OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-100

MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT

D. Hans Hwang
Adjudicator

November 23, 2023

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Summary: An applicant requested records relating to conditional water licences from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry). The Ministry provided the applicant with partial access to the responsive records but withheld some information in the records relying on several different exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator determined the Ministry properly applied s. 14 (solicitor-client privilege) to withhold the information at issue. The adjudicator determined the Ministry was authorized to withhold some, but not all, of the information at issue under ss. 15(1)(l) (security of a communications system) and 18(a) (harm to the conservation of heritage sites). The adjudicator also determined the Ministry was required to withhold most, but not all, of the information at issue under s. 22 (harm to personal privacy). Lastly, the adjudicator found that s. 3(5)(a) applies to some of the records at issue, thus they fall outside the scope of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 3(5)(a), 14, 15(1)(l), 18(a) and 22, Schedule 1 (Definitions); *Freedom of Information and Protection of Privacy Regulation, BC Reg 155/2012.*

INTRODUCTION

[1] A company (applicant) requested records relating to conditional water licences from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The Ministry provided partial access to the responsive records by withholding some information in the records under ss. 14 (solicitor-client privilege), 15(1)(l) (security of a communications system), 18(a) (harm to the conservation of heritage sites) and 22 (harm to personal privacy) of FIPPA. Also,

the Ministry said that some of the records at issue fall outside the scope of FIPPA under s. 3(5)(a).

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. Mediation by the OIPC did not resolve the issue and the matter proceeded to an inquiry.

Preliminary Issues

[4] In its response submission, the applicant raises the following new issues that were not set out in the OIPC investigator's fact report or the notice of inquiry.

Duty to assist, s. 6(1)

[5] The applicant submits "the Ministry's bad faith disclosure of records does not fulfill [its] obligation [to disclose under FIPPA]."[1] The applicant seems to be suggesting that the Ministry failed to comply with its duty to assist under s. 6(1) of FIPPA. Section 6(1) imposes a duty on a public body to conduct an adequate search for records.[2]

[6] The OIPC investigator's fact report in this case does not mention the applicant's complaint about the adequacy of the Ministry's search for records. Sections 6(1) is not listed in the investigator's fact report or notice of inquiry. Past OIPC orders have said that parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so.[3] The notice of inquiry, which was provided to both parties at the start of this inquiry, also states that parties may not add new issues into the inquiry without the OIPC's prior consent.[4]

[7] In this case, the applicant did not request prior permission from the OIPC to add s. 6(1) as an issue or explain what circumstances would justify adding it at this late stage. In addition, nothing before me suggests that it would be fair to add s. 6(1) as new issue or that there is any exceptional circumstance that warrants adding s. 6(1). Accordingly, I decline to add s. 6(1) as an issue in this inquiry.

Public Interest, s. 25

[8] The applicant also says disclosure of the disputed information is in the public's interest under s. 25(1)(b).[5] Section 25 imposes a duty on a public body to disclose information when it is in the public interest to do so. Neither the fact report nor the notice of inquiry said s. 25 is at issue in this inquiry. The applicant

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[1] Applicant's response submission at Part 2, para 4.
[2] Order 02-18, 2002 CanLII 42443 (BCIPC) at para 7.
[3] Order F16-34, 2016 BCIPC 38 at para 9.
[4] Revised notice of written inquiry dated March 10, 2023.
[5] Applicant's response submission at Part 4, paras 5-6.

did not request permission to add s. 25 or point to any exceptional circumstances that would justify doing so at this stage. Therefore, I will not consider s. 25.[6]

Offence to wilfully evade access provisions, s. 65.3

[9] The applicant also says that the Ministry committed an offence under s. 65. 3 of FIPPA by willfully concealing certain records responsive to its request.[7] Section 65.3 states it is an offence to willfully conceal, destroy or alter any record to avoid complying with a request for access to the record. In response, the Ministry says that the records the applicant says the Ministry is concealing are not responsive to its access request because they are outside the date range of the access request,[8] and the Ministry has no duty to produce records that the applicant did not request. Therefore, the Ministry says it never committed any wrongdoing, acted in bad faith or breached any obligation under FIPPA.[9]

[10] If the Commissioner believes that an offence has been committed under s.65.3, he may refer the matter to the Attorney General. The Attorney General is responsible for prosecuting offences under s. 65.3, and the courts are responsible for deciding those matters.[10] Since I have no authority to decide matters under s. 65.3, I will not add it to this inquiry. I also do not think it is appropriate to refer the matter to the Attorney General because the records the applicant asserts the Ministry willfully concealed are outside the date range of its access request.[11] The Ministry does not have a duty to produce records that the applicant did not request. Therefore, I find no circumstance to suggest s. 65.3 is engaged.[12]

ISSUES

[11] The issues I must decide in this inquiry are as follows:

1. Is the Ministry authorized to withhold the information in dispute because it falls outside the scope of FIPPA pursuant to s. 3(5)(a)?

2. Is the Ministry authorized to withhold the information in dispute under ss. 14, 15(1)(l) and 18(a)?

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[6] For similar reasoning, see Order F15-15, 2015 BCIPC 16 at para. 10; Decision F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.
[7] Applicant's response submission at Part 3, para 2 and Part 4, paras 10 and 12.
[8] The date range for the applicant's access request is January 1, 1996 to October 14, 2020.
[9] Ministry's reply submission at para 9.
[10] Order F21-04, 2021 BCIPC 4 (CanLII) at para 7.
[11] The date range for the applicant's access request was January 1, 1996 to October 14, 2020. The records the applicant says are being concealed pre-date January 1, 1996.
[12] Should the applicant continue to pursue this matter, he can do so through the OIPC complaint process, which is a different procedure than this inquiry.

3. Is the Ministry required to withhold the information in dispute under s. 22?

[12] Section 57 of FIPPA establishes the burden of proof in an inquiry. Although s. 57 is silent about which party bears the burden for inquiries involving s. 3, previous orders have established that the public body bears the burden of proving that the records are excluded from the scope of FIPPA under s. 3.[13] I adopt that approach here.

[13] Under s. 57(1) of FIPPA, the Ministry, which is a public body in this case,[14] has the burden of proving that the applicant has no right of access to the information it withheld under ss. 14, 15(1)(l) and 18(a).

[14] Meanwhile, s. 57(2) places the burden of the applicant to prove disclosing the information at issue under s. 22 would not unreasonably invade a third party's personal privacy. However, the public body has the initial burden of proving the information at issue is personal information.[15]

DISCUSSION

Background

[15] The Ministry is responsible for the stewardship of provincial Crown land and ensures the sustainable management of forest, wildlife, water and other land-based resources.

[16] In 1967, the then Minister of Transportation constructed a dam on Cherry Creek (Dam) located near Kamloops. In 1968, the engineer with the Kamloops Water District deemed the dam to be a hazard and directed that it was to remain fully open and no water to be stored.[16]

[17] In 1996 and 2002, conditional water licences (CWLs) were issued in relation to the Dam. In 2002, the applicant became the licensee as it purchased the property appurtenant to the CWLs.

[18] In 2017, Ministry staff inspected Cherry Creek and found that sediment had built up and clogged the Dam causing water to rush over its top. In 2019, the Ministry ordered the applicant to perform immediate maintenance of the Dam.

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[13] See, for example, Order F16-15, 2016 BCIPC 17 (CanLII); Order F17-30, 2017 BCIPC 32; Order F23-70, 2023 BCIPC 83.
[14] Schedule 1 "Definition" of FIPPA.
[15] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras 9-11.
[16] The applicant says it did not have any knowledge of the Dam's history when it acquired the conditional water licenses.

[19] The applicant requested all records pertaining to three specific CWLs for the time frame between January 1, 1996 to October 14, 2020.

Records and information at issue

[20] The responsive records consist of documents that total 384 pages, with approximately 60 pages containing the information in dispute. The information in dispute is in emails, site reports, maps, and title search prints.[17]

A record available for purchase, s. 3(5)(a)

[21] Section 3(5)(a) states that FIPPA does not apply to a record that is available for purchase by the public.

[22] The Ministry says that, under s. 3(5)(a), FIPPA does not apply to some of the records at issue which are land title system search results.[18] The Ministry says these records about the registrable interests on title are available online for anyone to lookup for a fee.[19] The Ministry's evidence demonstrates the Land Title and Survey Authority of BC (LTSA) website provides instructions on how to search titles (an individual must register to use the LTSA account, enter a nine-digit parcel identifier (PID) number, and must pay a fee).[20]

[23] The applicant did not say anything about the Ministry's submissions and evidence regarding s. 3(5)(a).

[24] Based on my review of the records and the Ministry's submission and evidence, I find the records at issue under s. 3(5)(a) are land title system search results. I accept the ministry's affidavit evidence which satisfactorily demonstrates that the public can purchase these records for a fee and the applicant can request them directly from the LTSA website.

[25] Therefore, I am satisfied that the land title system search results fall outside the scope of FIPPA and the applicant has no right to access those records under FIPPA. I will not consider these records any further.

Solicitor-client privilege, s. 14

[26] Section 14 permits a public body to refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice

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[17] The Ministry provided the responsive documents in two packages and numbered the pages sequentially across both packages and provided the table of records (Ministry's initial submission, Tab 6). I adopt this approach of numbering for ease of reference.
[18] Pages 17-19, 53-55, 58-60, 65, 90-91, 101, 126-127, 135 and 160-161 of the record in dispute part 1.
[19] Ministry's initial submission at para 23.
[20] Affidavit #1 of SM (Paralegal), Exhibit A.

privilege and litigation privilege.[21] The Ministry is relying on legal advice privilege to withhold the records in dispute.[22]

[27] In order for legal advice privilege to apply, there must be:

1. a communication between solicitor and client (or their agent);
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.[23]

[28] Courts have found that solicitor-client privilege extends beyond the actual requesting or giving of legal advice to the "continuum of communications" between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.[24]

[29] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that discuss legal advice and its implications.[25]

Evidentiary basis for solicitor-client privilege

[30] The Ministry is applying s. 14 to a paragraph in an email between two Ministry employees: a senior regional dam safety officer and an assistant water manager for the Thompson Rivers District (Assistant Water Manager).[26] The Ministry did not provide me with access to the information it withheld under s. 14.

[31] To support its claim of privilege over the withheld information, the Ministry provided affidavit evidence from a lawyer with the Ministry of Attorney General, Legal Service Branch (LSB Lawyer).[27]

[32] Section 44(1)(b) gives me, as the Commissioner's delegate, the power to order production of records to review them during the inquiry. However, given the importance of solicitor-client privilege, and in order to minimally infringe on that privilege, I would only order production of records being withheld under s. 14 when it is absolutely necessary to decide the issues in dispute.[28]

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[21] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 26.
[22] Ministry's initial submission at paras 32 and 37.
[23] *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at p 837.
[24] *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 [*Camp Developments*] at paras. 40-46.
[25] See for example Order F22-34, 2022 BCIPC 38 at para 41, Order F22-53, 2022 BCIPC 60 at para 13, and Order F23-07, 2023 BCIPC 8 at para 25.
[26] Page 164 of the records in dispute Part 2.
[27] Affidavit #1 of LSB Lawyer sworn March 9, 2023.
[28] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood*

[33] For the reasons that follow, after reviewing the Ministry's submissions and evidence, I determined that I have enough information to decide whether s. 14 applies to the information in dispute. I am satisfied that the LSB Lawyer has direct knowledge of the records in question. Her evidence is that information in the email reveals legal advice that she provided to the Ministry. She also gives evidence about the nature of the communication and the name and title of the individual involved in the communication. Therefore, I am satisfied I have sufficient detail to make an informed decision and it is not necessary to order production of the records.[29]

Parties' submissions

[34] The Ministry says the information it withheld under s. 14 is part of the internal communications that discuss the legal advice provided by the LSB Lawyer to the Ministry.

[35] In her affidavit, the LSB Lawyer says that she was acting as a solicitor with the Province and was responsible for advising on the administration of the provincial water allocation scheme.[30] She deposes that one of her main clients was and remains the Ministry and she advised Ministry staff on questions relating to the exercise of statutory powers and authorities and that she and the Assistant Water Manager discussed unauthorized structures, and possible regulatory powers and penalties.[31] She also says she advised on what orders can be made and what penalties can be imposed on the Dam pursuant to the *Water Sustainability Act*.[32]

[36] The applicant did not say anything about the Ministry's submissions and evidence regarding the information withheld under s. 14.

Analysis and findings

[37] I am satisfied that legal advice privilege applies to the information in dispute for the reasons that follow.

[38] Based on the LSB Lawyer's affidavit evidence, I accept that the withheld information reveals communications that the LSB Lawyer had with the Assistant Water Manager about the enforcement of the regulatory power respecting the

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Tribe Department of Health, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.

[29] For similar reasoning, see *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 78; Order F22-23, 2022 BCIPC 25 (CanLII) at paras 17-19.

[30] Affidavit #1 of LSB Lawyer sworn March 9, 2023 at para 7.

[31] Affidavit #1 of LSB Lawyer sworn March 9, 2023 at paras 8 and 9.

[32] Affidavit #1 of LSB Lawyer sworn March 9, 2023 at para 12.

Dam.[33] The affidavit evidence sufficiently demonstrates that these communications were made for the purpose of seeking, formulating and providing legal advice about the Ministry exercising statutory powers and authorities over the Dam. The affidavit evidence also satisfies me that the communications were intended to be confidential and have been treated as such.

[39] I conclude that the information at issue under s. 14 reveals confidential communications between solicitor and client for the purposes of seeking or giving legal advice. Therefore, I find the legal advice privilege applies to the information at issue and it may be withheld under s. 14.[34]

Harm to the security of a communications system, s. 15(1)(l)

[40] The Ministry is withholding some information in the records under s. 15(1)(l), which allows a public body to refuse to disclose information if the disclosure could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[41] The words "could reasonably be expected to" mean that the public body must establish a reasonable expectation of probable harm. This language tries to mark out a middle ground between that which is probable and that which is merely possible. To establish that there is a reasonable expectation of probable harm, the public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground. [35] There must be a direct link between the disclosure and the apprehended harm.[36]

Parties' submission

[42] The Ministry says the information it withheld under s. 15(1)(l) consists of a conference call ID number and pass code for a work-related conference call platform.[37] The Ministry provides affidavit evidence from its chief information security officer (CISO). The CISO says that an individual accessing a conference call would have access to sensitive and confidential third-party personal information disclosed during the call and that the access code is the only thing that prevents an unauthorized individual from gaining access to the conference call.[38]

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[33] Page 164 of the records in dispute Part 2.
[34] For added clarity, the information is located at page 164 of the records in dispute Part 2.
[35] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para 54.
[36] *Merck Frosst Canada Ltd v Canada Health*, 2012 SCC 3 at para. 219. See also Order F17-15, 2007 CanLII 35476 (BCIPC) at para. 17.
[37] Ministry's initial submission at paras 39 and 41. The information is located at Part 2, pages 63 and 76 of the records in dispute.
[38] Affidavit #1 of the chief information security officer at paras 16-21.

[43] The Ministry also withheld information in email headings (email header information) under s. 15(1)(l). It explains that this information is automatically generated by the program when the user moves an email from one folder to another.[39] The Ministry's affidavit evidence says the email header information reveals internal directory usernames (commonly know as IDIR names) that allows the user access to use the government computer systems. The affidavit evidence also says that the email header information reveals "privileges associated with their profile".[40] The Ministry says that disclosure of the IDIR username make the user and government more vulnerable to security incidents.[41]

[44] The applicant says that the Ministry cannot withhold the information at issue under s. 15 as "the investigation against the applicants is no longer ongoing".[42] However, the applicant did not say anything about the Ministry's submissions and evidence regarding s. 15(1)(l).

Analysis and findings on s. 15(1)(l)

[45] I accept that the teleconferencing system qualifies as a communications system within the meaning of s. 15(1)(l) and disclosing the conference call ID number and conference call pass code could reasonably be expected to harm the security of that communication system. Previous OIPC orders have consistently found that disclosing a teleconference phone number and/or access code could reasonably be expected to harm the security of the teleconferencing system due to the risk of unauthorized access.[43] I take the same approach in this case. I am satisfied that the conference call information,[44] if disclosed, would allow an unauthorized individual to call the conference call number, enter the pass code to access future calls and gain access to confidential government teleconference calls. I find the Ministry is authorized under s. 15(1)(l) to withhold the conference call ID number and access code.

[46] However, I am not satisfied that disclosure of the email header information could reasonably be expected to threaten the security of the government computer system. The Ministry's affidavit evidence states that hackers could use an IDIR username to increase their chances of successfully attacking the

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[39] Ministry's initial submission at para 43.
[40] Affidavit #1 of the chief information security officer at para 25.
[41] Ministry's initial submission at paras 43 and 44. The information is located at Part 2, pages 1, 7, 15, 31, 33, 42, 43, 46, 50, 51, 52, 59, 63, 64, 76, 77, 78, 79, 82, 83, 84, 88, 92, 102, 109, 110, 117, 128, 134, 140, 147, 154, 161, 162, 163 of the records in dispute.
[42] Applicant's response submission at para 3, Part 4.
[43] Order F15-32, 2015 BCIPC 35 at para. 12; Order F17-23, 2017 BCIPC 24 at para. 73; Order F20-08, 2020 BCIPC 9 at para. 72; Order F20-20, 2020 BCIPC 23, at para. 82.
[44] For added clarity, this information is located at Part 2, pages 63 and 76 of the records in dispute.

government computer system and they could use it for the purpose of initiating social engineering attacks.[45]

[47] In my view, it is reasonable to assume there are security measures or protocols in place to detect or prevent unauthorized access to the government computer system. The Ministry's submission that the information is sensitive in nature[46] strongly suggests that the government's security system would be set up to prevent unauthorized access.[47] However, the Ministry does not discuss what security measures are in place to defend against any attempts at unauthorized access to the government's computer system or the likelihood those measures would be inadequate to address its security concerns.

[48] Given the sensitivity of the information at issue stored in government database, it is not credible to believe that the Province's computer system is so defenceless that it would allow hackers to endlessly guess at login credentials or there would be no countermeasures to phishing attacks. Past OIPC orders stated the government is aware of those security risks and threats and it has security measures and protocols in place to address potential hacker attacks such as password complexity requirements, regularly scheduled password changes and temporary account lockouts after a set number of unsuccessful login attempts.[48]

[49] The Ministry stated the risk of unauthorized access would increase if the IDIR username is disclosed. However, the Ministry did not sufficiently demonstrate a direct connection between the disclosure of the information at issue and the alleged threat. The Ministry's affidavit evidence is about the general tactics of hackers and possible harm to government computer systems. In my view, general description regarding hackers' *modus operandi* is not sufficient to establish a direct connection between disclosure of the information at issue and the alleged threat.[49] There must be something more that ties a special risk to a particular context so as to meet the "reasonable expectation" test.[50]

[50] In addition, while the Ministry says it withheld the email header information because it identifies "privileges associated with their profile", the Ministry did not sufficiently explain what it means by "privileges" nor how disclosing those "privileges" might harm the government computer system.

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[45] Affidavit #1 of the chief information security officer at paras 34 and 40.
[46] Ministry's initial submission at para 44.
[47] For a similar conclusion, see Order F10-39, 2010 CanLII 77325 (BC IPC) at para 15, upheld on judicial review at *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 (CanLII); Order F21-35, 2021 BCIPC 43.
[48] Order F15-72, 2015 BCIPC 78 at para 19; Order F10-39, 2010 CanLII 77325 (BC IPC) at paras 15 and 17.
[49] For similar reasoning, Order F10-25, 2010 BCIPC 36 (CanLII) at para 18; Order F21-35, 2021 BCIPC 43 (CanLII) at para 93.
[50] Order F10-25, 2010 BCIPC 36 (CanLII) at para 20.

[51] I find the Ministry has not provided sufficient explanation or evidence to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative or that there is a direct connection between the disclosure of the information at issue and the alleged threat to the government's computer system.[51]

[52] As a result, I conclude the Ministry is not authorized to withhold the email header information at issue under s. 15(1)(l).[52]

Harm to the conservation of heritage site, s. 18(a)

[53] Section 18(a) allows a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of fossil sites, natural sites or sites that have an anthropological or heritage value.

[54] Section 18(a) has two parts, and the public body must prove both. First, the site at issue must be a fossil site, a natural site or a site that has an anthropological or heritage value. Second, disclosure of the information in dispute must reasonably be expected to result in damage to or interfere with the conservation of that site.[53]

[55] The Ministry has applied s. 18(a) to a map[54] and a site report[55] both of which relate to a location near the Dam. The Ministry submits that the site has both anthropological value and heritage value.[56] The applicant did not say anything about the Ministry's submissions and evidence regarding the information withheld under s. 18(a).

Anthropological value, s. 18(a)

[56] I find that the site at issue is a site that has anthropological value for the reasons that follow.

[57] Section 6 of the Freedom of Information and Protection of Privacy Regulation (FIPPR)[57] reads:

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[51] For similar conclusion, see Order F10-39, 2010 CanLII 77325 (BC IPC); Order F15-72, 2015 BCIPC 78; Order F14-12, 2014 BCIPC 15 (CanLII); Order F10-25, 2010 BCIPC 36 (CanLII); Order F21-35, 2021 BCIPC 43 (CanLII).
[52] For added clarity, the information is located at Part 2, pages 1, 7, 15, 31, 33, 42, 43, 46, 50, 51, 52, 59, 63, 64, 76, 77, 78, 79, 82, 83, 84, 88, 92, 102, 109, 110, 117, 128, 134, 140, 147, 154, 161, 162, 163 of the records in dispute.
[53] F22-34, 2022 BCIPC 38 (CanLII) at para 161.
[54] The information is located at Part 1, page 66 (duplicate on 102, 136) of the records in dispute.
[55] The information is located at Part 1, pages 67-68 (duplicate on 103-104 and 137-138) of the records in dispute.
[56] Ministry's initial submission as paras 55-56.
[57] BC Reg 155/2012.

> For the purposes of section 18 of the Act,
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> (a) a site has anthropological value if it contains an artifact or other physical evidence of past habitation or use that has research value, and
>
> (b) a site has heritage value if it is the location of a traditional societal practice for a living community or it has historical, cultural, aesthetic, educational, scientific or spiritual meaning or value for the Province or for a community including an Indigenous people.

[58] The Ministry says the withheld information identifies artefacts and other physical evidence of the past habitation of the area by the Indigenous peoples in the vicinity of Cherry Creek.[58] To support this submission, the Ministry provides affidavit evidence from a director of infrastructure projects, in the Ministry of Energy, Mines and Low Carbon Innovation's oil infrastructure group (Director). The Director says the site and artefacts have historical value for the Province and for local Indigenous communities.[59] He says the artefacts in the site demonstrate a physically verifiable link between the land and the Indigenous Community.[60]

[59] In addition to what the Director says, which I accept, I find that the records themselves demonstrate the link between the site and past habitation of the Indigenous Community.[61]

[60] Further, the anthropological value as defined in s. 6(1) of FIPPR requires that the physical evidence of past habitation have research value. The Director's evidence is that the artefacts and physical evidence found at the site have research value.[62] The Director says this site provides an opportunity to learn about the traditional ways of life of the Indigenous peoples who used to live near Cherry Creek[63] and that it must be protected to ensure the Indigenous people and the Province have the opportunity to explore the site. I accept the site at issue has "research value". I find the map and site report is directly about what has been collected from the site and information about a past cultivation and grazing field. In my view, the site has value for research of the past habitation of the Indigenous people who once cultivated and grazed near the site at issue.

[61] As a result, I am satisfied that the site at issue has anthropological value. Given this finding, I do not need to consider whether this site also has heritage value.

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[58] Ministry's initial submission at para 55.
[59] Affidavit #1 of Director at paras 19, 20 and 22.
[60] Affidavit #1 of Director at para 20.
[61] For example, at Part 1, pages 67-68 (duplicate on 103-104 and 137-138) of the records in dispute.
[62] Affidavit #1 of Director at para 22.
[63] Affidavit #1 of Director at para 25.

Harm, s. 18(a)

[62] Section 18(a) identifies two kinds of harm and either is sufficient for s. 18(a) to apply. The question is whether disclosure of the information in dispute could be reasonably expected to either:

- result in damage to a site; or
- interfere with the conservation of a site.

[63] The standard of proof is a reasonable expectation of probable harm, which is the same standard I have described above in relation to s. 15(1)(l).[64]

[64] In considering the type of evidence required to prove harm for the purposes of s. 18(a), former Commissioner Loukidelis stated in Order 01-11 that it is not necessary to prove that any individual has a motive to "despoil" the site, although evidence of such a motive may be useful.[65] He said that evidence of an opportunity to harm or interfere with the site is relevant, but not necessarily dispositive of the issue. He also acknowledged that, until the sites at issue were professionally excavated, their "only effective protection lies in their locations not being publicly known."[66]

[65] The Ministry says that the information about the location of the site in question is not publicly available[67] and public release of the location of this site creates a real and substantial risk that individuals would seek out and disturb the site. The Ministry also says that disturbance of the site would erase valuable information that could have been captured from the study of the site.[68]

[66] The Director explains that information in the map and site report describes the specific GPS coordinates of the site and location of specific artifacts or areas of cultural/social importance, as well as grid numbers based on longitude and latitude to locate the archeological site.[69] The Director says that the map and the site report is provided only to archeologists and Indigenous peoples who signed a data sharing agreement.[70] He says disclosing information about the site would likely motivate unauthorized individuals to access the site to search for artefacts or physical evidence.[71] The Director also says that once the archeological site has been disturbed, valuable information and insights that could have been

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[64] A public body must show that the likelihood of the harm occurring is "well beyond" or "considerably above" a mere possibility.
[65] Order 01-11, 2001 CanLII 21565 (BCIPC) at para 31.
[66] *Ibid* at para 44.
[67] Ministry's initial submission as para 54.
[68] Ministry's initial submission at para 59, citing Order 01-11.
[69] Affidavit #1 of Director at paras 17 and 18.
[70] Affidavit #1 of Director at para 15.
[71] Affidavit #1 of Director at para 21.

learned from the archeological and cultural study would be irreparably harmed and ultimately lost.[72]

[67] Considering all of the above, I am satisfied that disclosing most of the information in the map and site report could reasonably be expected to result in damage to the site at issue. That is because those records disclose the exact location of the site, and it is reasonable to conclude that people will seek out and disturb the site if they know where it is located. However, I find some of the information in the site report would not reveal the location of the site at issue because it is the template heading, general description and information about individuals who visited the site.[73] . I find that the Ministry can only withhold information on the forms that would reveal the location of the site, such as specific descriptions and coordinates.[74]

Disclosure harmful to third-party personal privacy, s. 22

[68] The Ministry has withheld some information under s. 22.[75]

[69] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[76]

Personal information

[70] The Ministry says that the information withheld under s. 22 is the personal information of third parties.[77]

[71] Section 22(1) applies to personal information; therefore, the first step in any s. 22 analysis is to determine whether the information in dispute is personal information.[78]

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[72] Affidavit #1 of Director at para 27.
[73] Information about the individuals who visited the site consists of names and roles of those individuals. While the Ministry applied s. 22 to withhold some information in the records in dispute, it did not apply s. 22 to the information about these individuals. Therefore, I consider it was the Ministry's decision not to apply s. 22 to the individuals' information in the Normal Site Report.
[74] There are three sets of the Map at Part 1, page 66 and the Normal Site Report forms at Part 1, pages 67-68 (duplicate on 102-104 and 136-138) of the records in dispute. I have highlighted one set of the Map and the Normal Site Report forms and the Ministry must sever the duplicates in accordance with my highlighting.
[75] Information is located at Part 1, pages 40, 41 and 45 and Part 2, page 163 of the record in dispute.
[76] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.
[77] Ministry's initial submission at para 61.
[78] See, for example, Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

[72] Schedule 1 of FIPPA defines personal information as "recorded information about an identifiable individual other than contact information" and contact information 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."[79] Past OIPC orders have said that information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.[80]

[73] All of the information the Ministry withheld under s. 22 appears in several emails and is mostly about third parties who own property near Cherry Creek.[81] It consists of a name and addresses, phone numbers and email addresses. In my view, this information is about identifiable individuals and it was not provided to enable those individuals to be contacted at their place of business or in their business capacity. Therefore, it qualifies as "personal information" and not "contact information" for the purposes of s. 22.

[74] The Ministry also withheld some information about a named Ministry employee under s. 22. Specifically, the Ministry withheld information about the Ministry employee's general wellbeing that appears in an email between two employees. This information is clearly about an identifiable individual so is personal information under s. 22.[82]

[75] To conclude, I am satisfied the information withheld by the Ministry under s. 22(1) qualifies as personal information under FIPPA.

Disclosure not an unreasonable invasion of privacy, s. 22(4)

[76] The second step in the s. 22 analysis is to determine whether the personal information falls into any of the types of information listed in s. 22(4). If so, its disclosure is not an unreasonable invasion of third-party personal privacy.

[77] The Ministry submits that none of s. 22(4) circumstances apply here.[83] The applicant makes no submission about this.

[78] I have considered all of the subsections in s. 22(4) and find there is no basis for finding that s. 22(4) applies here.

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[79] Definition, Schedule 1 of FIPPA.
[80] Order F19-13, 2019 BCIPC 15 at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.
[81] Information located at Part 1, pages 40, 41 and 45 of the record in dispute.
[82] Information located at Part 2, page 163 of the record in dispute.
[83] Ministry's initial submission at para 73.

Presumption of unreasonable invasion of privacy, s. 22(3)

[79] The third step in the s. 22 analysis is to determine whether any provisions under s. 22(3) apply to the personal information. If one or more do, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[80] The Ministry says that s. 22(3)(a) applies to the information related to the Ministry employee's wellbeing.[84] The applicant does not specifically address this.

[81] Section 22(3)(a) creates a presumption against releasing personal information related to a third party's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[82] I am not satisfied s. 22(3)(a) applies to the information about the Ministry employee. It does not reveal anything about the employee's medical condition, history or diagnosis. It simply indicates that the employee was unable to attend a meeting because of how they were feeling but does not reveal any specific medical or health details about them. In my view, this kind of vague information does not qualify as a person's medical, psychiatric or psychological history.[85]

[83] As a result, I find the presumption under s. 22(3)(a) does not apply to this information.

[84] The parties did not raise any other s. 22(3) presumptions. I have considered all of the presumptions under s. 22(3) and am satisfied that none apply.

Relevant circumstances, s. 22(2)

[85] 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). It is at this stage that any applicable s. 22(3) presumption may be rebutted.

[86] The Ministry submits that none of s. 22(2) circumstances apply here.[86] The applicant does not make any submissions about s. 22(2).

[87] I find that none of the circumstances enumerated in s. 22(2) are relevant to consider in this case. However, I considered if the information about the Ministry employee's wellbeing is sensitive information.

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[84] Ministry's initial submission at para 76; The information is located at Part 2, page 163 of the record in dispute.
[85] For a similar finding, see Order F22-34, 2022 BCIPC 38 at para 200.
[86] Ministry's initial submission at para 78.

[88] Sensitivity is not an enumerated factor under s. 22(2), however, many past orders have considered it as a relevant circumstance. Where information is sensitive, it is a circumstance weighing in favour of withholding the information.[87] Conversely, where information is not sensitive, past orders have found that this weighs in favour of disclosure.[88]

[89] The information about the Ministry employee's wellbeing consists of a factual description about how the employee is feeling generally, and it is said to a coworker to explain why their meeting needs to be postponed. This information, in my view, does not reveal any personal or intimate details about the employee or their thoughts, and I find it is not sensitive personal information.

Summary and conclusion, s. 22(1)

[90] I find the information the Ministry withheld under s. 22 is the personal information of third parties. I find none of the circumstances in s. 22(4) apply here. I find that none of the presumptions against disclosure under s. 22(3) apply. I find none of the circumstances in s. 22(2) apply here.

[91] I find that disclosing the information about how the Ministry employee is feeling would not be an unreasonable invasion of the employee's personal privacy because the information is about why a meeting needs to be postponed and it is not sensitive personal information. However, I find that disclosure of the rest of the personal information in dispute would be an unreasonable invasion of third-party personal privacy. The applicant has not said anything to persuade me otherwise.

[92] In conclusion, the Ministry is required to withhold most of the personal information in dispute[89] under s. 22(1) but it is not required to withhold the information about how the Ministry employee is feeling.[90]

CONCLUSION

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

1. I confirm the Ministry's decision that the land title system search results on pages 17-19, 53-55, 58-60, 65, 90-91, 101, 126-127, 135, 160-161, Part 1 of the records are available for purchase by the public and s. 3(5)(a) applies to those records. Therefore, the applicant has no right to access those records under FIPPA.

[87] Order F19-15, 2019 BCIPC 17 at para 99, for example.
[88] Order F16-52, 2016 BCIPC 58 at para 91, for example.
[89] Information located at Part 1, pages 40, 41 and 45 of the record in dispute.
[90] Information located at Part 2, page 163 of the record in dispute.

2. I confirm the Ministry's decision that it is authorized to refuse to disclose the information at issue under s. 14.

3. The Ministry is authorized, under s. 15(1)(l), to refuse to disclose only the information that I have highlighted on pages 63 and 76, Part 2 of the records that are provided to the Ministry with this order. The Ministry is required to disclose the rest of the information it withheld under s. 15(1)(l) to the applicant.

4. The Ministry is authorized, under s. 18(1)(a), to refuse to disclose only the information that I have highlighted on pages 66, 67 and 68, Part 1 of the records that are provided to the Ministry with this order. Duplicates of those pages are at pages 102-104 and 136-138, and the Ministry must sever them in the same way as pages 66, 67 and 68. The Ministry is required to disclose the rest of the information it withheld under s. 18(1)(a) to the applicant.

5. The Ministry is required, under s. 22(1), to withhold only the information that I have highlighted on pages 40, 41 and 45, Part 1 of the records that are provided to the Ministry with this order. The Ministry is required to disclose the rest of the information it withheld under s. 22(1) to the applicant.

6. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at items 3, 4 and 5 above.

Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by January 9, 2024.

November 23, 2023

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-86504