested feedback. The rest of the message is withheld.

[50] In assessing TRU's assertion of privilege over this information, I considered the applicant's argument that the Lawyer's advice about draft media statements is more likely to have been business advice than legal advice. As the Lawyer was just one of many TRU representatives who received the Media Rep's request for advice, there is some basis to consider whether the purpose of the request may have been to solicit business advice rather than legal advice. However, the Lawyer is the solicitor in the solicitor-client relationship. He states that he reviewed the chain in preparing his affidavit and that he was personally involved in the communication. The Lawyer is also an officer of the court with a professional duty to ensure that privilege is properly claimed. He deposes that the withheld information is a request for legal advice.

[51] In *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)* [*Minister of Finance*] Justice Steeves of the BC Supreme Court provided guidance about how the OIPC should approach a solicitor's affidavit in support of an assertion of solicitor-client privilege in

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[27] TRU withheld 13 email chains in full or in part based on solicitor-client privilege. In referring to these email chains I will refer to them based on the "electronic number" on the records and referenced in the supplemental records table filed by TRU on May 1, 2023, not the "marked numbers" used by the Lawyer in his affidavit. For an explanation of the numbering discrepancy, see TRU's correspondence of May 3, 2023. The email chain in which the Lawyer asserts that the Media Rep requested legal advice from the Lawyer is found at pages 1 – 5 of the Severed Records.

[28] The five email exchanges in which the Lawyer asserts that a TRU representative requested and/or the Lawyer provided legal advice are found at pages 1-5, 6-7, 11-12, 13-15, and 16-28 of the Withheld Records. See also affidavit of Lawyer at para 7.

[29] Affidavit of Lawyer at para 6(a).

circumstances where the underlying documents are (or in this case, information is) not available:

> [T]he use of affidavits from lawyers (without the actual document being available) means that some weight has to be given to the judgement of counsel when the IPC is adjudicating claims of solicitor-client privilege. … The task before an adjudicator is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege. As to the reliability of a lawyer's claim it first of all needs to be recognized that the lawyer's conduct is subject to the standards of the Law Society. It would be a professional error for a lawyer to misrepresent the nature of solicitor-client communications to an agency like the IPC (or to anyone). The corollary of this is that a claim of solicitor-client privilege should be made by counsel only after careful consideration. A claim that cannot be justified, and certainly a spurious one, is a reason for the IPC to request more information and submissions.[30]

[52] I accept Justice Steeves' statement of the legal principles. Applying these principles to the facts before me, I prefer the Lawyer's direct evidence about the nature of the communications over the applicant's argument about their probable content.

[53] Accordingly, I accept that the withheld information is a request from the Media Rep to the Lawyer for legal advice. It is well-established that solicitor-client privilege applies to requests for legal advice.[31] Accordingly, I am satisfied that the information in the severed chain entails the seeking or providing of legal advice. I come to the same conclusion about the five email exchanges that TRU withheld in full. The Lawyer describes these communications as email exchanges between himself and TRU representatives. The supplementary records table that TRU provided echoes the Lawyer's evidence. For these reasons and those set out above, I accept the Lawyer's evidence, and I find that these communications entail the seeking or providing of legal advice.

Other Messages that form Part of a Chain in which Legal Advice was Sought and Received

[54] The Lawyer states that TRU also withheld information that relates to or was the basis on which he provided the legal advice in two of the email chains discussed above.[32] He asserts that disclosure of the information would reveal or allow inferences about the nature of the legal advice that he provided.[33] The

[30] 2021 BCSC 266 at para 87.
[31] *Descôteaux et al v. Mierzwinski*, 1982 CanLII 22 (SCC) at pp. 876-877. See also *Lee*, supra note 17 at para 35.
[32] See Affidavit of Lawyer at paras 7(a) and (b).
[33] See Affidavit of Lawyer at paras 7(a) and (b).

information at issue is found in the same email chains as the related advice.

[55] The courts have made it clear that for information that was sent to a lawyer to be privileged, the evidence must establish that the information was provided to the lawyer in a context where it is directly related to the seeking, formulating or giving of legal advice,[34] or that it was provided to the lawyer in order to obtain legal advice.[35]

[56] Based on the Lawyer's direct evidence and the fact that the information is found in the same email chain as information that I have already found is legal advice, I accept the Lawyer's evidence that the information at issue relates to or was the basis on which he provided the legal advice. Accordingly, I find that this information entails the seeking or providing of legal advice.

Discussions about Legal Advice

[57] The Lawyer states that TRU severed information from five email chains in which TRU representatives discussed seeking and receiving legal advice from him. Specifically, he asserts that the withheld information is discussions about issues on which to seek legal advice,[36] discussions about legal advice sought,[37] and in some cases received from him.[38] He also asserts that TRU withheld a sixth email chain in full in which one TRU representative forwarded his legal advice to other TRU representatives.[39] I can see from the parts of the records that were disclosed that the Lawyer is involved in some, but not all of these email chains.

[58] The applicant specifically addressed some of the email chains described above in his argument about business advice. Accordingly, in considering TRU's application of s. 14 to this information, I carefully considered the applicant's arguments that emails that contain "thoughts" from a TRU representative other than the Lawyer, that discuss draft media statements, or that address how to update faculty about the media attention on the applicant are unlikely to contain legal advice. However, again applying Justice Steeves' reasoning in *Minister of Finance*, I prefer the Lawyer's evidence about the nature of the information.

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[34] *Murchison v. Export Development Canada*, 2009 FC 77 at para 44, *Canada (Public Prosecution Service) v. JGC*, 2014 BCSC 557 at paras. 16-19, *Belgravia Investments Ltd. v Canada*, 2002 FCT 649 at para 46 Order F15-52, 2015 BCIPC 55 at para 14.
[35] *Descôteaux et al v. Mierzwinski,* 1982 CanLII 22 (SCC) at pages 892-893.
[36] Severed Records pages 6-7 and affidavit of the Lawyer at para 6(b).
[37] Severed Records pages 8-11 and affidavit of the Lawyer at para 6(c).
[38] Severed records page 12 and affidavit of the Lawyer at para 6(d); Severed Records Pages 25-29 and affidavit of Lawyer para 6(e) (for clarification see my letter to the parties dated April 26, 2023 and TRU letter to registrar dated May 1, 2023, page 3); Severed Records pages 18-32. Affidavit of Lawyer, para 6(e). See TRU's May 1, 2023 correspondence for an explanation of the pagination issue in the Lawyer's affidavit.
[39] Withheld Records pages 8-10 and Affidavit of Lawyer at para 7(c).

In my view, it is clear that communications about legal advice sought and/or received from the Lawyer as well as the forwarded chain containing legal advice itself entail the seeking or providing of legal advice.

[59] The application of privilege to the internal discussion identifying issues on which to seek legal advice is less clear-cut. On its own, information that discloses an intention to seek legal advice in the future is not captured by s. 14 because it does not establish that there was any actual communication between lawyer and client.[40] What past OIPC orders have required is some evidence that the client ultimately sought the legal advice in issue. [41]

[60] In the instant case, the Lawyer states that he provided advice to TRU on the issues set out in the information in this category. In keeping with the OIPC's jurisprudence, I find that TRU's identification of issues on which to seek legal advice, in circumstances where it ultimately sought advice would reveal both TRU's requests for legal advice and the subject of the subsequent legal advice. For these reasons, I am satisfied that the internal discussions identifying issues on which to seek legal advice also entail the seeking or providing of legal advice.

Attachments

[61] TRU also withheld three attachments from the severed email chains described above. Based on the information available to me, all three appear to be draft media statements prepared by the Media Rep and sent to other TRU representatives, including the Lawyer, for feedback.[42]

[62] An attachment may be privileged on its own, independent of being attached to another privileged record, or it may be privileged if it is an integral part of the privileged communication to which it is attached, and it would reveal that communication either directly or by inference.[43]

[63] In this case TRU provided no evidence to suggest that the draft media statements were confidential communications between lawyer and client when they were originally created. They are, however, appended to records that I found are privileged. The critical question therefore is whether they are an integral part of those communications such that they would reveal the legal advice at issue.

[40] See for example Order F18-38, 2018 BCIPC 41 (CanLII) at para 37 and Order F17-23, 2017 BCIPC 24 (CanLII) at para 49.
[41] See for example Order F18-38, 2018 BCIPC 41 (CanLII) at para 37 and Order F17-23, 2017 BCIPC 24 (CanLII) at para 49.
[42] The draft media statement attachments are found on pages 1 and 6 of the severed records.
[43] Order F18-19, 2018 BCIPC 22 (CanLII) at para 36 – 44.

[64] The draft media statements are the very subject matter on which the Lawyer asserts the Media Rep sought, and he provided, legal advice. The Lawyer states that releasing the draft media statements "would reveal or allow third parties to draw accurate inferences about the nature and subject matter of the confidential legal advice that [he] provided."[44] Given the clear connection between the draft media statements and the legal advice at issue, I accept the Lawyer's evidence. In my view, knowing the content of the draft media statements could very well allow the applicant to make accurate inferences about the Lawyer's advice.

[65] I find that the draft media statements entail the seeking or providing of legal advice. I will address the applicant's waiver arguments at the conclusion of my consideration of the legal test for legal advice privilege.

Information about which the Lawyer Declined to Provide Evidence

[66] Finally, TRU withheld a small amount of information about which the Lawyer declined to provide evidence. The information is found in two severed email chains. The first chain is five pages in length, and the Lawyer gave no evidence about it.[45] The second chain is fifteen pages in length, and the Lawyer gave evidence about five pages of those pages. As I have already determined that the 5 pages are privileged, it is the other 10 pages that remain in issue.[46]

[67] I find that the Lawyer's refusal to give evidence is a significant factor to consider in assessing TRU's assertion of privilege over the remaining information. As the solicitor in the solicitor-client relationship at issue, the Lawyer is best positioned to provide evidence in support of TRU's assertion of privilege the information. In short, for all the reasons I found his evidence in support of TRU's assertion of privilege persuasive, I now find his selective refusal to give evidence about the remaining information an important contextual factor.

[68] Furthermore, TRU did not adequately explain the Lawyer's refusal to give evidence. Initially, in its submissions responding to my inquiry about the missing evidence, TRU explained that the Lawyer had elected not to provide evidence about the remaining information because "[g]iven the passage of time … [he] was … not able to attest to his subjective understanding of this communication[s] at the time."[47] Later, however TRU argued that no adverse inference should be drawn from the Lawyer's decision not to give evidence about the remaining

[44] Affidavit of Lawyer at para 6(a).
[45] Severed Records at pages 15-17.
[46] The Lawyer provided evidence about pages 21-25 of the Severed Record (see Affidavit of Lawyer para 6(e)). However, pages 21-25 are part of a larger email chain that spans pages 22-36 of the Severed Records. While the Lawyer attested that pages 21-25 contain references to legal advice sought and received from the Lawyer, he declined to provide evidence about the remaining pages of the record.
[47] Excerpt found in TRU's correspondence of May 1, 2023 at page 3.

information issue because, as head of TRU's legal department, he is not available to provide evidence in every case. While perhaps persuasive in different circumstances, the second argument does not accord with the first or with the fact that the Lawyer did provide evidence in this inquiry, just not about the remaining information.

[69] It is against this background that I must determine whether TRU's other evidence is sufficient to overcome the Lawyer's selective refusal to give evidence about the remaining information. In doing so, I will consider all other evidence, that is the evidence of the Privacy Assistant, Media Rep, and the Privacy Officer, and the context provided by the records.

[70] The Privacy Assistant made it clear that she did not have first-hand knowledge about many of the matters deposed to in her affidavit.[48] She addressed the records as a whole rather than describing each individual record or category of records. Her evidence was that all the s. 14 information was "legal and other advice."[49] Her evidence is a bald legal conclusion from a non-lawyer without firsthand knowledge, and I do not find it helpful in assessing TRU's assertion of privilege.

[71] The Media Rep deposed that she was the recipient of the legal advice at issue and was personally involved in the communications. Like the Privacy Assistant, however, the Media Rep addressed the records as a whole and her evidence was quite general. She described the s. 14 information as communications between herself and the Lawyer for the purpose of seeking, formulating or receiving legal advice,[50] and communications on which the Lawyer was not directly copied, that discuss or flow directly from the Lawyer's legal advice.[51] She did not, however, explain which information fell into which category. While somewhat general, the Media Rep's evidence is nonetheless a factor to consider.

[72] The Privacy Officer deposed that she is a lawyer and that in her role as TRU's Privacy Officer she is responsible for receiving and responding to FIPPA access requests. She stated that through this role she is familiar with the records at issue in the inquiry. The Privacy Officer's evidence addressed the information that the Lawyer's evidence did not.

[73] The Privacy Officer states that the information withheld from the five-page record relates to a legal proceeding and is an express observation about a legal issue. She notes that it was sent to a group that included the Lawyer, and that it

[48] Affidavit of Privacy Assistant at para 8.
[49] Affidavit of Privacy Assistant at para 14.
[50] Affidavit of Media Rep at para 9.
[51] Affidavit of Media Rep at para 10.

raised a matter on which the Lawyer was consistently advising TRU.[52] Addressing the information withheld from the 15-page record, she states that the first email identifies a proposed course of action and seeks feedback from various TRU representatives including the Lawyer, and that the remaining messages relate to or flow from the officer's request for input from the group.[53] She also reiterates the Lawyer's evidence that five pages of the email chain reference his legal advice.[54]

[74] The Privacy Officer is a practicing lawyer who reviewed the records and provided evidence that is clear, specific, and consistent with the evidence of the Media Rep. It is the kind of evidence that a lawyer with some knowledge of the circumstances could provide based on a review of the records. Furthermore, to reject the evidence of the Privacy Officer would be, in effect, to find that she breached her professional obligations. While in ordinary circumstances the Privacy Officer's evidence would be sufficient to support an assertion of solicitor-client privilege, it is difficult to understand how the Privacy Officer was able to provide this evidence when the Lawyer was not.

[75] The records relate to a narrow issue – instructions and guidance given to the Media Rep for responding to media inquiries about the applicant during July and August of 2020. TRU disclosed a considerable amount of information from the two email chains in which the remaining information is found. In both cases the disclosed information relates to the media attention on the applicant's suspension - the subject about which TRU asserts the Lawyer provided legal advice. In my view, these facts support TRU's argument that the remaining information falls within the continuum of communications that attracts legal advice privilege.

[76] In addition, I have already determined that part of the 15-page record is privileged. As the remaining information relates to the narrow legal issue on which the Lawyer advised TRU, it is difficult to have any certainty that revealing the remaining 10 pages would not risk revealing the privileged information. Furthermore, in light of the court's admonition again severance in this context, I find that this fact too supports a finding that s. 14 applies to the information in the 15-page record.

[77] Finally, the structure of the email chains is consistent with the evidence of the Privacy Officer, and with the second category of records described by the Media Rep in that they are communications amongst TRU representatives on which the Lawyer was copied.

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[52] Affidavit of Privacy Officer at paras. 15 and 16.
[53] Affidavit of Privacy Officer at para 14 a), c), d).
[54] Affidavit of Privacy Officer at para 14 b).

[78] Ultimately, I do not know why the Lawyer refused to give evidence about the remaining evidence. As TRU's various explanations for his refusal do not accord with one another or the facts, I do not accept them. Certainly, one reason a solicitor in the Lawyer's position might refuse to give evidence about select information is that he does not believe that the information is subject to solicitor-client privilege. Ultimately, I am left to balance otherwise good evidence in support of TRU's assertion of solicitor-client privilege against the uncertainty caused by the Lawyer's selective refusal to give evidence.

[79] In assessing TRU's assertion of privilege over the remaining information, I also considered whether these were appropriate circumstances for a production order. The Commissioner has the power under s. 44 of FIPPA, to order production of records over which solicitor-client privilege is claimed.[55] However, the Commissioner exercises this authority cautiously and with restraint given the clear direction by the courts that a reviewing body's decision to examine privileged documents must never be made lightly or as a matter of course.[56] Therefore, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, the Commissioner, like the courts, will only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.[57] I do not find that it is absolutely necessary here, and decline to order production.

[80] I recognize that this outcome may be unsatisfactory to the applicant. However, the Privacy Officer, a lawyer who reviewed the information, provided clear and specific evidence that, if accepted, establishes that the information is privileged. The Media Rep's evidence accords with that of the Privacy Officer. The context provided by the records corroborates their evidence and suggests that the remaining information falls within the continuum of communications. In my view, the evidence in support of TRU's assertion of privilege is sufficient to overcome the uncertainty created by the Lawyer's refusal to give evidence. Accordingly, I accept the Privacy Officer's evidence that the information in the five-page record relates to a legal proceeding and is an express observation about a legal issue. I find that revealing this information would allow accurate inferences about the legal advice itself. I also accept the Privacy Officer's evidence that the remaining information in the 15-page record identifies a proposed course of action and seeks feedback from various TRU representatives including the Lawyer and relates to or flows from the request for input. As this information is found in the same email chain and relates to the same general

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[55] Section 44(1)(b) of FIPPA states the Commissioner may order the production of a record, and s. 44(2.1) specifies that such a production order may apply to a record that is subject to solicitor-client privilege.
[56] Order F19-21, 2019 BCIPC 23 (CanLII) at para 46, citing *GWL Properties Ltd. v. WR Grace & Co. of Canada Ltd*., 1992 CanLII 182 (BCSC) at pp. 11-12.
[57] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) at para 68.

topic as information that I have already found is privileged, I find that it cannot be severed without risk of revealing the privileged information.

[81] Accordingly, with some reservation and an eye to the BC Supreme Court's comment in *Minister of Finance*[58] that "the task before an adjudicator is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege,"[59] I am satisfied that the remaining information establishes the second step of the test for legal advice privilege.

Intended by the Solicitor and Client to be Confidential

[82] The final step in the test for legal advice privilege requires that the communication was intended by the solicitor and client to be confidential.

[83] The Media Rep states that her communications with the Lawyer were confidential.[60] She also states that the email communications at issue were not shared with third parties, that to the extent they were shared within TRU it was on a confidential, need to know basis, and that to the best of her knowledge they remain confidential.[61] The Lawyer expressly states that some of the communications were confidential, but is silent with respect to others. Given his professional obligation to protect his client's right to confidentiality, I find that it is more probable than not that the Lawyer also intended his legal advice to be confidential. Finally, the only persons involved in the communications are representatives of TRU.

[84] Based on the above, I am satisfied that the communications were intended by both the Lawyer and the client to be confidential.

Waiver

[85] During the parties' supplemental submissions concerning the sufficiency of TRU's position under s. 14, the applicant argued that TRU had waived privilege over at least one of the draft media statements, and as a result, over all records. In making this assertion, the applicant posits that at least one of the draft media statements was used, and thus made public. As this argument arose at the end of a round of submissions, TRU did not have an opportunity to respond. However, I am satisfied that I can fairly determine this issue without the need for submissions from TRU.

[58] *Supra* note 31.
[59] *Ibid* at para 86.
[60] Affidavit of Media Rep at para 9.
[61] Affidavit of Media Rep at paras 9 and 13.

[86] Solicitor-client privilege belongs to, and can only be waived by, the client.[62] Once privilege is established, the party seeking to displace it has the onus of showing it has been waived.[63] 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.[64]

[87] A waiver of solicitor-client privilege may be express or it may be by implication where required by fairness and consistency. The following statement from *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd*. is most often cited for the common law 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…[65]

[88] In order to succeed, the applicant was required to provide "clear and unambiguous" evidence to establish that TRU waived privilege over the draft media statements. The applicant provided no evidence that TRU ever actually used either of the draft media statements referred to in the records. While it is clear from the records that the Media Rep sought feedback from other TRU representatives about at least two draft statements, nothing in the records establishes that TRU ever used either of the draft statements. In the absence of evidence from the applicant, I find that the applicant has not established that there was a waiver of privilege in this case.

Conclusion – s. 14

[89] In summary, I find that TRU is authorized to withhold all the information it withheld under s. 14.

Section 13 – Advice and Recommendations

[90] 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. The

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[62] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para 39; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para 39.
[63] *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.
[64] *Ibid* at para 40.
[65] *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd*. 1983 CanLII 407 (BC SC) at para 6 and *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at paras. 47-48.

purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.[66]

[91] The test under s. 13 of FIPPA is well-established. First, I must determine whether disclosing the information at issue would reveal advice or recommendations developed by or for a public body under s. 13(1). If it would, the next step is to decide whether the information falls into any of the categories in s. 13(2) or whether it has been in existence for more than 10 years under s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, it cannot be withheld under s. 13(1). In this case the disputed records do not go back 10 years so s. 13(3) is not in issue.

[92] TRU withheld several excerpts from two email chains between TRU representatives under s. 13(1). There was overlap between TRU's application of ss. 13 and 14. I will consider the application of s. 13 only to the information that I have not already found that TRU is authorized to withhold under s. 14.

Section 13(1) – Would disclosure reveal advice or recommendations

[93] "Recommendations" involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised."[67]

[94] The term "advice" has a broader meaning than the term "recommendations,"[68] and includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact;" [69] "expert opinion on matters of fact on which a public body must make a decision for future action;" [70] and "factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body."[71]

[95] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.[72]

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[66] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para 52.
[67] *John Doe v. Ontario (Finance),* 2014 SCC 36 at para 24 [*John Doe*].
[68] *John Doe*, *ibid* at para 23.
[69] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII) [*College*] at para 113; Order No. F21-15, 2021 BCIPC 19 (CanLII) at para 59.
[70] *College, ibid* at para 113.
[71] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para 94. See also *College, supra* note 78 at para 110.
[72] See for example *John Doe*, *Supra* note 76 at para 24; Order 02-38, 2002 CanLII 42472 (BCIPC), Order F10-15, 2010 BCIPC 24 (CanLII) and Order F21-15, 2021 BCIPC 19 (CanLII).

TRU's Submission – s. 13(1)

[96] TRU argues that s. 13(1) has consistently received a broad interpretation and application by decision-makers, and that even when information may not appear, on its face, to be overly sensitive, a public body may still exercise its discretion to withhold or redact records in order to protect its deliberative processes.

[97] It submits that s. 13(1) is not limited to protecting advice or recommendations related to "policy", but instead that the purpose of section 13 is to protect internal deliberative processes within a public body, in order to foster debate on matters affecting that public body. In this regard, it asserts that the protection extends to public relations matters and argues that a public relations specialist's role is advisory in nature and that the plans, strategies and communications they prepare are the central vehicle through which they provide advice and recommendations. In support of these propositions, TRU cites decisions in which the OIPC ruled that s. 13(1) applied to advice and recommendations about communications and media strategy.

Applicant's Submission – s. 13(1)

[98] The applicant's arguments flow from his description of the withheld information as communications about simple damage control, attempts to supress public criticism and respond to negative media attention, and strategies to target him personally.

[99] The applicant argues that the communications are not covered by s. 13(1) because damage control and efforts to suppress criticism are not "policy" and thus are not intended to be covered by s. 13(1). He also submits that the communications fall outside the purpose of s. 13(1) as s. 13(1) is not intended to allow a public body to withhold information related to personal attacks against an employee or strategies to suppress unfavourable news coverage. Finally, the applicant asserts that it is in the public interest to have this information disclosed in order to understand how the public body deploys its internal resources in response to public criticism.

Findings and Analysis – s. 13(1)

[100] Before turning to the information at issue, I will address an issue raised by the applicant concerning the scope of s. 13. Section 13(1) is not limited to advice and recommendations that concern government policy making. It applies to all advice and recommendations developed by or for a public body. In this regard, as TRU notes, past OIPC decisions have held that advice and recommendations related to communication strategies and media relations fall under s. 13(1).
I find that s. 13(1) applies to two pieces of information TRU withheld. The first is a suggestion about what to do about an existing strategy. It is clear from the

information TRU disclosed that the suggestion was made during a discussion about other proposed strategies, and it is clear from the context that the suggestion is intended to be accepted or rejected by the recipients. I find that the suggestion is a recommendation within the meaning of s. 13(1).[73]

[101] The second piece of information withheld under s. 13(1) is a statement that one TRU representative would accept a recommendation made by another. The statement references the recommendation. While the statement itself is not advice or recommendations, I find that it would allow accurate inferences about the recommendation. [74]

[102] However, I find that the balance of the information would not reveal advice or recommendations within the meaning of s. 13(1). TRU withheld a representative's views and reactions on events that had already taken place.[75] Information about a TRU representative's reaction to past events is not advice or recommendations. Moreover, having reviewed the information, I find that it does not reveal advice or recommendations. This finding accords with previous OIPC decisions.[76]

[103] TRU also withheld a request for advice. [77] A question or request for advice may lead to advice or recommendations, but the question or request itself is not advice. A request for advice is not protected under s. 13(1) unless it would allow an accurate inference about advice received.[78] In this case the request is too general in nature to reveal or allow accurate inferences about any advice or recommendations.

[104] TRU withheld words of encouragement from one TRU representative to another.[79] The words did not suggest or offer an opinion as to a course of action. Instead, they appear to be a compliment about the recipient's course of action to date. They are not advice or recommendations, and as the words of encouragement are general, they do not reveal advice or recommendations. While this information seems inconsequential, the applicant is nonetheless

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[73] TRU is authorized to withhold the information in the portion of the second paragraph of the last email on page 13 of the Severed Records that begins after the comma.
[74] TRU is authorized to withhold the information in first email message on page 8 of the records.
[75] TRU is not authorized to withhold the first sentence of the last email on page 13 of the records.
[76] Order F19-27, 2019 BCIPC 29 (CanLII) at para 33 and Order 01-15, 2001 CanLII 21569 (BC IPC) at para 27.
[77] TRU is not authorized to withhold the second sentence of the last email on page 13 of the records.
[78] For orders dealing with questions, see Order F14-19, 2014 BCIPC 22 at para 35; Order F12-01, 2012 BCIPC 1 at para 32, portions related to records 29, 37, 40, 66, 69, 127, and 225. For orders related to requests for advice, see Order F18-41 supra note 27 at paras. 16 and 20; and Order F17-39, 2017 BCIPC 43 at para 37. For similar reasoning, see Order F17-23, 2017 BCIPC 24 at para 19 and Order F19-27, 2019 BCIPC 29 (CanLII) at para 32.
[79] TRU is not authorized to withhold the first 11 words of the second paragraph of the last email on page 13 of the records.

entitled to it because the portion of the email that falls under s. 13(1) can reasonably be severed in accordance with s. 4(2).[80]

[105] Finally, TRU withheld one sentence in which a TRU representative states that they are aware of the need to address a particular issue in the future.[81] The statement is general in nature and provides no information about how the representative plans to address the issue. It is not itself advice or a recommendation. Due to its general nature, it neither reveals advice or recommendations, nor would it allow the applicant to draw accurate inferences about any advice or recommendations. In previous orders, the OIPC has held that s. 13(1) does not apply to this kind of information.[82]

Section 13(2)

[106] The second step in the s. 13 analysis is to consider whether any of the information that I found would reveal advice or recommendations falls within s. 13(2). Section 13(2) sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1). In light of my findings above, the only two pieces of information that remain at issue are limited to a suggestion that is intended to be accepted or rejected and a statement that a TRU representative will accept a recommendation.

[107] TRU argues that s. 13(2)(a) does not apply to the withheld information, while the applicant submits that ss. 13(2)(k)(m) and (n) may apply. The applicant also suggests that the applicability of other sections may be clear to me on the face of the withheld information. I will address each of the factors raised by the parties, and then consider the remaining sections of s. 13(2).

Section 13(2)(a) – Factual Material

[108] Section 13(2)(a) provides that the head of a public body must not refuse to disclose any factual material. The term "factual material" is not defined in FIPPA. However, in distinguishing it from "factual information" which may be withheld under s. 13(1), the courts have interpreted "factual material" to mean "source materials" or "background facts in isolation" that are not necessary to the advice

[80] Section 4(2) of FIPPA provides that if information that is excepted from disclosure can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. For a similar approach see Order F22-24, 2022 BCIPC 26 (CanLII) at para 18. See also Order F19-27, 2019 BCIPC 29 (CanLII) at para 32 in which an adjudicator ruled that words of encouragement could not be withheld under s. 13(1).
[81] TRU is not authorized to withhold the second sentence of the second email on page 16 of the records.
[82] See for example Order F21-23, 2021 BCIPC 28 (CanLII) at para 94.

provided.[83] Where facts are compiled and selected by an expert as an integral component of their advice, then it is not "factual material" under s. 13(2)(a).[84]

[109] TRU submits that s. 13(2)(a) does not apply as any factual information that has been redacted under section 13(1) is integrated with and forms part of the advice and recommendations.

[110] Having reviewed the information that remains in dispute, I find that it is not factual in nature at all, and therefore s. 13(2)(a) does not apply.

Section 13(2)(k) – Report of a Task Force or Similar

[111] Section 13(2)(k) provides that the head of a public body must not refuse to disclose 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.

[112] The applicant argues that those involved in the email communications about how to address the negative media attention on TRU should be considered an *ad hoc* committee or a task force for the purposes of s. 13(2)(k).

[113] Section 13(2)(k) contains a number of requirements, one of which is that the information at issue is a "report". Past OIPC orders have defined the term "report" under s. 13(2)(k) as "a formal statement or account of the results of the collation and consideration of information,"[85] and "an account given or opinion formally expressed after investigation or consideration."[86]

[114] The information at issue is found in email communications between TRU representatives about media strategy. The communications are an ongoing dialogue. They do not include a formal statement or account, and I can see no evidence of any larger review, investigation, collation or consideration of the matters at issue. Relying on the definitions set out above, I find that the information is not a "report" within the meaning of s. 13(2)(k). As the report requirement is not met, it is not necessary to consider whether the other requirements of s. 13(2)(k) are met. I find that s. 13(2)(k) does not apply.

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[83] *PHSA supra* note 80 at para 94.
[84] *PHSA supra* note 80 at para 94.
[85] Order F17-33, 2017 BCIPC 35 (CanLII) at para 17, Order F22-27, 2022 BCIPC 30 (CanLII) at para 31 and Order F17-33, 2017 BCIPC 35 (CanLII) at para 17.
[86] Order F17-39, 2017 BCIPC 43 (CanLII) at para 46 and Order F22-27, 2022 BCIPC 30 (CanLII) at para 31.

Section 13(2)(m) – Publicly Cited as Basis for Decision

[115] Section 13(2)(m) provides that a public body must not refuse to disclose information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy.

[116] The applicant argues that the withheld information relates to the reasons TRU gave the media for deciding to suspend him, and therefore falls under s. 13(2)(m). TRU argues that the applicant has mischaracterized the information and says that it instead relates to internal discussions for the purposes of seeking legal advice and deliberating on matters affecting TRU's public affairs.

[117] I have reviewed the two pieces of information that remain at issue. They do not refer to the applicant or his discipline, and instead relate to TRU's overall strategy regarding media attention on its dispute with the applicant. This information is not the kind of information that could be cited publicly as the basis for disciplining the applicant and in any event, there is no evidence before me to suggest that it was. I find that s. 13(2)(m) does not apply.

Section 13(2)(n) – Decision Affecting the Applicant's Rights

[118] Section 13(2)(n) states that a public body must not refuse to disclose 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.

[119] The applicant argues that TRU's decision to discipline him in 2020 relates to the negative media attention it received as a result of his public statements, and that accordingly the withheld information likely includes reasons for TRU's disciplinary action against him.

[120] In response TRU argues that the application of s. 13(2)(n) is limited to the actual record of a decision and does not include internal deliberations such as those contained in the records.

[121] To be captured by s. 13(2)(n) information must both relate to a decision including the reasons for the decision and affect the rights of the applicant. The information that remains at issue satisfies neither requirement. First, the information is found in internal, ongoing email communications. It is not a decision or the reasons for that decision. In this regard, I note that s. 13(2)(n) is limited to a decision and its reasons and does not include all records related to the decision.[87] Second, as discussed above in relation to s. 13(2)(m), the withheld information does not refer to the applicant or his discipline in any way.

[87] Order 218-1998, at para 32, Order F14-57, 2014 BCIPC 61 (CanLII) at para 21, and Order F08-05, 2008 CanLII 13323 (BCIPC), at paras 7 - 8.

For this reason, I find that it does not "affect the rights of the applicant". Accordingly, I find that s. 13(2)(n) does not apply.

Other s. 13(2) Subsections

[122] I have reviewed the withheld information at issue, and I find that no other subsections in 13(2) apply.

Conclusion – s. 13

[123] In summary, I find that apart from the suggestion[88] and statement that a TRU representative would accept a recommendation,[89] TRU is not authorized to withhold the information it withheld under s. 13(1).[90]

Section 22(1) – Unreasonable Invasion of Third-Party Personal Privacy

[124] Section 22 of FIPPA requires a public body to refuse to disclose personal information that would be an unreasonable invasion of a third party's personal privacy.

[125] There was overlap between TRU's application of ss. 22 and 14 to the records. I will consider the application of s. 22 only to the information that I have not already found that TRU is authorized to withhold under s. 14.

[126] TRU withheld one TRU representative's assessment of another TRU representative's skills (the Employee Assessment),[91] but disclosed the names of both representatives. It withheld a reporter's reason why he would not write a story (the Reporter's Reasons),[92] but disclosed the reporter's name. It also withheld information about the emotional state of an individual who is described in the withheld information by their role but not named (the Emotional State Information).[93]

Section 22(1) – Personal Information

[127] As s. 22(1) applies only to personal information, the first step in the s. 22 analysis is to determine whether the information in dispute is personal

[88] The portion of the second paragraph of the last email on page 13 of the records that begins after the comma.
[89] The first email on page 8 of the records.
[90] TRU is not authorized to withhold the first sentence of the information in the last email on page 13 of the records excepting the information described in note 88, above, and the second sentence of the second email on page 16 of the records.
[91] The withheld information is found on page 13 of the records.
[92] The withheld information is found on page 16 of the records.
[93] The withheld information is found on pages 32-33 of the records.

information. TRU has the initial burden to prove that the information at issue qualifies as personal information about a third party.[94]

[128] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[95] Information is about an "identifiable individual" when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information. The term "contact information" is defined under FIPPA 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." Finally, under FIPPA a third party is "any person, group of persons or organization other than: (a) the person who made the request, or (b) a public body".[96]

[129] TRU did not make submissions regarding s. 22, instead taking the position that the basis for the information's status as third party personal information is clear on the face of the records. The applicant argues that as the email chains relate to him, he is the only person whose personal information could be at issue.

[130] For the reasons set out below, I find that all the information withheld under s. 22(1) is "personal information" within the meaning of s. 22(1) of FIPPA.

[131] The Employee Assessment and Reporter's Reasons consist of recorded information about persons who are not party to the inquiry. It is not contact information. As it appears with their names, it is about identifiable individuals.

[132] Similarly, the Emotional State information is recorded information about an individual who is not a party to the inquiry and it is not contact information. While the individual is not identified by name, in my view, given the applicant's familiarity with the workplace and the issues giving rise to his discipline, it is more probable than not that he will be able to identify the individual from their title and the context of the email.

[133] As TRU has satisfied the burden of establishing that the withheld information is personal information about identifiable individuals, the burden now shifts to the applicant to establish that disclosure of the personal information would not be an unreasonable invasion of the third parties' privacy.

Section 22(4) – Disclosure Not an Unreasonable Invasion of Privacy

[134] The next step in the s. 22 analysis is to consider whether any of the factors in s. 22(4) apply to the withheld information. Section 22(4) sets out

[94] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.
[95] Schedule 1 of FIPPA.
[96] Schedule 1 of FIPPA.

circumstances when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. Neither party made submissions about s. 22(4) and I find that s. 22(4) does not apply.

Section 22(3) – Presumptions that Disclosure is an Unreasonable Invasion of Privacy

[135] The third step is to determine whether any of the presumptions against disclosure in s. 22(3) apply. Section 22(3) sets out the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. Neither party made submissions about s. 22(3). Having considered the relevant factors, I find that s. 22(3) does not apply.

Subsection 22(2) – Other Factors

[136] The fourth step in the analysis is to consider, given all the relevant circumstances, including those in s. 22(2), whether disclosure of the disputed personal information would be an unreasonable invasion of third-party personal privacy. The applicant states that ss. 22(2)(a) and (c) may be relevant to the information in dispute. I have considered all remaining factors in s. 22(2) and find that no other enumerated s. 22(2) factors are relevant to the information withheld under s. 22(1). However, as discussed below, I find that the sensitivity of the information at issue is relevant to the Emotional State information.

Section 22(2)(a) – Scrutiny of a Public Body

[137] Section 22(2)(a) requires the public body to consider whether "the disclosure is desirable for the purpose of subjecting the activities of … a public body to public scrutiny."

[138] What lies behind s. 22(2)(a) is the concept that where disclosure of records would foster accountability of a public body, this may support a finding that the release of third-party personal information would not constitute an unreasonable invasion of personal privacy.[97]

[139] In this case, the withheld information is limited. It reveals nothing about TRU's activities. The redactions do not alter the meaning of any of the three email chains in a way that impacts the public's ability to scrutinize TRU's actions, or to understand its approach to dealing with media attention on the applicant. Accordingly, I am not persuaded that disclosing the personal information is desirable for purpose of subjecting TRU to public scrutiny.

[97] See for example F05-18, 2005 CanLII 24734 (BC IPC) at para 49.

Section 22(2)(c) – Fair Determination of the Applicant's Rights

[140] Section 22(2)(c) requires the public body to consider whether the personal information is relevant to a fair determination of the applicant's rights.

[141] In Order 01-07,[98] Former Commissioner Loukidelis set out the now well-established, four-part test to determine whether s. 22(2)(c) applies:

> 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.

[142] In support of his position the applicant relies on the two grievances filed by the Union on his behalf as well as several records related to the discipline that is the subject of the grievances. Having reviewed the grievances, I accept that applicant's income and future job security are at issue in these grievances, and that they engage the applicant's legal rights. For these reasons, I find that part one of the test is satisfied.

[143] Part two of the test requires that the right be related to (1) "a proceeding" that is (2) "underway or contemplated." A grievance is often the first step in challenging discipline in a unionized workplace. While many grievances are resolved without resort to arbitration, many others proceed to arbitration. Both the applicant and TRU state that the grievances remain outstanding.[99] The fact that the grievances remain outstanding is sufficient to convince me that labour arbitration is "underway or contemplated."[100]

[144] In addition, I have no difficulty finding that a labour arbitration is "a proceeding". Much like a court proceeding, a labour arbitration involves two

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[98] Order 01-07, 2001 CanLII 21561 (BC IPC) at para 31.
[99] Applicant's initial submission at page 5 and see Affidavit of Privacy Officer at para 6(c).
[100] The question of whether the grievance and arbitration procedures are part of a single proceeding, or two separate steps depends on the language of the collective agreement at issue. This language is not before me, and in any event, a determination of this question is not necessary. On the facts before me I find that a proceeding is either underway (if the two are a single proceeding) or contemplated (if they are two separate steps).

parties who are adverse in interest in contested proceedings.[101] Furthermore, in past decisions the OIPC has accepted that a labour arbitration is a "proceeding" for the purposes of the test set out above.[102] Accordingly, I find that part two of the test is satisfied.

[145] Part three of the test requires that the information "have some bearing on, or significance for, determination of the right in question." In other words, the applicant must prove there is a "demonstrable nexus" or connection between the withheld information and the legal right.[103]

[146] Neither the Employee Assessment nor the Reporter's Reasons are in any way related to the subject matter of either grievance. There is no evidence before me that would suggest that this information could have any bearing on or significance to the determination of the legal right in question, and the applicant has not explained how it could. I find that part three of the test is not satisfied with respect to this information.

[147] As for the Emotional State Information, in her affidavit the Privacy Officer states that both TRU's harassment investigations and resulting disciplinary responses relate to the applicant's alleged harassment of his coworkers by making public statements."[104] It is this discipline that is the subject of the grievances.

[148] Based on its subject and the timing of the applicant's discipline in relation to the communications about the Emotional State Information, I find that it is more probable than not that the employee's emotional state relates to the applicant's public statements, and thus TRU's decision to discipline the applicant. As TRU is required to prove that it had just cause to discipline the applicant in order to succeed at arbitration, in my view the Emotional State Information has some significance to the determination of the grievance. I find that part three of the test is satisfied with respect to the Emotional State Information.

[149] To satisfy the fourth step of the test, the applicant must establish that the personal information is necessary to prepare for or ensure a fair hearing.

[150] Previous OIPC orders have taken two approaches when deciding if information is necessary for a potential lawsuit under s. 22(2)(c). One approach

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[101] It is well-established that labour arbitration is "litigation" for the purposes of s. 14 of FIPPA and the mirror s. 23 of *Personal Information Protection Act* (PIPA). See for example Order P06-02, [2006] B.C.I.P.C.D. No. 28, Order P10-02, [2010] B.C.I.P.C.D. No. 10. In my view the reasoning in these cases is duly applicable to the question of whether a labour arbitration is a "proceeding" for the purposes of the test set out above.
[102] Order F15-11, 2015 BCIPC 11 (CanLII), at para 27.
[103] See for example Order F16-36, 2016 BCIPC 40 (CanLII) at paras. 52 and 62 and Order F16-36, 2016 BCIPC 40 (CanLII).
[104] Affidavit of Privacy Officer at para 6. See in particular para 6(a).

is to find that this fourth part of the test will not be satisfied when the applicant is able to obtain the information by another means such as court proceedings or litigation disclosure processes.[105]

[151] In Order F16-36 Adjudicator Alexander rejected this restrictive approach because it would be inconsistent with the modern approach to statutory interpretation:

> In my view, the approach of reading in a requirement that part four of the test is only met in situations where the FOI process is an applicant's sole way to receive the information is inconsistent with s. 22(2)(c), as interpreted using modern statutory interpretation principles. Section 22(2)(c) is about whether the *personal information* itself is necessary in order to prepare for the proceeding or to ensure a fair hearing. It is not about whether *disclosure* of the personal information through FOI is necessary for that purpose.[106]

[152] Adjudicator Alexander elaborated that "summarily dismissing s. 22(2)(c) because the applicant may be able to receive the information by another means may result in prejudice to the applicant in relation to his or her legal rights."[107] By way of one example, he noted that summarily rejecting s. 22(2)(c) because an applicant can likely get the information by another means [could] in some cases circumscribe the applicant's access rights by increasing barriers on the applicant to obtaining the information or resulting in the applicant not receiving some or all of the information through the disclosure processes in the relevant proceeding.[108]

[153] Adjudicator Alexander's approach has been cited with approval in subsequent OIPC orders.[109]

[154] I accept and adopt the reasoning and approach set out in Order F16-36 at the cases following it. Accordingly, I find that the focus under part four of the s. 22(2)(c) test should be whether the personal information itself is necessary in order to prepare for the proceeding or ensure a fair hearing, not whether the applicant can obtain the information through an arbitration.

[155] The Emotional State Information is the kind of information that could give the applicant and his Union some (albeit limited) insight into the kind of evidence to expect TRU to lead at arbitration. An important aspect of fairness at a hearing

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[105] See for example Order F21-19, 2021 BCIPC 24 (CanLII) at para 33 and Order F15-50, 2015 BCIPC 53 (CanLII) at para 28.
[106] Order F16-36, 2016 BCIPC 40 (CanLII) at para. 56, citations omitted and emphasis in original.
[107] *Ibid* at para. 59.
[108] Order F16-36, 2016 BCIPC 40 (CanLII) at para 59, citations omitted.
[109] See for example Order F16-46, 2016 BCIPC 51 (CanLII) at para 47 and Order F23-13, 2023 BCIPC 15 (CanLII) at paras. 151-154.

requires that no party is surprised by the evidence the other intends to lead and accordingly, I find that it is necessary to ensure a fair hearing.

[156] In terms of weighing the importance of this factor, I note that the grievances concern the suspension and termination of the applicant's employment. The right not to be dismissed without just cause is a core right for unionized employees. In my view, the importance of the interest at stake for the applicant increases the significance of this factor in the overall weighing exercise.

[157] As a public body is required to satisfy all four parts of the test in order to engage s. 22(2)(c), I find that s. 22(2)(c) weighs in favour of disclosing the Emotional State Information, but not the Employee Assessment or the Reporter's Reasons.

Sensitivity

[158] Sensitivity is not an enumerated factor under s. 22(2); however, many past orders have considered it a relevant circumstance. Where information is sensitive, this circumstance weighs in favour of withholding the information. Conversely, where information is not sensitive, past orders have found that this circumstance weighs in favour of disclosure.[110]

[159] The Emotional State Information relates to a third party's emotional response to workplace conflict. Emotional responses can be information that individuals wish to keep private. On the other hand, the fact that the information relates to a harassment investigation and potential grievance arbitration likely means that the information – at least in substance – is already known to many in the workplace.

[160] I find that the Emotional State information is sensitive personal information, but that its sensitivity is limited. In any event, this factor weighs against disclosure.

Conclusion

[161] The information in dispute is personal information within the meaning of s. 22(1). There are no circumstances present where disclosure would not be an unreasonable invasion of a third party's privacy under s. 22(4), and equally there are no circumstances present where disclosure is presumed to be an unreasonable invasion of a third party's privacy under s. 22(3). Turning to s. 22(2), in my view, the applicable s. 22(2) factors weigh in favour of withholding the Employee Assessment and Reporter's Reasons information, but not the

[110] See Order F21-69, 2021 BCIPC 80 (CanLII) at para 82. See also Order F19-15, 2019 BCIPC 17 at para 99 and Order F16-52, 2016 BCIPC 58 at para 91.

Emotional State Information.

[162] The Employee Assessment provides insight into one employee's assessment of another employee's performance while the Reporter's Reasons concerns a reporter's personal reasons for not writing a story. Withholding this information does not impact the applicant's ability to scrutinize the TRU's activities. The onus is on the party seeking disclosure, and I am not persuaded that its disclosure would not result in an unreasonable invasion of a third party's personal privacy.

[163] As for the Emotional State Information, s. 22(2)(c) weighs in favour of disclosure. While the information is somewhat sensitive, in my view its sensitivity is insufficient to outweigh the applicant's right to access information that is relevant to a fair determination of his legal rights concerning the termination of his employment. Accordingly, I find that disclosing the Emotional State Information would not result in an unreasonable invasion of a third party's personal privacy.

[164] For the reasons set out above, I find that TRU is required to refuse to disclose the Employee Assessment and Reporter's Reasons information, [111] but not the Emotional State Information under s. 22.[112]

CONCLUSION

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

1. I confirm TRU's decision to refuse the applicant access to the information withheld under s. 14.
2. I confirm, in part, the Ministry's decision that it is authorized to refuse the applicant access to the information withheld under s. 13(1) subject to item 4 below.
3. I confirm, in part, TRU's decision that it is required to refuse to disclose the information in dispute under s. 22(1), subject to item 4 below.
4. TRU is not authorized or required to refuse to disclose the information it withheld under ss. 13(1) and 22(1) that I have highlighted in a copy of the records provided to TRU with this order. TRU is required to give the applicant access to the highlighted information.
5. TRU must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 4 above.

[111] The information TRU is required to withhold under s. 22(1) is found at pages 13 and 16 of the records.
[112] The information TRU is not authorized to withhold under s. 22(1) is found at pages 31 and 21 of the records.

[166] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by September 28, 2023.

August 16, 2023

ORIGINAL SIGNED BY

Allison J. Shamas, Adjudicator

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