



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-36

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

D. Hans Hwang
Adjudicator

May 6, 2024

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Summary: An applicant requested the Ministry of Public Safety and Solicitor General (Ministry) provide records about the applicant's past employment with the Ministry. The Ministry disclosed some information but withheld the rest under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), 15(1)(l) (security of property or system) and 22(1) (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined that the Ministry was authorized to withhold all the information withheld under s. 14 but was not authorized or required to withhold some of the information withheld under ss. 13(1), 15(1)(l) or 22(1), and ordered the Ministry to disclose that information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 13(1), 14, 15(1)(l), 22(1), 22(2)(a), 22(2)(f), 22(3)(d), 22(3)(g), 22(4), 22(5) and Schedule 1 (Definitions).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an individual (applicant) requested records from the Ministry of Public Safety and Solicitor General (Ministry). The applicant is a former employee of the Ministry. The applicant's request is for records related to his employment and dismissal.

[2] The Ministry provided the responsive records to the applicant but withheld some information from those records under ss. 13 (advice or recommendations), 14 (solicitor-client privilege), 15(1)(l) (security of property or system) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.¹

¹ From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The OIPC's mediation process did not resolve the matter and it proceeded to inquiry.

ISSUES AND BURDEN OF PROOF

[4] The issues I must decide in this inquiry are the following:

1. Whether ss. 13(1), 14 or 15(1)(l) authorize the Ministry to withhold the information in dispute; and
2. Whether s. 22(1) requires the Ministry to withhold the information in dispute.

[5] Under s. 57(1), the Ministry, which is the public body in this case,² has the burden of proving that the applicant does not have right of access to the information withheld under ss. 13, 14, and 15(1)(l).

[6] Meanwhile, s. 57(2) places the burden on the applicant to establish that disclosure of the information at issue under s. 22(1) would not unreasonably invade a third-party's personal privacy. However, the Ministry has the initial burden of proving the information at issue qualifies as personal information.³

DISCUSSION

Background

[7] The Ministry is responsible for delivering public safety services in British Columbia.⁴

[8] The applicant was formerly employed by the Ministry. His employment was terminated in 2020.

[9] The Ministry provided its initial submission and evidence for this inquiry. The applicant had an opportunity to respond to the Ministry's initial submission but chose not to do so.

Records and information at issue

[10] In response to the applicant's request, the Ministry identified 409 pages of responsive records. The Ministry has withheld some information from the records consisting of emails, notes, spreadsheets, directives and guidelines. I will identify

² Schedule 1 "Definition".

³ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

⁴ The information in this background section is based on the information already disclosed in the records and the parties' submissions. It is not information in dispute.

and discuss the specific information withheld from the records as it relates to ss. 13(1), 14, 15(1)(l), and 22(1).

Solicitor-client privilege, s. 14

[11] Section 14 permits a public body to refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice privilege and litigation privilege.⁵ The Ministry is relying on legal advice privilege to withhold some of the records in dispute.⁶

[12] Not all communications between a client and their lawyer are protected by legal advice privilege, but the privilege will apply to communications that:

1. are between a solicitor and client (or a third party that is integral to the solicitor-client relationship);⁷
2. entail the seeking or giving of legal advice; and
3. are intended by the solicitor and client to be confidential.⁸

[13] 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.⁹

[14] 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.¹⁰

[15] Further, legal advice privilege applies to communications involving a lawyer’s support staff and communications dealing with administrative matters if the communications were made with a view to obtaining legal advice.¹¹

Evidentiary basis for solicitor-client privilege

⁵ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para 26.

⁶ Ministry’s initial submission at para 82.

⁷ *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 (CanLII), at para 83.

⁸ *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [Solosky] at p. 837.

⁹ *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.

¹⁰ 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.

¹¹ *Descôteaux et al v Mierzwinski*, 1982 CanLII 22 (SCC) at p 893.

[16] The Ministry did not provide me with a copy of the information it withheld under s. 14. To support its claim of privilege over the records, the Ministry provided three affidavits. The first is from a lawyer with the Ministry of Attorney General's Legal Services Branch (LSB Lawyer).¹² The Ministry also provided affidavits from the Provincial Director of the division of the Ministry where the applicant worked (Provincial Director) and the Workforce Restructuring Specialist for the Public Service Agency (PSA Specialist). The PSA is the central agency within the provincial government that is responsible for personnel management of British Columbia's public service.¹³

[17] Section 44 empowers me, as the Commissioner's delegate, to order production of records over which solicitor-client privilege is claimed. However, I will only exercise this discretionary power if it is absolutely necessary in order to adjudicate the s. 14 issues in dispute.¹⁴

[18] After reviewing the Ministry's submissions and sworn affidavits, I have determined that I have sufficient evidence to decide whether s. 14 applies. The affiants depose that they reviewed all of the records,¹⁵ and I am satisfied that the LSB Lawyer, Provincial Director, and the PSA Specialist have direct knowledge of the content and context of the information at issue. The Provincial Director and the PSA Specialist were included in the emails that contain the information withheld under s. 14. Further, I accept the LSB Lawyer, as a lawyer and an officer of the court, has a professional duty to ensure that privilege is properly claimed which means that some deference to their evidence is appropriate.¹⁶ I concluded it is not necessary to exercise my discretion under s. 44 to order production of the records.

Analysis and findings, s. 14

[19] For the reasons that follow, I find solicitor-client privilege applies to the withheld information.

[20] From my review of the records and submissions, I find that the Ministry is refusing to disclose the following information under s. 14:

- An excerpt in emails between Ministry employees (Employee Emails)¹⁷ and

¹² Ministry of Attorney General Legal Services Branch (LSB).

¹³ PSA Specialist's affidavit at para 2.

¹⁴ Order F22-23, 2022 BCIPC 25 at para 13.

¹⁵ Affidavit #1 of LSB Lawyer at para 7, Affidavit #1 of PSA Specialist at para 15 and Affidavit #1 of Provincial Director at para 25.

¹⁶ For similar reasoning *Nelson and District Credit Union v Fiserv Solutions of Canada, Inc.*, 2017 BCSC 1139 at para 54.

¹⁷ The withheld excerpt is located on pp 86 and 123 of the records at issue.

- An email that the PSA Specialist sent to the Provincial Director and another Ministry employee (Specialist Email)¹⁸

[21] Based on the affidavit evidence, I find that the information withheld from the Employee Emails and the Specialist Email contain legal advice the LSB Lawyer provided to a manager at the PSA (PSA Manager).¹⁹

[22] The LSB Lawyer attests that in his capacity as legal counsel, he provides legal advice on employment law matters, and he was consulted by the PSA Specialist and the PSA Manager to provide legal advice on the employment matter regarding the applicant.²⁰ I find that the LSB Lawyer was acting as a solicitor providing legal advice to the PSA, his client, in relation to the applicant's employment matter. As a result, I conclude the information at issue contains communications between a solicitor and their client, and the first requirement of the legal test is met.

[23] The Provincial Director attests that she is familiar with the records at issue and the information withheld from the Employee Emails and Specialist Emails relates to legal advice that the LSB Lawyer provided to the PSA Manager regarding the applicant's employment matter.²¹ The PSA Specialist attests that she has reviewed the withheld information and the information relates to the applicant's employment matter. She also attests that the PSA Manager consulted with the LSB Lawyer to obtain legal advice respecting the applicant's employment matter.²²

[24] Having considered these circumstances, I am satisfied that disclosing the withheld information would reveal communications between the LSB Lawyer and the PSA that relates directly to the seeking, formulating or giving of legal advice.²³

[25] I also accept that the withheld information was intended to be confidential, on the basis of the affidavit evidence before me.²⁴

[26] There is no question that the Specialist Email contains legal advice provided by the LSB Lawyer to the PSA Manager in which a client requests and a lawyer provides legal advice.

¹⁸ Information located on p 381 of the records at issue.

¹⁹ PSA is a division of the government of British Columbia within the Ministry of Finance and is the central agency responsible for personnel management of the British Columbia public service.

²⁰ Affidavit #1 of LSB Lawyer at para 8.

²¹ Affidavit #1 of Provincial Director at paras 28-30.

²² Affidavit # 1 of PSA Specialist at para 16.

²³ Affidavit #1 of LSB Lawyer at para 10.

²⁴ Affidavit #1 of LSB Lawyer at para 12; Affidavit # 1 of PSA Specialist at para 19; Affidavit #1 of Provincial Director at para 31.

[27] Turning to the involvement of the Ministry employees, I find the Ministry's affidavit evidence establishes that the PSA Manager shared the legal advice with the Ministry employees on a confidential basis.²⁵ This satisfies me that the PSA Manager shared the legal advice with the Ministry employees on the understanding that the advice would be held in confidence.

[28] Further, I am satisfied that the common interest exception to waiver of solicitor-client privilege applies. The exception may apply to legal advice shared between parties in certain fiduciary, contractual or agency relations.²⁶

[29] In this case, it is clear to me from the Ministry's affidavit evidence that the PSA and the Ministry were working together toward a common goal of dealing appropriately with the applicant's employment matters and concerns. In this context, it makes sense to me that the PSA would have shared legal advice confidentially with the Ministry and that the Ministry would also have had an interest in that advice. In my view, in these circumstances, the PSA and the Ministry did have a common interest sufficient to preserve the solicitor-client privilege. Additionally, I find no implied or explicit waiver of the privilege may occur here.

[30] As a result, I conclude the parties to the solicitor-client relationship intended for the communications to be confidential and the communications were treated in that manner.

Conclusion, s. 14

[31] To summarize, I find that disclosing the information in dispute would reveal confidential solicitor-client communications that entail the seeking and providing of legal advice. I conclude the Ministry is authorized to refuse to disclose the withheld information under s. 14.

Advice or Recommendations, s. 13

[32] Section 13(1) authorizes the head of a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister, subject to certain exceptions.

[33] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.²⁷

²⁵ Affidavit #1 of Provincial Director at paras 27-28 and Affidavit #1 of PSA Specialist at para 19.

²⁶ *Pitney Bowes of Canada Ltd. v. Canada*, 2003 FCT 214; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 24.

²⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at paras 45-51.

[34] Past OIPC orders and court decisions have established the following principles for the interpretation of s. 13(1):

- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.²⁸
- “Recommendations” relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.²⁹
- “Advice” has a broader meaning than “recommendations.”³⁰ It includes providing relevant considerations, options, analysis and opinions, including expert opinions on matters of fact.³¹ Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.³²
- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.³³ This includes factual information compiled and selected by an expert, using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.³⁴

[35] In the s. 13 analysis, the first step is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for a public body. If it would, then I must decide whether the information falls into any of the categories or circumstances listed in s. 13(2). If information falls within one or more of these categories, a public body must not refuse to disclose it under s. 13(1).

[36] Finally, s. 13(3) says s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. In this case, the records are not 10 or more years old, so s. 13(3) does not apply.

Would the disputed information reveal advice or recommendations?

²⁸ Order 02-38, 2002 CanLII 42472 (BC IPC) at para 135.

²⁹ *John Doe*, supra note 27 at paras 23-24.

³⁰ *Ibid* at para 24.

³¹ *Ibid* at paras 26-27 and 46-47; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras 103 and 113 [*College of Physicians*].

³² *College of Physicians*, supra note 31 at para 103.

³³ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras 52-53.

³⁴ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.

[37] The Ministry says that the information withheld under s. 13(1) clearly contains advice and recommendations.³⁵

Briefing notes

[38] The Ministry has completely withheld three types of briefing notes (briefing note) prepared by the Provincial Director. The Ministry says that the purpose of the briefing notes was to provide information, advice and recommendations to the decision-maker to assist with his deliberations and decision-making with regard to the Applicant.³⁶

[39] Whereas one briefing note was approved and signed by the deputy minister, the others appear to be working copies as they contain comments, word suggestions, and highlighting for the final decision-maker to review.³⁷

[40] I find that these briefing notes include relevant considerations identified by the Provincial Director for the deputy minister about the applicant's employment and background information about the circumstances giving rise to those considerations. In my view, this information is clearly advice developed by the Provincial Director for the Ministry.

[41] The briefing notes also include headings that describe the subject of the notes and paragraphs, information about the author and reviewer of the records, file number, date and page number. I do not see how this information would reveal advice or recommendation by or for a public body. As a result, I find that s. 13(1) does not apply to this information.

Emails

[42] The Ministry withheld several emails partially or in full under s. 13(1).³⁸ I will address each email separately below.

[43] I find some of the information at issue in the emails qualifies as advice or recommendations. For example, some of the information is a Ministry employee's advice to another employee on how to handle a situation or what they will

³⁵ Ministry's initial submission at paras 34-39.

³⁶ Ministry's initial submission at para 38.

³⁷ Briefing note located on pp 3-6 is a copy that has been approved and signed by the deputy minister; briefing notes located on pp 51-54, 56-58 and 408-409 contain comments, word suggestions or highlights.

³⁸ Information located on pp 44, 55, 59, 65-67, 77-78, 85, 110, 119, 153-156, 166, 171, 172, 348, 351, 362-368, 369-373, 375, 376, 379, 381, 382, 384, 387, 396, 399 of the records at issue. The Ministry applied to withhold both ss. 13 and 14 to withhold information in dispute on page 381. As I have already found that s. 14 applies to that information, I am not reviewing if s. 13 also applies to the same information.

discuss in relation to the situation.³⁹ Other information reveals a Ministry employee's advice to another employee and advice or recommendations a Ministry employee received from another employee or the PSA.⁴⁰

[44] Regarding the email communications between Ministry employees seeking another employee's review and providing comments and feedback on draft response to the applicant, I find that disclosure would allow the applicant to infer advice or recommendations developed and provided.⁴¹

[45] Some of the information reveals a human resources advisor's advice and recommendations about the matter under discussion. It also includes background information and facts that are integral to the advice and recommendations and necessary, in my view, to understand the human resources advisor's analysis and suggested course of action. This is the type of background facts and information that the Courts and OIPC orders have said is part of the deliberative process s. 13 protects because it is "necessary to the consideration of specific or alternative courses of action."⁴² Therefore, I conclude disclosing this would reveal advice.⁴³

[46] However, I find that some of the information at issue in the emails does not reveal advice or recommendations, so the Ministry cannot withhold it under s. 13(1). Some of the disputed information is a suggestion for further discussion or action.⁴⁴ In my view, the suggestion does not amount to advice or recommendation unless it would allow for accurate inferences as to advice or recommendations actually received. I find the information at issue here would not allow for any such inferences.

[47] Some of the information at issue contains questions. Unless disclosure would allow for accurate inferences of the advice or recommendations that were given, a question does not typically amount to advice or recommendations. I find the questions at issue here would not allow for any such inferences.⁴⁵

[48] Finally, some of the information contains an email chain in which a program manager at Corrections Academy communicated with the applicant

³⁹ Information located on pp 44, 77, 85, 110 and 362 of the records at issue.

⁴⁰ Information located on pp 119, 155, 351, 363-370, 375, 376, 384, 387 and 396 of the records at issue.

⁴¹ Information located on pp 59, 363-365, 366-370 and 372-373 of the records at issue.

⁴² *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 52; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras 79-96.

⁴³ Information located on pp 153-155 of the records at issue.

⁴⁴ Information located on pp 55, 85, 171 and 396 of the records at issue.

⁴⁵ Information located on pp 85, 154-155, 166, 348, 363-364, 366, 379, 382, 384, and 399 of the records at issue.

and a Ministry employee.⁴⁶ The program manager's email to the Ministry employee provides information about the applicant that was within the program manager's possession. Also, there are email chains in which a Ministry employee or a human resources advisor provided another employee with information about the applicant.⁴⁷ I do not see how any of this information would reveal advice or recommendations. As a result, I find that s. 13(1) does not apply to this information.

Notes

[49] The Ministry withheld entire pages of certain performance management notes (Notes) under s. 13(1).⁴⁸ The Ministry says that the Notes were used to summarize the applicant's job performance and that they contain opinions regarding an existing set of circumstances.⁴⁹ However, the Ministry has not identified which opinions, advice, or recommendations it refers to and where they are located.

[50] I find some of the information at issue clearly qualifies as advice or recommendations. For example, there is information that summarizes discussions between Ministry employees. I find that these discussions would directly reveal advice or recommendations or would allow for accurate inferences as to the advice or recommendations actually provided.⁵⁰

[51] However, the remaining information withheld from the Notes includes a summary of a Ministry employee interacting with the applicant and discussions between the applicant and his supervisor about the next steps to take. I do not see how disclosing this information would reveal any advice or recommendations, so the Ministry cannot withhold it under s. 13(1).

Guides

[52] The Ministry withheld two guides in full: Letter of Expectation Reference Guide for Managers (Reference Guide) and Letters of Expectations Topic Guide (Topic Guide) (collectively, the "Guides").⁵¹

[53] The Ministry says that the Guides are only provided to managers or supervisors upon request to assist in drafting a letter of expectations.⁵² It says

⁴⁶ Information located on pp 65-67 of the records at issue.

⁴⁷ Information located on pp 153-154 of the records at issue.

⁴⁸ Information located on pp 87-101 of the records at issue.

⁴⁹ Ministry's initial submission at para 46.

⁵⁰ Information located on pp 87, 89 and 93 of the records at issue.

⁵¹ Information located at pp 157-159 and 160-165 of the records at issue.

⁵² Ministry's initial submission at para 46.

that if managers or supervisors need specific assistance with an employment matter, they have to contact the PSA⁵³ to access detailed information.

[54] While adjudicators must not interpret the term “advice” too narrowly, it is equally true they must not define it so broadly that it exceeds the bounds of a purposeful interpretation. In addition, as explained above, the purpose of s. 13 is to protect the deliberative process by ensuring that advisors provide decision makers with full and frank advice. The deliberative process must be protected by giving close consideration of constraints that result from the prospect of disclosing advice received.⁵⁴

[55] The Reference Guide is a 3-page document that provides information about the purpose of a letter of expectations and how to develop and deliver such a letter. The Topic Guide is a 6-page document that is intended for use when PSA employees are working with supervisors or managers who have issues or questions related to the management of their work unit. This document provides an overview, frequently asked questions, discusses important questions to ask of employees and offers general guidance and links to other related content.

[56] The Ministry characterizes the Guides as documents that were provided to aid the Ministry with the employee performance management process.⁵⁵ The Ministry has not, however, explained how specific passages in the Guides constitute “advice.” In my view, the Ministry has not sufficiently demonstrated that these Guides are properly characterized as advice or recommendations for the purposes of s. 13(1).

[57] Previous OIPC decisions have consistently found that s. 13(1) does not apply to directions or instructions that recipients have no freedom to accept or reject.⁵⁶ Section 13(1) does not typically capture material in a manual because it is a public body’s settled policy or position about how to approach an issue.⁵⁷

[58] I find that the Guides are intended to assist government employees in developing and delivering a letter of expectations and they provide specific guidelines and procedures for government employees to follow. In my view, this is not advice or recommendations that the users of the Guides are free to accept or reject. While acknowledging that each case may have its own unique circumstances that may require different approaches and the users may have some discretion in whether or how to follow the Guides, the Guides in this matter

⁵³ A division of the government of British Columbia within the Ministry of Finance and is the central agency responsible for personnel management of the British Columbia public service.

⁵⁴ See for similar reasoning Order F23-67, 2023 BCIPC 78 (CanLII) at paras 15-16.

⁵⁵ Ministry’s initial submission at para 24; Affidavit # 1 of PSA Specialist at paras 12 and 13.

⁵⁶ See for example Order F23-53, 2023 BCIPC 61 (CanLII) at para 93; Order F19-27, 2019 BCIPC 29 at para 32 and Order F21-41, 2021 BCIPC 49 at para 29.

⁵⁷ Order F14-34, 2014 BCIPC 37 at para 18.

set clear expectations and boundaries on employees. As a result, I conclude the Ministry has failed to establish that the information at issue would reveal advice or recommendations.

Draft documents

[59] The Ministry withheld several draft documents in full. They include a draft operations and business continuity plan (draft plan),⁵⁸ a draft briefing note,⁵⁹ and draft meeting bullets.⁶⁰ The Ministry says the applicant had drafted these documents and in response to that, the supervisor provided advice, comments, and feedback on them.⁶¹ Additionally, there is a draft meeting note.⁶²

[60] I find some of the information withheld from the draft documents constitutes recommendations under s. 13(1). It is information that reveals the supervisor providing the author with explicit recommendations in the form of suggested alternative wordings or ideas for proposed amendments.⁶³ I am satisfied that they are suggestions for editorial changes to the wording of the draft documents, and I find that they are recommendations within the meaning of s. 13(1). This finding is in keeping with past orders which have accepted that editorial suggestions or changes to wording may constitute advice or recommendations on the content of a record.⁶⁴

[61] However, I find the remaining information in the draft documents would not reveal advice or recommendations if disclosed. This information is the content of the draft documents on which a reviewer never provided any opinions, comments or other feedback. I do not see how disclosing this information would reveal any advice or recommendations, and the Ministry has not adequately explained how it would. As a result, I am not satisfied that disclosing that information would reveal any advice or recommendations, therefore, the Ministry cannot withhold it under s. 13(1).

⁵⁸ Information located on pp 7-19 of the records at issue.

⁵⁹ Information located on pp 127-129 of the records at issue.

⁶⁰ Information located on pp 133-136 of the records at issue.

⁶¹ Ministry's initial submission at para 50.

⁶² Information located on p 46 of the records at issue.

⁶³ Information located on pp 9, 11, 17, 46, 59, 127, 128, 129, 133, 134, 135, 136, 375-376 of the records as issue.

⁶⁴ Order F19-28, 2019 BCIPC 30 (CanLII) at para 39 citing Order F14-44, 2014 BCIPC 47 at para 32 and Order F18-41, 2018 BCIPC 44 at para 29.

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

[62] 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.

[63] The words “could reasonably be expected to” mean that the public body must establish a reasonable expectation of probable harm. This language indicates 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.⁶⁵ Additionally, there must be a direct link between the disclosure and the apprehended harm.⁶⁶

[64] The Ministry is relying on s. 15(1)(l) to refuse access to the IDIR usernames of current and former employees. IDIR is the acronym for the government’s Internal Directory and Authentication Service.⁶⁷ The Ministry submission explains that every government employee and contractor must have an IDIR username and password to log into government systems.⁶⁸ To support its decision to refuse access to the IDIR usernames, the Ministry provides affidavit evidence from its Chief Information Security Officer (CISO). The CISO attests that the government treats IDIR usernames as confidential for security reasons as they form half of the credentials required to authenticate an individual’s identity.⁶⁹ He also attests that disclosure of IDIR usernames would increase the risk of unauthorized access to the government computer system and if a cybercriminal had an IDIR username, they could use that to increase their chances of successfully attacking the computer system.⁷⁰

[65] The CISO also says:

Employees must securely manage and protect the usernames and passwords they use to access government IT resources.⁷¹

⁶⁵ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54.

⁶⁶ *Merck Frosst Canada Ltd v Canada Health*, 2012 SCC 3 at para. 219. See also Order F22-32, 2022 BCIPC 36 (CanLII), at para 27.

2007 CanLII 35476 (BCIPC) at para 17.

⁶⁷ Ministry’s initial submission at para 100.

⁶⁸ Ministry’s initial submission at para 101.

⁶⁹ Affidavit #1 of CISO at paras 10 and 20.

⁷⁰ Affidavit #1 of CISO at paras 21 and 22.

⁷¹ Affidavit #1 of CISO, Exhibit B “Appropriate Use of Government Information and Information Technology Policy”.

Unauthorized individuals may gain access to critical data or systems due to ineffective access control rules and definitions. To ensure critical data can only be accessed by authorized personnel, systems and processes must be in place to limit access based on need to know and according to job responsibilities.⁷²

[66] For the reasons that follow, I am not persuaded by the Ministry's submission that the information may be withheld under s. 15(1).

[67] I understand the Ministry is concerned that it would be easier for unauthorized individuals to gain access to government computer systems if they can obtain an active IDIR username. However, it is important to recognize that in order to gain access to systems, a password is also needed. An IDIR username is not, on this own, sufficient to gain access to internal government systems. The Ministry did not adequately explain how it would be.

[68] Additionally, the Ministry did not demonstrate that the already-disclosed information in the responsive records would serve as a roadmap to access government systems or Ministry records. That was the case in Order F18-38 where there was also information about internet pathways to portals where records were kept, and for that reason the adjudicator decided s. 15(1)(l) applied to the IDIR usernames.

[69] I find the Ministry has not provided sufficient explanation or evidence to show that disclosing the IDIR usernames will result in a risk of harm that is well beyond the merely possible or speculative, nor that there is a direct connection between disclosure and the alleged threat to the government's computer system. The Ministry's evidence is about harm to the government-wide computer system and industrial standards for information security. In my view, general evidence regarding security measures is not sufficient to establish a direct connect between disclosure of the withheld information and the alleged threat.

[70] These findings are consistent with previous OIPC orders that have considered comparable information to what is at issue (i.e., user login IDs) and found that s. 15(1)(l) did not apply. The orders have found the assertions and arguments about the alleged harm, specifically hackers using social engineering techniques such as phishing attacks and guessing at login credentials to directly attack the government's computer system, were not sufficient.⁷³

⁷² Affidavit #1 of CISO, Exhibit C "Payment Card Industry Data Security Standard: Requirements and Testing Procedures."

⁷³ 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); F21-35, 2021 BCIPC 43 (CanLII) at paras 93-95 and 99.

[71] As a result, I conclude the Ministry is not authorized to withhold the information at issue under s. 15(1)(l). The Ministry also refused access to the IDIR usernames under s. 22, so I will consider them again, below.

Unreasonable invasion of third-party personal privacy, s. 22

[72] 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.⁷⁴ Past BC orders have considered the application of s. 22 and have consistently applied the same analytical framework. I will apply the same approach below.⁷⁵

Personal information

[73] The first step of the s. 22 analysis is to determine whether the information is personal information.

[74] "Personal information" is defined as "recorded information about an identifiable individual other than contact information."⁷⁶ 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.⁷⁷

[75] Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."⁷⁸

[76] The Ministry says that the information contained in the records at issue is personal information about Ministry employees who are third parties.⁷⁹

[77] I am satisfied that some of the information withheld by the Ministry under s. 22(1) is personal information of several third parties. This information is about individuals who are identified by name. This information does not qualify as contact information.

⁷⁴ 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.

⁷⁵ See for example Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.

⁷⁶ See Schedule 1 of FIPPA for this definition.

⁷⁷ Order F16-36, 2016 BCIPC 40 (CanLII) at para 17.

⁷⁸ See Schedule 1 of FIPPA for this definition.

⁷⁹ Ministry's initial submission at para 142.

[78] Some of the withheld information does not directly identify individuals by name, but it is reasonable to conclude that the applicant or other members of the public would be able to identify the individuals given the context and surrounding information. For example, some of the information at issue is the individuals' comments about the applicant. An individual's opinions and comments are their personal information if their identity is known or can be accurately inferred.⁸⁰ Given that the comments relate to interactions involving the applicant, I am satisfied that the applicant could accurately infer their identities. I find the third parties' comments are the personal information of those third parties. These comments are simultaneously the personal information of the applicant because they are about him.

[79] However, some of the withheld information is contact information. This information includes names and email addresses contained in email headings. I find that this information is about identifiable individuals that enable them to be contacted at their place of business or in their business capacity.⁸¹ Given that this is contact information, it is not the personal information of any third party.

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

[80] The next step in the s. 22 analysis is to determine whether the personal information falls into any of the categories listed in s. 22(4). Section 22(4) sets out circumstances where disclosure of personal information is not an unreasonable invasion of third-party personal privacy. If s. 22(4) applies to the disputed information, the public body cannot refuse to disclose it under s. 22(1).

[81] The Ministry says s. 22(4) does not apply to the information in dispute.⁸²

[82] I have considered all of the subsections in s. 22(4) and find there is no basis for finding that s. 22(4) applies to any of the information severed under s. 22(1).

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

[83] 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, then disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

[84] The Ministry submits that disclosing the information at issue is presumed to be an unreasonable invasion of third-party personal privacy because some of

⁸⁰ Order F17-01, 2017 BCIPC 1 at para 48.

⁸¹ Information located on pp 77-78 of the records at issue.

⁸² Ministry's initial submission at para 146.

it relates to a third party's occupational and employment history under s. 22(3)(d) and personal evaluation about the third party under s. 22(3)(g).⁸³

Employment history, s. 22(3)(d)

[85] Section 22(3)(d) says that personal information related to a third party's employment, occupational or educational history is presumptively an unreasonable invasion of their personal privacy.

[86] The Ministry says that there are numerous records from which it withheld personal information of third parties as they are related to their employment or educational history. The Ministry describes some of these records as staff training spreadsheets (spreadsheets) and class lists containing third parties' employment information (class lists).⁸⁴

[87] I am satisfied that some of the withheld personal information relates to the employment and occupational history of third parties. I find the spreadsheets and the class lists contain employment numbers, names, work locations, job positions and educational histories of multiple third parties. Therefore, disclosure of the information withheld in the spreadsheets and the class lists would presumptively be an unreasonable invasion of the personal privacy of several third parties.⁸⁵

[88] Other records contain information that reveals a third party's work schedule.⁸⁶ Elsewhere, the disputed information consists of communications between Ministry employees discussing certain third parties' educational requirements and plans.⁸⁷ Further, I find some of the information in dispute was recorded in the context of occupational performance or history of the third parties.⁸⁸ This information includes the supervisor statements respecting the employment performance of the individuals who were also involved in interactions with the applicant. This information also includes communications in relation to third parties' work performance and workplace behaviours.⁸⁹ In addition, this information includes an email that transmits the record check result of an individual.⁹⁰

⁸³ Ministry's initial submission at paras 148 and 155.

⁸⁴ Ministry's initial submission at paras 148-149; Information located on pp 42, 68-74, 87-101, 109, 172, 223, 292, 385 and 397 of the records at issue.

⁸⁵ Information located on pp 68-74 and 78 of the records at issue.

⁸⁶ Information located on pp 42 and 385 of the records at issue.

⁸⁷ Information located on pp 65-67 of the records at issue.

⁸⁸ Information located on pp 87-101, 109, 172, 223, 292, 377, 385 and 397 of the records at issue.

⁸⁹ Information located on pp 87-101, 109, 172, of the records at issue.

⁹⁰ Information located on p 223 of the records at issue.

[89] Citing Order F21-35, the Ministry submits that s. 22(3)(d) applies to the IDIR usernames of the current and former employees.⁹¹ That order determined that s. 22(3)(d) applied to the IDIR usernames of several public body employees since the usernames are a unique combination of letters derived from an employee's name and the IDIR username is assigned to them and used by them as part of their employment.⁹² I find the reasoning in F21-35 equally applicable here since it is the same type of information. The usernames at issue here are personal identifiers derived from the public employees' names. The IDIR usernames were assigned to each employee and are used or were used by them as part of their employment. As a result, I conclude the IDIR usernames are part of those individuals' employment history and can be withheld under s. 22(3)(d).⁹³

[90] However, I am not satisfied that s. 22(3)(d) applies to the remaining personal information in the records at issue.

[91] This remaining personal information includes factual information compiled by the supervisor in relation to what the supervisor and several third parties, observed or said about the applicant from workplace interactions with him. I find this information does not identify third parties nor provide detail about the third parties. Instead, this information reveals the applicant's work performance, the supervisor's description and comments about the applicant and his workplace behaviour.⁹⁴ As a result, I conclude this is personal information of the applicant about his employment history and not a third party's employment history as intended under s. 23(3)(d).⁹⁵

Personal recommendations or evaluations, s. 22(3)(g)

[92] Section 22(3)(g) applies to personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about a third party. Previous orders have stated this section can apply to an investigator's evaluative statements of a third party's performance in the workplace.⁹⁶ However, factual statements and evidence relating to allegations

⁹¹ Ministry's initial submission at paras 152 and 153.

⁹² Order F21-35, 2021 BCIPC 43 (CanLII) at para 189.

⁹³ Information located on pp 267, 268 and 359 of the records at issue.

⁹⁴ Information located on pp 87-101 of the records at issue.

⁹⁵ See for similar reasoning Order F19-41, 2019 BCIPC 46 at para 62; Order 01-53, 2001 CanLII 21607 at para 41: names of witnesses and other personal information about them is not covered by s. 22(3)(d).

⁹⁶ Order 01-07, 2001 CanLII 21561 at para 21; Order F05-30, 2005 CanLII 32547 (BC IPC) at paras 41-42; Order F14-10, 2014 BCIPC 12 (CanLII) at para 19; Order F16-12, 2016 BCIPC 14 at para 28.

against a third party, including the allegations themselves, are not the kind of evaluative material covered by s. 22(3)(g).⁹⁷

[93] The Ministry says that some of the records at issue contain personal evaluations by or about third parties.⁹⁸ It says the Notes contain information about personal evaluations and the Applicant's job performance that was provided by third parties in confidence.

[94] I have reviewed the records and can confirm they contain passages including evaluations of the applicant in the context of his job performance. However, s. 23(3)(g) applies only to evaluations of third parties. In this case, the evaluations are only about the applicant's work performance. As a result, this section does not apply to the evaluations at issue here.

Relevant circumstances, Section 22(2)

[95] The final step in the s. 22 analysis is to consider whether disclosing the personal information at issue would constitute an unreasonable invasion of a third party's personal privacy. This is determined by considering all relevant circumstances, including those listed under s. 22(2). It is at this stage of the analysis that the presumptions I found to apply under s. 22(3)(d) may be rebutted.

[96] The Ministry submits that ss. 22(2)(a) and (f) are relevant.

Public scrutiny of a public body, s. 22(2)(a)

[97] Section 22(2)(a) requires a public body to consider whether disclosing the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Where disclosure would foster the accountability of a public body, this may be a relevant circumstance that weighs in favour of disclosing the information at issue.⁹⁹

[98] The Ministry submits that s. 22(2)(a) is not a factor that is in favour of disclosure in this inquiry.¹⁰⁰

[99] Past OIPC orders have found that one of the purposes of s. 22(2)(a) is to make public bodies more accountable.¹⁰¹ Therefore, for s. 22(2)(a) to apply, the disclosure of the specific information at issue must be desirable for subjecting

⁹⁷ Order 01-53, 2001 CanLII 21607 (BCIPC) at paras 44-45.

⁹⁸ Ministry's initial submission at paras 155-156; Pages 65-67 and 87-101 of the records at issue.

⁹⁹ Order F05-18, 2005 CanLII 24734 at para 49.

¹⁰⁰ Ministry's initial submission at para 161.

¹⁰¹ Order F18-47, 2018 BCIPC 50 (CanLII) at para 32.

a public body's activities to public scrutiny, as opposed to subjecting an individual third party's activities to public or private scrutiny.¹⁰²

[100] In this case, I find the disputed information is about the applicant or a few third parties. The third parties' personal information here is very specific to several individuals and disclosure would provide no value in allowing the public to scrutinize the Ministry's activities. I am also not persuaded that disclosing the information that identifies individuals who were mentioned in the spreadsheets and class lists would be desirable for the purpose of subjecting the Ministry's activities to public scrutiny. In my view, that information is solely about those individuals and it has no broader significance.

[101] As a result, I conclude s. 22(2)(a) is not a circumstance that favours disclosing the information withheld by the Ministry under s. 22(1).

Supplied in confidence, s. 22(2)(f)

[102] Section 22(2)(f) requires a public body to consider whether the personal information was supplied in confidence. In order for s. 22(2)(f) to apply, there must be evidence that a third party supplied personal information to another and it was done so under an objectively reasonable expectation of confidentiality at the time of supply.¹⁰³

[103] The Ministry says the information at issue reveals the content of personal evaluations supplied by third parties in confidence; therefore, s. 22(2)(f) is a relevant circumstance which favours withholding the disputed information.¹⁰⁴

[104] I am persuaded that the personal information was supplied by the third parties to the supervisor while the supervisor was gathering information in relation to the applicant's workplace performance. I accept the Ministry's evidence that it treats all correspondence and materials related to an employment matter as confidential and only discloses file contents to individuals who are required and authorized to see them.¹⁰⁵ I am also satisfied that third parties who provided comments about the applicant's workplace behaviour expected that the information would not be shared other than for the purpose of evaluating the applicant's work performance. As a result, I conclude that the information in dispute was supplied in confidence in accordance with s. 22(2)(f)

¹⁰² Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.

¹⁰³ Order F11-05, 2011 BCIPC 5 (CanLII) at para 41, citing and adopting the analysis in Order 01-36, 2001 CanLII 21590 (BC IPC) at paras 23-26 regarding s. 21(1)(b).

¹⁰⁴ Ministry's initial submission at para 164.

¹⁰⁵ Affidavit #1 of Provincial Director at para 41; Affidavit #1 of PSA Specialist at para 22.

and that is a relevant circumstance weighing in favour of withholding the information.¹⁰⁶

[105] However, it is not obvious from the content and context of the remaining records that the rest of the withheld personal information was supplied in confidence. For example, information withheld in the Notes was compiled by the supervisor based on what the applicant said about his own actions. As a result, this information constitutes personal information of the applicant, and therefore, disclosure of the information would not be unreasonable invasion of a third party's personal privacy. I conclude that s. 22(2)(f) is not a relevant circumstance with regard to this information.

Applicant's existing knowledge

[106] While not enumerated in s. 22(2), past orders have considered whether the applicant has pre-existing knowledge of the information in dispute. Depending on the circumstances, this may weigh for or against disclosure.¹⁰⁷

[107] Based on the applicant's relationship to the supervisor and other Ministry employees and what is revealed by the records, I can see that the applicant already knows some of the personal information in dispute. For example, I find that the applicant knows the name and job title of the supervisor and Ministry employees with whom he interacted in his role with the Ministry. Additionally, he knows the spreadsheets and class lists which he would have likely organized during his employment.¹⁰⁸ I find that the applicant's pre-existing knowledge weighs in favour of disclosing this information to the applicant.

Applicant's personal information

[108] Previous orders have considered as a relevant circumstance under s. 22(2) whether the disputed information is the applicant's personal information.¹⁰⁹ In general, an applicant is entitled to their own personal information.¹¹⁰

[109] I find that the descriptions and comments about the applicant provided by several third parties are simultaneously the personal information of the applicant

¹⁰⁶ Information located on pp 87-101 of the records at issue.

¹⁰⁷ Order F18-48, 2018 BCIPC 51 at para 27; Order F20-22, 2020 BCIPC 26 at para 51.

¹⁰⁸ Ministry's initial submission at para 149.

¹⁰⁹ See for example, Order F18-30, 2018 BCIPC 33 at para 41; Order F20-13, 2020 BCIPC 15 at para 73.

¹¹⁰ Order F14-47, 2014 BCIPC 51 at para 36, citing Order F10-10, 2010 BCIPC 17 at para 37 and Order F06-11, 2006 CanLII 25571 (BC IPC) at para 77.

and the third parties. Given that some of the disputed information is the personal information of the applicant, this circumstance weighs in favour of disclosing it.

Conclusion, s. 22(1)

[110] To summarize, I find that most of the information being withheld under s. 22(1) qualifies as the personal information of several individuals, including multiple third parties and the applicant. I find that none of the circumstances in s. 22(4) apply to any of this personal information.

[111] I find that most, but not all, of the personal information in dispute is subject to the presumption against disclosure in s. 22(3)(d) since it relates to the employment and occupational history of third parties. Some of this information was recorded in the context of occupational performance or history of the third parties. However, I find that s. 23(3)(g) does not apply here since this section only applies to evaluations of a third party and does not apply to evaluations of the applicant.

[112] Having considered the relevant circumstances under s. 22(2), I find that s. 22(2)(a) is not a circumstance that favours disclosing the withheld information because disclosure would only subject the activities of an individual to public scrutiny as opposed to the activities of the Ministry. I find s. 22(2)(f) is a circumstance weighing in favour of withholding some of the information as third parties would have some expectation that the information they provided would not be shared other than for the specified purpose of evaluating the applicant's work performance.

[113] Some of the personal information is the personal information of the applicant, and the applicant would have likely known some of the personal information of third parties. These are circumstances weighing in favour of disclosure.

[114] After considering the circumstances noted above, I conclude that the presumption against disclosure under s. 23(3)(d) has not been rebutted. I find that disclosure of some of the personal information in dispute would constitute an unreasonable invasion of multiple third parties' personal privacy.

[115] Lastly, I do not consider it would be reasonable under s. 4(2) that the third-party personal information could be severed and the rest of the information disclosed.¹¹¹ I find the information that is not third-party personal information

¹¹¹ Under s. 4(2), if excepted information can reasonably be severed, an applicant has the right of access to the remainder of the information.

consists of disconnected headings (e.g. email heading and date¹¹² and title and column description of the spreadheads and class list¹¹³). In my view, this information cannot be reasonably severed from the records as the result would be meaningless without the surrounding text and context.¹¹⁴

Summary of the applicant's personal information, s. 22(5)

[116] Under s. 22(5)(a), the Ministry must give a summary of personal information supplied in confidence about the applicant unless the summary cannot be prepared without also disclosing the identity of a third party who supplied that information. Neither party addressed whether s. 22(5) applies in this matter.

[117] I am not satisfied that any of the information supplied in confidence about the applicant can be summarized without revealing the identities of the third parties who supplied the information. In my view, given that the applicant would know the identities of some of the third parties involved, summarizing the information would allow the applicant to infer the specific information that each third party provided. Consequently, I find that the Ministry is not required to provide the applicant with a s. 22(5) summary of any personal information about the applicant.

CONCLUSION

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

1. Subject to item 5 below, I confirm the Ministry's decision to refuse to disclose the information withheld under s. 13 of FIPPA.
2. I confirm the Ministry's decision to refuse to disclose the information withheld under s. 14 of FIPPA.
3. The Ministry is not authorized to refuse to disclose the information withheld under s. 15 of FIPPA.
4. Subject to item 5 below, I confirm the Ministry's decision to refuse to disclose the information withheld under s. 22 of FIPPA.

¹¹² Information located on pp 65-67 of the records at issue.

¹¹³ Information located on pp 68-74 of the records at issue.

¹¹⁴ For similar reasoning Order F21-19, 2021 BCIPC 24 (CanLII) at para 47.

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5. Ministry is authorized or required to withhold, under ss. 13, 14 and 22, the information I have highlighted in green on pages 3-6, 9, 11, 17, 42, 44, 46, 51-53, 56-58, 59, 65-74, 77-78, 84-85, 86, 87-101, 109, 110, 119, 123, 127-129, 133-136, 153-155, 172, 223, 267, 268, 292, 351, 359, 362, 363-365, 366-370, 372-373, 375-376, 377, 381, 384, 385, 387, 396, 397, 408 of the copy of the responsive documents which will be provided to the Ministry along with this order. I require the Ministry to give the applicant access to the information that I have found it is not authorized or required to withhold.
 6. The Ministry must copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages it sends to the applicant in compliance with item 5 above.

[119] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by June 18, 2024.

May 6, 2024

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-86646