Order F24-52

MINISTRY OF ATTORNEY GENERAL

D. Hans Hwang
Adjudicator

June 19, 2024

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Summary: An applicant requested the Ministry of Attorney General (Ministry) provide access to records relating to his criminal prosecution. The Ministry provided responsive records withholding some information under several exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act*. The adjudicator determined the Ministry properly applied s. 14 (solicitor-client privilege) to withhold the information at issue. The adjudicator determined that the Ministry was required to withhold all the information in dispute, which was provided for the adjudicator's review, under s. 22(1) (unreasonable invasion of third-party personal privacy). The adjudicator also found that the Ministry was not authorized under s. 16(1)(b) (harm to intergovernmental relations) to withhold the disputed information. Given the Ministry did not provide some records to which it applied ss. 15(1)(g) (exercise of prosecutorial discretion) and/or 22(1), the adjudicator ordered the Ministry, under s. 44(1)(b), to produce these records for the purpose of adjudicating these issues on the merits.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 14, 15(1)(g), 16(1)(b), 22(1), 22(2)(a), 22(2)(c), 22(2)(f), 22(3)(a), 22(3)(b), 22(3)(d), 22(4), 44(1)(b) and Schedule 1 (Definitions).

INTRODUCTION

[1] An individual (applicant) requested certain records relating to his criminal prosecution from the Ministry of Attorney General (Ministry) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry provided 416 pages of responsive records to the applicant but withheld some information in those records under ss. 14 (solicitor-client privilege), 15(1)(g) (exercise of prosecutorial discretion), 16(1)(b) (harm to intergovernmental relations) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The applicant requested 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.

[2] Concurrent with providing its submissions in this inquiry, the Ministry reconsidered its severing decisions and released additional information to the applicant.[1] Only the information which remains severed is at issue in this inquiry.

ISSUES AND BURDEN OF PROOF

[3] The issues I must decided in this inquiry are the following: [2]

1. Is the Ministry authorized to refuse to disclose the information at issue under ss. 14, 15(1)(g) and 16(1)(b)?

2. Is the Ministry required to refuse to disclose the information at issue under s. 22(1)?

[4] Under s. 57(1), the Ministry, which is the public body in this case,[3] has the burden of proving that the applicant does not have right of access to the information withheld under ss. 14, 15(1)(g) and 16(1)(b).

[5] 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.

DISCUSSION

Background

[6] The British Columbia Prosecution Service (BCPS) of the Ministry conducts prosecutions of offences in British Columbia pursuant to the *Crown Counsel Act*.[4]

[7] Crown counsel are lawyers with the BCPS who are authorized under s. 4(3) of the *Crown Counsel Act* to decide whether to prosecute offences and to conduct the prosecutions (Crown Counsel).

[8] The applicant was charged under the *Criminal Code*, and several Crown Counsel were involved with, and had conduct of, the prosecution at various stages. Ultimately, there was no trial because the applicant pled guilty.[5]

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[1] Affidavit #1 of the Information Access and Privacy Coordinator who is also Crown counsel with the BCPS (Privacy Coordinator) at para 7.
[2] From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.
[3] For the definition of "public body" see Schedule 1 of FIPPA.
[4] R.S.B.C. 1996, c. 87.
[5] Affidavit #1 of Privacy Coordinator at paras 10-15.

[9] The applicant seeks access to records relating to his criminal prosecution conducted by Crown Counsel.

Information at issue

[10] The information at issue is on approximately 126 of pages that consist of emails, letters, medical records, and documents related to the applicant's prosecution.

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.[6] The Ministry is relying on legal advice privilege to withhold information from some of the records in dispute.[7]

[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);[8]

2. entail the seeking or giving of legal advice; and

3. are intended by the solicitor and client to be confidential.[9]

[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.[10]

[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.[11]

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[6] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.
[7] Ministry's initial submission at para 63.
[8] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 (CanLII), at para 83.
[9] *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at p. 837.
[10] *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.
[11] 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.

Evidentiary basis for solicitor-client privilege

[15] 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 affidavit evidence from a crown prosecutor with the BCPS. She is also the Information Access and Privacy Coordinator (Privacy Coordinator).

[16] The applicant's submission does not address the Ministry's assertion of s. 14.

[17] 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. That approach is warranted due to the importance of solicitor-client privilege to the proper functioning of the legal system.[12]

[18] After a preliminary review of the Ministry's submissions and the Privacy Coordinator's affidavit, I determined that the Ministry had not provided a sufficient evidentiary basis for me to make a decision about the claim of solicitor-client privilege respecting information withheld from several records. Therefore, I provided the Ministry an opportunity to submit additional evidence in support of its privilege claim over this information.[13] The Ministry provided further submissions and a second affidavit from the Privacy Coordinator.[14]

[19] After reviewing the additional submissions and affidavit, I have determined that I now have sufficient evidence to decide whether s. 14 applies.

[20] The Privacy Coordinator attests that she has more than 20 years of criminal prosecution experience and knowledge of the matters as both a crown prosecutor and an information access and privacy coordinator with the BCPS. The Privacy Coordinator also attests that she reviewed the applicant's prosecution file and all the records.

[21] As an administrative tribunal, OIPC is not bound by strict rules of evidence and it is open to me accept sworn evidence and belief as opposed to first-hand knowledge in some cases.[15] While the Privacy Coordinator was not included in

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[12] Order F19-14, 2019 BCIPC 16 (CanLII) at para 10; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.
[13] OIPC letter dated March 13, 2024.
[14] Ministry's additional submissions dated April 10, 2024; Affidavit #2 of Privacy Coordinator.
[15] Order F21-15, 2021 BCIPC 19 at para 65, citing Order F20-16, 2020 BCIPC 18 at para 10; Order P07-01, 2007 CanLII 44884 (BC IPC) at para 59 citing *Cambie Hotel (Nanaimo) Ltd. (c.o.b.*

the communications from which the Ministry withheld information under s. 14, I am satisfied that she has personal knowledge of the records. Further, I accept that the Privacy Coordinator, as a lawyer and an officer of the court, has a professional duty to ensure that privilege is properly claimed.[16]

[22] As a result, I conclude that the Ministry's evidence provides a sufficient basis for me to assess its assertion of solicitor-client privilege.[17]

Analysis and findings

[23] Based on the Ministry's evidence, I find the Ministry is refusing to disclose the information under s. 14 from:

1. communications between Crown Counsel and the Vancouver Police Department (VPD) (VPD Communications);[18]

2. communications between Crown Counsel, communications between Crown Counsel and their assistants,[19] and information contained in Crown Counsel notes[20] (Crown Communications); and

3. communications between Crown Counsel and Ministry of Children and Family Development (MCFD) employees (MCFD Communications).[21]

[24] For the reasons that follow, I am satisfied that legal advice privilege applies to the information at issue.

VPD Communications

[25] The Ministry says that one of Crown Counsel's roles is to provide legal advice to police about criminal investigations and the evidence gathered in those investigations. The Ministry says that Crown Counsel and the VPD were in

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Cambie Hotel) v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2006 BCCA 119.

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

[17] See for similar reasoning *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.

[18] Pages 64-65, 97-98, 100-107 and 166 of the records at issue.

[19] Pages 8-9, 14, 84-85, 87, 89, 162-164, 167-168, 247, 410-412 and 414-415 of the records at issue.

[20] Pages 1, 4, 7, 26, 55-56, 73-74, 75-77, 79, 80-82, 83, 86, 88, 90-91, 165, 169-172, 184-185, 196-201, 210-213, 267, 391-394 and 416 of the records at issue.

[21] Pages 27-31, 33-36 and 37-43 of the records at issue. In Affidavit #1 of Privacy Coordinator, she attests the Crown Communications contain information withheld from pages 37-43 of the records at issue; however, she attests, in Affidavit #2, information withheld from pages 37-43 fall within the MCFD Communications. Therefore, I consider the Ministry is withholding this information from the MCFD Communications.

solicitor-client relationship. Therefore, the VPD Communications are privileged communications.[22]

[26] The courts have upheld that it is of importance that police officers are able to obtain professional legal advice in connection with criminal investigations without the potential disclosure of their confidences in subsequent proceedings.[23]

[27] However, a solicitor-client relationship is not automatically established between a crown prosecutor and a police officer. The courts have found that not everything done by a government lawyer attracts solicitor-client privilege.[24] Deciding whether the communication between a crown prosecutor and a police officer is protected by solicitor client privilege needs to be decided on a case-by-case basis.[25] Therefore, whether or not solicitor-client privilege attaches depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.[26]

[28] Having considered the above principles, I am satisfied that legal advice privilege applies to the VPD Communications for the reasons that follow.

[29] Based on the Privacy Coordinator's affidavit evidence, I am satisfied that Crown Counsel was acting as a solicitor for their client, the VPD. The affidavit evidence sufficiently demonstrates that Crown Counsel provided legal advice to the VPD. The Privacy Coordinator says that the disputed information is about Crown Counsel's legal advice on the investigation into the applicant's criminal offence and the investigation was ongoing throughout the prosecution. She says the disputed information includes information that Crown Counsel and VPD shared in order to inform and facilitate the provision of the legal advice. Also, I accept the Privacy Coordinator's evidence that Crown Counsel and the VPD intended to keep this information confidential.[27]

[30] As a result, I am satisfied that disclosure of the information withheld from the VPD Communications would reveal confidential communications between Crown Counsel and the VPD for the purposes of seeking, formulating or giving legal advice. Therefore, the VPD Communications may be withheld under s. 14.

Crown Communications

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[22] Ministry's initial submission on para 74.
[23] *R v Creswell* 2000 BCCA 583 at para 32; *R. v. Campbell,* 1999 CanLII 676 (SCC), [1999] 1 SCR 565, at para 49, citing *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, at p. 289.
[24] *R. v. Aitken*, 2008 BCSC 744 (CanLII), at para 4, citing *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565.
[25] *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, at para 50.
[26] *Descôteaux v. Mierzwinski*, 1982 CanLII 22; *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565 at para 50.
[27] Affidavit #1 of Privacy Coordinator at para 32.

[31] The Crown Communications are not direct communications between solicitor and client. They are a collection of handwritten notes of Crown Counsel and communications (i.e., emails, letters and instant messages) between Crown Counsel and between Crown Counsel and their assistants.

[32] The Privacy Coordinator says that the purpose of the Crown Communications was to manage, prepare for, and conduct the applicant's prosecution. The Privacy Coordinator says that Crown Counsel used these notes and communications to inform and facilitate the provision of legal advice to the VPD in the VPD Communications. She also says that Crown Counsel intended these records to be confidential.[28]

[33] It is well established that communications between lawyers who are working together to provide legal advice to a client fall within the scope of a communication between a legal advisor and client.[29] I am satisfied this principle applies to the Crown Communications as Crown Counsel worked together on the provision of legal advice to the VPD.

[34] As for the communication between Crown Counsel and their assistants,[30] the Supreme Court of Canada has stated that the solicitor-client relationship extends to those who professionally assist lawyers in providing or preparing legal advice.[31] I accept the Privacy Coordinator's evidence that communications between Crown Counsel and their assistants were used to inform and facilitate the provision of legal advice to the VPD.[32]

[35] I conclude that disclosing the Crown Counsels' notes, Crown Counsels' communications amongst themselves and their communications with their assistants occurred for the purpose of informing and facilitating legal advice to the VPD, their client. Therefore, I find that disclosing the Crown Communications would reveal information that is protected by legal advice privilege and it may be withheld under s. 14.

MCFD Communications

[36] Based on the Ministry's evidence, I find that the MCFD Communications fall within three distinct categories:

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[28] Affidavit #1 of Privacy Coordinator at paras 30 and 33.
[29] Order F20-16, 2020 BCIPC 18 at para 65, citing *Shuttleworth v Eberts* et. al., 2011 ONSC 6106 at paras 67 and 70-71; *Weary v Ramos*, 2005 ABQB 750 at para 9.
[30] Pages 84, 89, 162-164, 410-412 and 414-415 of the records at issue.
[31] *Descoteaux et al. v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at pp. 872-873; see also Order F19-33, 2019 BCIPC 36 (CanLII) at para. 23.
[32] Affidavit #1 of Privacy Coordinator at para 33.

1. An initial chain of emails between MCFD social workers and two Crown Counsel (Crown Counsel A and B) (First Email Chain);[33]

2. A subsequent chain of emails between Crown Counsel A and B that includes the First Email Chain (Second Email Chain);[34]

3. A third chain of emails between a MCFD social worker and Crown Counsel A and B that includes the First Email Chain (Third Email Chain).[35]

[37] The Ministry submits that the First Email Chain contains sensitive personal information and confidentiality notices, and the Second Email Chain contains discussions between Crown Counsel A and B about the sensitive, confidential information provided in the First Email Chain. The Ministry also submits that the Third Email Chain consists of the First Email Chain and one additional email that the MCFD sent to Crown Counsel A and B respecting the subject matter discussed in the two previous email chains.[36]

[38] The Ministry submits that information withheld from the MCFD Communications relates to Crown Counsel preparing legal strategy for the applicant's prosecution.[37] The Ministry submits this information reveals the legal services provided by Crown Counsel to the Crown, therefore, it falls within the ambit of solicitor-client privilege.[38] To support this, the Privacy Coordinator provides the following evidence:

- The MCFD Communications reflect legal services that Crown Counsel provided to the Crown.[39] The Crown Counsel involved in the MCFD Communications were providing legal services necessary to conduct the criminal prosecution on behalf of the Crown. They were fulfilling their statutory mandate under s. 4 of the *Crown Counsel Act* to represent the Crown before the British Columbia court in relation to the prosecution of the applicant's offence.
- In the MCFD Communications, Crown Counsel A and B seek information from an MCFD social worker relating to the applicant's prosecution and the social worker provides the requested information. [40]

[33] Appears on pages 27-31, 34-36 and 39-43 of the records at issue.
[34] Pages 37-43 of the records at issue
[35] Page 27-31 of the records at issue.
[36] Ministry's additional submission at paras 7, 9 and 13.
[37] Ministry's additional submission at paras 15-16.
[38] Ministry's additional submission at paras 18 and 31.
[39] Affidavit #2 of Privacy Coordinator at paras 21-22.
[40] Affidavit #1 of Privacy Coordinator at para 34; Affidavit #2 of Privacy Coordinator at para 9. In Affidavit #1, the Privacy Coordinator attests "Crown Counsel" seeks information from the MCFD; in Affidavit #2, she clarifies two crown prosecutors (A and B) involved in the MCFD Communications.

- All the MCFD Communications would reveal the Crown's confidential legal advice and strategy.[41]
- In the Second Email Chain, Crown Counsel A and B discuss the information provided by the MCFD social worker and strategize about how to best prepare for an upcoming court hearing in the applicant's criminal prosecution. That legal strategy relates to the determination of appropriate next steps to take in the criminal prosecution based on the information obtained from the MCFD and other relevant details known to Crown Counsel.[42]
- Crown Counsel A and B share legal advice with one another as they were working together on the same file.[43]

[39] I am satisfied that disclosing the information withheld from the MCFD Communications would reveal privileged communications between lawyers who are working together to provide legal advice to a client.[44]

[40] Section 2 of the *Crown Counsel Act* states that the Criminal Justice Branch of the Ministry approves and conducts, on behalf of the Crown, all prosecutions of offences in British Columbia as well as advises the government on all criminal law matters.[45] In conducting prosecutions, the Attorney General, as represented by Crown Counsel, is in a different position from the ordinary litigant because the Attorney General represents the public interest of the community at large.[46] Numerous cases have spoken of the fundamental duty of Crown Counsel to respect their obligations to be independent from those who may have an interest in the prosecution and how important this is to the proper operation of the rule of law.[47]

[41] In this case, Crown Counsel A and B were working together on the applicant's prosecution and representing the interest of the Crown (i.e. British Columbia).[48] I am satisfied that Crown Counsel, as a solicitor, conducted the prosecution on behalf of British Columbia, a client, whose public interest is

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[41] Affidavit #2 of Privacy Coordinator at paras 19 and 22.
[42] Affidavit #2 of Privacy Coordinator at paras 17-18.
[43] Affidavit #2 of Privacy Coordinator at paras 18-19.
[44] Order F20-16, 2020 BCIPC 18 at para 65, citing *Shuttleworth v Eberts* et. al., 2011 ONSC 6106 at paras 67 and 70-71; *Weary v Ramos*, 2005 ABQB 750 at para 9.
[45] As set out in Background section, the British Columbia Prosecution Service (BCPS) of the Criminal Justice Branch conducts prosecutions of offences in British Columbia pursuant to the *Crown Counsel Act*, and Crown Counsel are lawyers with the BCPS, who are authorized to decide whether to prosecute offences and to conduct the prosecutions under s. 4(3) of the *Crown Counsel Act.*
[46] *Skogman v. The Queen*, 1984 CanLII 22 (SCC), p 109.
[47] For example, *Krieger v. Law Society of Alberta*, 2002 SCC 65 at paras 29-30. See also, *R. v. Regan*, 2002 SCC 12 at paras 156-157; *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337.
[48] Section 1 "Definition" of the *Crown Proceeding Act*, RSBC 1996 c. 89 defines "Crown" as Her Majesty the Queen in right of British Columbia.

represented in the proceedings. I accept that the MCFD Communications contain communications between Crown Counsel who were strategizing about how best to provide legal services for their client, the Crown. As explained above, communications between lawyers who are working together to provide legal advice to a client fall within the scope of a communication between a legal advisor and client.[49] I am satisfied that this principle applies to the Second Email Chain, and the first requirement of the legal test is met for the information withheld from that record.

[42] Turning to whether the disputed information entails seeking or giving of legal advice, I am satisfied that in the Second Email Chain, Crown Counsel A and B discussed information about the applicant's prosecution provided in the First Email Chain and they developed legal strategies based on that information. As a result, disclosing information withheld from the Second Email Chain would reveal privileged communications between Crown Counsel.

[43] On their face, the First Email Chain and the Third Email Chain are not communications between solicitor and client. However, the First Email Chain contains information which Crown Counsel used to develop their legal advice and legal strategies. Further, the Third Email Chain contains the subject matter discussed in the previous email chains. In my view, disclosing the First and Third Email Chains would reveal or allow an accurate inference about Crown Counsel's legal advice. As a result, I find these email chains cannot be disclosed without risk of privileged legal advice being revealed.

[44] I find that the Second Email Chain was only shared between Crown Counsel A and B and the rest of the email chains were only shared between Crown Counsel and the MCFD social workers who were involved in the communications. I am satisfied the Ministry's affidavit evidence establishes that the senders and recipients on these emails communicated on a confidential basis.[50] There is nothing to suggest that they did not remain confidential.

[45] As a result, I conclude that legal advice privilege applies to the MCFD Communications.

Disclosure harmful to intergovernmental relations, s. 16(1)(b)

[46] Section 16 authorizes public bodies to refuse access to information if disclosure would be harmful to intergovernmental relations. The parts of s. 16 relevant to this inquiry are as follows:

[49] Order F20-16, 2020 BCIPC 18 at para 65, citing *Shuttleworth v Eberts* et. al., 2011 ONSC 6106 at paras 67 and 70-71; *Weary v Ramos*, 2005 ABQB 750 at para 9.
[50] Affidavit #2 of Privacy Coordinator at paras 16 and 19.

> 16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
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> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
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> (i) the government of Canada or a province of Canada;
>
> …
>
> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies …

[47] The Ministry has applied s. 16(1)(b) to withhold a record that contains information from the Canadian Police Information Centre database (CPIC).[51] In support of the Ministry's argument, the Privacy Coordinator says that CPIC is a database controlled by the Royal Canadian Mounted Police (RCMP) and Crown Counsel received the CPIC information from the VPD who accessed the database.[52]

[48] The applicant's submission does not address the Ministry's application of s. 16(1)(b).

[49] For the reasons that follow, I find that the s. 16(1)(b) does not apply to the information in dispute.

[50] Section 16(1)(b) applies to information whose disclosure could reasonably be expected to harm the relations between the government of British Columbia and the government of Canada or another provincial government. In order for s. 16(1)(b) to apply, a public body must establish two things: (1) disclosure would reveal information it received from a government, council or organization listed in s. 16(1)(a) or one of their agencies, and (2) the information was received in confidence.[53]

[51] The Ministry says that Crown Counsel received the disputed information in confidence from the VPD who originally received that information from the RCMP.[54] While the Ministry explains the RCMP is an agency of the government of Canada,[55] the Ministry has not explained whether the VPD is a government or an agency within the meaning of s. 16(1). In support of its s. 16(1) arguments, the Ministry is relying on Order F17-56 in which the Delta Police Department was asked for access under FIPPA to information it had received directly from the RCMP. However, the facts here are not like Order F17-56 as the Ministry of the

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[51] Page 173 of the records at issue; Ministry's submission at para 81.
[52] Affidavit #1 of Privacy Coordinator at para 35.
[53] Order 02-19, 2002 CanLII 42444 (BC IPC), para 18; Order 331-1999, 1999 CanLII 4253 (BCIPC) at pp 6-9.
[54] Ministry's initial submission at paras 81-82; Affidavit #1 of Privacy Coordinator at para 35.
[55] Ministry's initial submission at para 82, relying on Order F17-56, 2017 BCIPC 61 at paras. 81-96.

Attorney General, the public body in this inquiry, did not directly receive the disputed information from the RCMP, but received it from the VPD.

[52] Therefore, whether the VPD qualifies as a government, a council or an organization, or one of their agencies under s. 16(1)(a), is an essential element of establishing s. 16(1)(b) applies here. As mentioned, the Ministry did not explain. Therefore, I am not persuaded that the VPD falls into any of the categories of government listed in s. 16(1)(a) or their agency.

[53] I conclude that s. 16(1)(b) does not apply to the information at issue.

Exercise of prosecutorial discretion, s. 15(1)(g)

[54] There was some overlap between the Ministry's application of ss. 14 and 15(1)(g) to the records. Where I have already decided the Ministry may refuse access to information under s. 14, I will not consider whether it may also refuse access under s. 15(1)(g).[56]

[55] Section 15(1)(g) authorizes a public body to refuse to disclose information that could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. Schedule 1 of FIPPA defines the term "exercise of prosecutorial discretion" as follows:

> "exercise of prosecutorial discretion" means the exercise by
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> (a) Crown counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act,* including the duty or power
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> (i) to approve or not to approve a prosecution,
> (ii) to stay a proceeding,
> (iii) to prepare for a hearing or trial,
> (iv) to conduct a hearing or trial,
> (v) to take a position on sentence, and
> (vi) to initiate an appeal.

[56] Prosecutorial discretion ensures the independence of Crown Counsel in conducting criminal prosecution.[57] The Courts have said that prosecutorial discretion is a necessary part of a properly functioning criminal justice system and it advances the public interest by allowing prosecutors to fulfil their professional obligations without fear of judicial or political interference.[58]

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[56] The information that I am considering under s. 15(1)(g) is on pages 2, 62-63, 66-71, 72, 78, 154-156, 157-160, 161, 174, 175, 176, 177, 178, 186-195, 202-203, 204-209, 214-219, 220-221, 241-243, 244-245, 248, 249-253, 254-261, 262-266, 272-276, 277-298, 299-303, 304-308, 309-318, 319, 320, 321, 322-325, 326, 327, 328, 329-332, 348-350, 408-409, 413.
[57] *R. v. Anderson*, 2014 SCC 41, [2014] 2 SCR 167 at para 44.
[58] *R v. Anderson,* 2014 SCC 41 at para 37.

[57] The courts have explained that prosecutorial discretion is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it".[59] The courts have provided the following examples of the types of decisions that fall into the scope of prosecutorial discretion:

- whether to bring the prosecution of a charge laid by police;
- whether to enter a stay of proceedings in either a private or public prosecution;
- whether to accept a guilty plea to a lesser charge;
- whether to withdraw from criminal proceedings altogether; and
- whether to take control of a private prosecution.[60]

Evidentiary basis for the s. 15(1)(g) decision

[58] The Ministry did not provide me with a copy of the information it withheld under s. 15(1)(g). The Ministry says the following about why I should decide without looking at the information:

> As explained above, prosecutorial discretion privilege is a cornerstone of the criminal justice system. It safeguards constitutional principles. Like solicitor-client privilege, prosecutorial discretion privilege has been recognized as a principle of fundamental justice under s. 7 of the *Charter*. It is not merely an evidentiary rule. For these reasons, prosecutorial discretion privilege and solicitor-client privilege belong in the same category and should be treated similarly under FIPPA and in OIPC inquiries. Given the significance of prosecutorial discretion privilege, the Ministry respectfully declines to infringe the privilege by voluntarily providing the Section 15(1)(g) Records to the OIPC for review.
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> Further, it is not absolutely necessary in this case for the OIPC to review the Section 15(1)(g) records to decide whether s. 15(1)(g) applies to them. The Ministry's submissions and affidavit evidence alone are more than sufficient to decide that s. 15(1)(g) applies to the information in the Section 15(1)(g) Records. Therefore, the Ministry respectfully submits that a s. 44(1)(b) order is not warranted here.[61]

[59] The applicant's submission does not address the Ministry's decision not to provide the records for my review.

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[59] *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para 47.
[60] *R v. Anderson* 2014 SCC 41 at paras 40 and 44 citing *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 and *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566.
[61] Ministry's initial submission at paras 43-44, citing *Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.*, 2022 BCSC 272 at para 19, which discusses the quasi-constitutional protection afforded to solicitor-client communications and the importance of that privilege to the integrity of the legal system.

[60] For the reasons that follow, I have found that I cannot decide s. 15(1)(g) without reviewing the records and have decided to order the Ministry to produce the records for which it is claiming prosecutorial discretion.

[61] What the Ministry says does not persuade me that the principles the Courts have expressed about solicitor-client privilege apply equally to the exercise of prosecutorial discretion. As discussed above, the exercise of prosecutorial discretion protects the independence of Crown Counsel in conducting criminal prosecution. Solicitor-client privilege protects other values. Solicitor-client privilege protects a broad range of communications between a lawyer and their client, and the Courts have said that the concept at the heart of solicitor-client privilege is that people must be able to speak candidly with their lawyers to enable their interests to be fully represented.[62]

[62] The courts have said the following about disclosure of information protected under solicitor-client privilege:

- compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege;[63]
- solicitor-client privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction;[64] and
- solicitor-client privilege will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis.[65]

[63] There is no question that solicitor-client privilege is protected as an important civil and legal right and a principle of fundamental justice. This privilege applies to communications between a solicitor and their client; therefore clients have a right to keep these communications confidential. The courts have repeatedly explained why solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary, including by a privacy commissioner.[66] The Ministry cited no case law where the courts have said the same about information that relates to the exercise of prosecutorial discretion and a privacy commissioner's ability to review such information. I was also unable to find any past OIPC order where an

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[62] *R. v. McClure*, 2001 SCC 14 (CanLII) at para 2.
[63] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 at para 35.
[64] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 SCR 809, at para 17.
[65] *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445 at para 35.
[66] For example: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 at para 35; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 SCR 809, at para 17; *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445 at para 35.

adjudicator decided that it is appropriate to decide whether s. 15(1)(g) applies in the absence of the records.

[64] Having considered these circumstances, it is clear that prosecutorial discretion and solicitor-client privilege have different purposes and protect different values, and they have not been treated the same by the courts. Given this, I am not persuaded that information withheld under prosecutorial discretion warrants the same treatment in this inquiry as information withheld under solicitor-client privilege.

[65] Deciding whether a FIPPA exception to disclosure applies requires the Commissioner conduct an independent, line-by-line review of the disputed information. As discussed above, the only time this does not occur is in the context of s. 14 because the courts have cautioned against reviewing records for which a claim of solicitor-client privilege has been made. I do not think it would be appropriate to decide s. 15(1)(g) without seeing the information in dispute.

[66] Additionally, the Ministry has applied s. 15(1)(g) to several different types of records in their entirety. They are a police file summary, disclosure notices, general occurrence reports, an accused's history report, a jail report, an interview transcript, reports to Crown Counsel and attachments, the VPD notes provided to Crown Counsel, communications between Crown Counsel and their administrative staff and communications between Crown Counsel and a defence counsel.[67] In my view, I need to review this information in detail in order to decide whether s. 15(1)(g) applies.

[67] As a result, I consider it necessary and appropriate to order the Ministry to produce to me the records containing the information it asserts is excepted from disclosure under s. 15(1)(g). For clarity, this does not include the information that I found above the Ministry may refuse to disclose under s. 14.

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

[68] The Ministry applies s. 22(1) to some information to which it also applied s. 15(1)(g).[68] Since the Ministry did not provide this information for my review, I cannot decide whether s. 22(1) applies to that specific information. Therefore, I have only decided if s. 22(1) applies to the information that I can see in the records the Ministry provided for my review.[69]

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[67] Tab 3, Table of Records.
[68] Pages 66-71, 78, 154-156, 157-160, 186-195, 202-203, 204-209, 214-219, 220-221, 241-243, 248, 249-253, 254-261, 262-266, 272-276, 277-298, 299-303, 304-308, 309-318, 319, 320, 321, 322-325, 326, 327, 328 of the records at issue.
[69] Pages 5-6, 10, 12, 13, 18, 19, 20, 21, 23, 24, 46, 47, 48, 58, 59, 94-96, 99, 110-128, 131-153, 180, 181, 183, 227, 228, 231-235, 238-240, 269, 271, 334, 336, 337, 339, 340, 341, 343, 344, 346, 352, 353, 355, 356, 360-361, 363-364, 366-367, 370-372, 374, 379-382, 385-386, 389, 390, 395 of the records at issue.

[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.[70] Past BC orders have considered the application of s. 22, and I will apply those same principles here.[71]

Personal information

[70] 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.[72]

[71] 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."[73] 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.[74]

[72] The Ministry says that the information contained in the records is about identifiable individuals (e.g., applicant's family members, VPD police officers and Crown witnesses).[75]

[73] The applicant makes no submissions about s. 22(1).

[74] Based on my review of the records, I am satisfied that the information withheld by the Ministry under s. 22(1) and provided for my review 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. I find some of the personal information is withheld from records prepared by the applicant.[76] This information is about the applicant and several third parties, so it is simultaneously personal information of the applicant and personal information of the third parties. None of the information is just the applicant's personal information.

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[70] 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.
[71] See, for example, Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.
[72] *Ibid*.
[73] Definition, Schedule 1 of FIPPA.
[74] Order F19-13, 2019 BCIPC 15 at para 16, citing Order F18-11, 2018 BCIPC 14 at para 32.
[75] Ministry's initial submission at para 89.
[76] Pages 10, 269 and 271 of the records at issue.

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

[75] The next 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). 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).

[76] The Ministry submits that none of the s. 22(4) circumstances apply here.

[77] 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)

[78] 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.

[79] The Ministry submits that disclosing the information at issue is presumed to be an unreasonable invasion of third-party personal privacy because some of it relates to a medical history of a third party under s. 22(3)(a),[77] some is information compiled as part of an investigation under s. 22(3)(b),[78] and some is a third party's employment history under s. 22(3)(d).[79]

Medical, psychiatric or psychological history, s. 22(3)(a)

[80] 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.

[81] The Ministry submits that some of the disputed information is medical information that contains medical history, diagnosis, condition, treatment and evaluation respecting a third party.

[82] I can see that some of the personal information is contained in hospital records and medical examination reports. This information clearly relates to a third party's medical history, diagnosis, condition, or treatment.[80] I am satisfied that s. 22(3)(a) applies to this information and disclosure is presumed to be an unreasonable invasion of the third-party's personal privacy.

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[77] Ministry's initial submission at para 95.
[78] Ministry's initial submission at para 97.
[79] Ministry's initial submission at para 100.
[80] Pages 110-128 and 131-153 of the records at issue.

Part of an investigation into a possible violation of law, s. 22(3)(b)

[83] Section 22(3)(b) applies to personal information that was complied and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation. For the purposes of s. 22(3)(b), the term "law" refers to a statute or regulation enacted by, or under the statutory authority of, the Legislature, Parliament or another legislature and where a penalty or sanction could be imposed for violation of that law.[81]

[84] The Ministry submits that some of the information in dispute was withheld in the records relating to an investigation against the applicant. The Ministry says the investigation was an ongoing process of compiling evidence to support the charge against the applicant and was clearly an "investigation into possible violation of law" within the meaning of s. 23(3)(b).[82]

[85] Having reviewed the Ministry's evidence and records in dispute, I find it is apparent that the VPD investigated if the applicant had committed a crime under the *Criminal Code*, and Crown Counsel approved the charge against him.[83] I am satisfied that personal information about third parties was complied in the criminal investigation. As a result, I conclude that s. 22(3)(b) applies to some of the third-party personal information in dispute[84] and disclosure of this information is presumed to be an unreasonable invasion of the third parties' personal privacy.

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

[86] Section 22(3)(d) creates a presumption against disclosing personal information related to a third party's employment, educational or occupational history.

[87] The Ministry submits that s. 22(3)(d) applies to information withheld from curriculum vitae of the Crown expert witnesses (CVs) and information withheld from a letter because this information contains third parties' employment history, work status and education.[85]

[88] I find that the CVs contain information about the witnesses' education, professional training, employment history, publications, and research experiences, and the information withheld from the letter is about third parties'

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[81] Order 01-12, 2001 CanLII 21566 (BC IPC) at para 17.
[82] Ministry's initial submission at paras 98-99.
[83] Affidavit #1 of Privacy Coordinator at para 40.
[84] Pages 12, 13, 18, 21, 22-24, 46, 47, 48, 58-59, 94-96, 180-181, 183, 227, 228, 231, 232, 233, 234, 235, 238, 239, 240, 334, 336-337, 339, 340-341, 343-344, 346, 352-353, 355-356, 360-361, 363-364, 366-367, 379-382, 385, 386, 389, 390, 395 of the records at issue.
[85] Ministry's initial submission at paras 101-102.

employment and education. Therefore, disclosure of this personal information[86] is presumed to be an unreasonable invasion of these third parties' personal privacy.

Relevant circumstances, s. 22(2)

[89] 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.

[90] The Ministry submits ss. 22(2)(a), (c) and (f) are relevant. Additionally, the Ministry submits that the following factors are also relevant to consider: the applicant's knowledge of some of the information, the fact that some of the information is his personal information, the sensitivity of the information, and the fact that this kind of information would only be disclosed when the recipient is under an implied undertaking of confidentiality.

Public scrutiny, s. 22(2)(a)

[91] 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.[87]

[92] The Ministry submits that s. 22(2)(a) is not a factor that is in favour of disclosure in this inquiry.[88]

[93] Past OIPC orders have found that one of the purposes of s. 22(2)(a) is to make public bodies more accountable.[89] Therefore, for s. 22(2)(a) to apply, the disclosure of the specific information at issue must be desirable for subjecting a public body's activities to public scrutiny, as opposed to subjecting an individual third party's activities to public or private scrutiny.[90]

[94] In this case, I find disclosure of the information in dispute is not desirable for subjecting the Ministry or another public body's activities to public scrutiny. I find that the third parties' personal information here is very specific to several

[86] Pages 10, 94-96 and 131-134 of the records at issue.
[87] Order F05-18, 2005 CanLII 24734 at para 49.
[88] Ministry's initial submission at para 106.
[89] Order F18-47, 2018 BCIPC 50 (CanLII) at para 32.
[90] Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.

individuals and disclosure would provide no value in allowing the public to scrutinize the Ministry's activities. In my view, that information is solely about those individuals and it does not have broader significance.

Fair determination of an applicant's rights, s. 22(2)(c)

[95] Section 22(2)(c) provides that a relevant circumstance is whether the personal information is relevant to a fair determination of the applicant's rights.

[96] The Ministry submits s. 22(2)(c) is not a factor that is in favour of disclosure in this inquiry as the applicant's rights had already been fairly determined.[91]

[97] I am satisfied that fair determination of the applicant's rights is not a factor that weighs in favour of disclosure of the disputed third-party information. Section 22(2)(c) applies where the personal information is relevant to a fair determination of the applicant's rights in a legal proceeding that is contemplated or is actually underway. The applicant has not identified any such proceeding here.

Supplied in confidence, s. 22(2)(f) and implied undertaking of confidentiality

[98] 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.[92]

[99] The Ministry submits that s. 22(2)(f) applies because the third-party personal information was supplied in confidence to the Crown for the specific purpose of assisting with the prosecution.[93]

[100] The Ministry acknowledges that the Crown Counsel disclosed some personal information to the applicant in accordance with its *Stinchcombe* obligations in the applicant's prosecution.[94] Despite this, the Ministry says that the personal information remains confidential because it was subject to an implied undertaking of confidentiality by the applicant, which continues to apply. Therefore, the Ministry says that this information should still be considered to be "supplied in confidence" for the purpose of s. 22(2)(f) and disclosure of

[91] Ministry's initial submission at paras 107-108.
[92] 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).
[93] Ministry's initial submission at paras 111.
[94] This is in reference to the Supreme Court of Canada's decision in *R. v. Stinchcombe*, [1991] 3 SCR 326 in which the court established Crown Counsel's obligation to disclose all relevant records in their prosecution.

information in the criminal prosecution does not require disclosure under FIPPA.[95]

[101] I accept the Ministry's evidence that in the course of the applicant's prosecution, personal information of several third parties was supplied in confidence to Crown Counsel, the defence and the court.[96] This information is about MCFD employees, doctors, individuals who provided character references for the applicant and potential witnesses in the criminal prosecution that never went to trial.[97]

[102] I accept that Crown Counsel received the third parties' personal information for the purpose of the criminal prosecution and treated it as confidentially supplied by being careful not to disclose it unless required to do so under *Stinchcombe* obligations and then only with the protection of an implied undertaking by the person receiving it.

[103] As a result, I conclude the disputed information[98] was supplied in confidence. This is a circumstance that weighs in favour of withholding the personal information.

Applicant's knowledge

[104] While not enumerated in s. 22(2), previous orders have found that a relevant circumstance under s. 22(2) is the fact that an applicant knows or is aware of the personal information in issue. It may or may not favour disclosure, depending on the case.[99]

[105] The Ministry submits while the applicant likely already knows the disputed personal information either through disclosure from the Crown Counsel during the criminal proceedings or through his own experiences with the third parties, the applicant's existing knowledge does not weigh in favour of disclosure. The Ministry submits that it would be an unreasonable invasion of the third parties' personal privacy to disclose their personal information because disclosure under FIPPA is presumed to be disclosure to the world.[100]

[106] I find that the applicant's pre-existing knowledge is relevant. I can see that the applicant already knew some of the personal information in dispute. For

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[95] Ministry's initial submission at para 112.
[96] Affidavit #1 of Privacy Coordinator at paras 38-39.
[97] Pages 46-47 (duplicate on pp 370-371), 48, 99, 58-59, 110-118 and 131-153 of the records at issue.
[98] For clarity, this is the information withheld under s. 22 from the responsive records that the Ministry provided for my review.
[99] See, for example, Order 03-24, 2005 CanLII 11964 (BC IPC); Order F10-41, 2010 BCIPC No. 61.
[100] Ministry's initial submission at paras 113-114.

example, there is information withheld from documents the applicant prepared and provided to Crown Counsel or submitted to the court in the criminal proceedings.[101] Therefore, this is a circumstance weighing in favour of disclosing that information.

Applicant's personal information

[107] Previous orders have considered whether the disputed information is the applicant's personal information as a relevant circumstance weighing in favour of disclosure.[102]

[108] The Ministry says this factor does not weigh in favour of disclosure as the disputed information is the joint personal information of the applicant and third parties or a third party's sole personal information.[103]

[109] I find some of the personal information of third parties is simultaneously personal information of the applicant[104] because it is about his interactions with other people. While normally an applicant is entitled to their own personal information, the fact that I find it is inextricably combined with someone else's personal information is a circumstance weighs against disclosing the applicant's personal information to him.

Sensitivity

[110] Sensitivity is not a circumstance listed in s. 22(2), however past orders have said that where information is sensitive, it is a circumstance weighing in favour of withholding the information. Conversely, where information is not sensitive, this weighs in favour of disclosure.[105] I find sensitivity is a relevant circumstance to consider in this case.

[111] The Ministry submits that the personal information in dispute relates to family violence and some of the information is about a child victim and evidence and medical records about him. The Ministry says this information is clearly sensitive and these circumstances weigh in favour of withholding this information.[106]

[112] I am satisfied that that some information withheld from the records at issue is about the third parties' well-being, background, or health condition. Specifically, I accept the Privacy Coordinator's evidence that the information

[101] Pages 10, 269 and 271 of the records at issue.
[102] See, for example, Order F18-30, 2018 BCIPC 33 (CanLII) at para 41; Order F20-13, 2020 BCIPC 15 (CanLII) at para 73.
[103] Ministry's initial submission at para 116.
[104] Page 10, 269 and 271 of the records at issue.
[105] Order F19-15, 2019 BCIPC 17 at para 99; Order F16-52, 2016 BCIPC 58 at para 91.
[106] Ministry's initial submission at para 118.

relates to family violence and likely contains personal information about third parties who are the child victim and witnesses.[107] In my view, the sensitive nature of the information in dispute weighs heavily against disclosure.

Summary and conclusion, s. 22(1)

[113] I find that all the disputed information the Ministry withheld under s. 22 is personal information of third parties.[108] I find a small amount of the personal information is simultaneously personal information of the applicant.

[114] I find none of the circumstances in s. 22(4) apply here. Section 23(3)(a) presumption against releasing personal information about medical history applies to some of the information. I also find that s. 22(3)(b) applies to some of the third parties' personal information because it was complied and is identifiable as part of an investigation into a possible violation of law. Further, s. 23(3)(d) presumption against releasing personal information about employment, occupational, or educational history applies to some of the third-party personal information.

[115] I find that personal information of third parties was supplied to the Ministry in confidence. Crown Counsel treat it as being confidential information that must be kept in confidence and the only exception is when it is disclosed as required during the criminal proceedings with the condition of an implied undertaking (and when breaches of the undertaking can be dealt with by the Court). Therefore, s. 22(2)(f) weighs against disclosure. Also, the sensitivity of the personal information weighs against disclosure.

[116] I find that the applicant's existing knowledge weighs in favour of disclosure. Further, although some of the information is the applicant's personal information and usually that weighs in favour of disclosure, in this case it does not because his personal information is simultaneously third parties' personal information.

[117] In conclusion, I find that disclosing the third-party personal information would be an unreasonable invasion of the third parties' personal privacy. The Ministry must refuse to disclose this information under s. 22(1).

[118] As set above, the Ministry did not provide some of the information withheld under s. 22(1) for my review.[109] As explained in paragraph 65 above, deciding whether a FIPPA exception to disclosure applies requires the Commissioner

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[107] Affidavit #1 of Privacy Coordinator para 39.
[108] For clarity, this is the information withheld under s. 22 from the responsive records that the Ministry provided for my review.
[109] Pages 66-71, 78, 154-156, 157-160, 186-195, 202-203, 204-209, 214-219, 220-221, 241-243, 248, 249-253, 254-261, 262-266, 272-276, 277-298, 299-303, 304-308, 309-318, 319, 320, 321, 322-325, 326, 327, 328 of the records at issue.

conduct an independent, line-by-line review of the information in dispute. The only time this does not occur is in the context of s. 14. Without being able to review the disputed information, I cannot make a decision on whether the Ministry is required to refuse to disclose the information under s. 22(1). Therefore, I conclude it is necessary and appropriate to order the Ministry to produce that information for my review so I can decide whether s. 22(1) applies. For clarity, this does not include the information that I found above the Ministry may withhold under s. 14.

CONCLUSION

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

1. I confirm the Ministry's decision to refuse to disclose information under s. 14 of FIPPA.

2. The Ministry is not authorized to refuse to disclose the information at issue under s. 16(1)(b), and it is required to give the applicant access to this information.

3. The Ministry is required, under s. 22(1) of FIPPA, to refuse to disclose the information at issue on pages 5-6, 10, 12, 13, 18, 19, 20, 21, 23, 24, 46, 47, 48, 58, 59, 94-96, 99, 110-128, 131-153, 180, 181, 183, 227, 228, 231-235, 238-240, 269, 271, 334, 336, 337, 339, 340, 341, 343, 344, 346, 352, 353, 355, 356, 360-361, 363-364, 366-367, 370-372, 374, 379-382, 385-386, 389, 390, 395 of the responsive records.

[120] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with paragraph 119, item 2, above by **August 1, 2024**.

[121] Under s. 44(1)(b), the Ministry is required to produce to me pages 2, 62-63, 66-71, 72, 78, 154-155, 157-160, 161, 174-178, 186-195, 202-203, 204-209, 214-219, 220-221, 241-243, 244-245, 248, 249-252, 254-261, 262-265, 272-276, 277-298, 299-302, 304-308, 309-310, 312-318, 319, 320, 321, 322-324, 326, 327, 328, 329-331, 348-350, 408-409, 413 of the records so I can decide if ss. 15(1)(g) and 22(1) apply. Under s. 44(3), the Ministry must produce these records by **July 4, 2024**. For added clarity, I am not ordering the Ministry to produce the information that I found it may refuse to disclose under s. 14.

June 19, 2024

ORIGINAL SIGNED BY

D. Hans Hwang, Adjudicator

OIPC File No.: F21-85628