Order F24-93

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

David S. Adams
Adjudicator

November 8, 2024

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Summary: An applicant requested information about himself from the Ministry of Children and Family Development (Ministry). The Ministry disclosed the responsive records, but withheld some information in them under various sections of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and the *Child, Family and Community Service Act* (CFCSA). The adjudicator found that s. 3(3)(a) of FIPPA (records to which FIPPA does not apply) did not apply. The adjudicator found that ss. 77(1) (identity of a person who made a child protection report) and 77(2)(b) (information supplied in confidence during an assessment or investigation) of the CFCSA applied to most, but not all, of the information the Ministry withheld under those sections. The adjudicator found that the Ministry properly applied s. 14 of FIPPA (solicitor-client privilege), and that the Ministry was required to withhold most, but not all, of the information it withheld under s. 22 of FIPPA (unreasonable invasion of a third party's personal privacy). The adjudicator ordered the Ministry to give the applicant access to the information it was not authorized or required to refuse to disclose.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 3(3)(a), 3(7), 4(2), 14, 15(1)(l), 22(1), 22(2), 22(2)(a), 22(2)(e), 22(2)(f), 22(2)(g), 22(3)(a), 22(3)(d), 22(4), 22(4)(c), 22(4)(e), 22(5); *Child, Family and Community Service Act*, RSBC 1996 c 46, ss. 13, 14, 16(2)(b.1), 16(2)(c), 74, 77(1), 77(2)(b) 79(b); *Family Law Act*, SBC 2011 c 25, s. 41; *Interpretation Act*, RSBC 1996 c 238, s. 1 definitions of "Act", "enactment", and "regulation".

INTRODUCTION

[1] In 2022, an applicant requested information about himself from the Ministry of Children and Family Development (the Ministry). The Ministry had been involved with, and provided services to, his family. The Ministry disclosed the responsive records, but withheld some information in them under various

sections of the *Freedom of Information and Protection of Privacy Act* (FIPPA)[1] and the *Child, Family and Community Service Act* (CFCSA).[2]

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information. Mediation did not resolve the outstanding issues and the applicant requested that the matter proceed to this inquiry. At the inquiry, the OIPC approved the Ministry's request to add the application of s. 3(3)(a) as an issue. Both parties provided written submissions and supporting evidence.

ISSUES AND BURDEN OF PROOF

[3] The issues I must decide in this inquiry are:

1. Whether some of the records are excluded from the scope of FIPPA by s. 3(3)(a);

2. Whether the Ministry must withhold information under s. 77(1) of the CFCSA;

3. Whether the Ministry may withhold information under s. 77(2)(b) of the CFCSA;

4. Whether the Ministry may withhold information under s. 14 of FIPPA;

5. Whether the Ministry must withhold information under s. 22(1) of FIPPA; and

6. Whether the Ministry may withhold information under s. 15(1)(l) of FIPPA.

[4] Previous orders have established that the Ministry has the burden of establishing that records are excluded from the scope of FIPPA under s. 3(3)(a).[3] The Ministry also has the burden of establishing that ss. 77(1) and 77(2)(b) of the CFCSA apply.[4]

[5] Under s. 57(1) of FIPPA, the Ministry has the burden of establishing that ss. 14 and 15(1)(l) of FIPPA apply.

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[1] RSBC 1996 c 165.
[2] RSBC 1996 c 46.
[3] Order F23-109, 2023 BCIPC 125 (CanLII) at para 5; Order F15-61, 2015 BCIPC 67 (CanLII) at para 7.
[4] Order F21-35, 2021 BCIPC 43 (CanLII) at paras 20-22; Order F23-15, 2023 BCIPC 18 (CanLII) at para 7.

[6] Under s. 57(2), the applicant has the burden of establishing that the disclosure of personal information withheld under s. 22(1) would not be an unreasonable invasion of third-party personal privacy. However, it is up to the Ministry to establish that the information it withheld under s. 22(1) is personal information.[5]

DISCUSSION

Background[6]

[7] The CFCSA is the legislative framework governing the Ministry's provision of services, including child protection services, to families.[7] The CFCSA provides, in s. 2, that it must be interpreted and administered so that the safety and well-being of children are the paramount considerations.

[8] The CFCSA defines "director" as a person designated by the minister. Section 92(1) provides that subject to the CFCSA regulations, a director can delegate any or all of their duties, powers, or functions under the CFCSA. The director delegates the provision of child protection services to child protection social workers.[8]

[9] The applicant and his now-ex-spouse have two children together. They separated in 2020. Also in 2020, the Ministry became involved with the family and provided child protection services. There were also civil and family law proceedings between the ex-spouses.

[10] In June 2022, the applicant made the access request for records in the Ministry's possession which mention him.

Records and information at issue

[11] The responsive records total 568 pages; the Ministry has withheld information on approximately 230 of those pages.

[12] The responsive records consist of the documents in the applicant's Ministry case file. The withheld information consists of portions of Ministry case notes, notes of interviews with third parties, and portions of various other documents.

[13] In some instances, the Ministry withheld the same information under more than one section of FIPPA and/or the CFCSA. In going through my analysis, if I

[5] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.
[6] The information in this section is drawn from the parties' submissions and evidence.
[7] Affidavit of Social Worker at paras 5-7.
[8] Ministry's initial submission at paras 24-25.

found that one exception to access applied, I did not consider the other cited exception(s).

Scope of FIPPA – Court records – s. 3(3)(a)

[14] Section 3(3)(a) of FIPPA provides that FIPPA does not apply to "a court record". The relevant parts of s. 3 say as follows:

> **3** (1) Subject to subsections (3) to (5), this Act applies to all records in the custody or under the control of a public body, including court administration records.
>
> …
>
> (3) This Act does not apply to the following:
>
> (a) a court record

[15] The Ministry says that s. 3(3)(a) applies to exclude the application of FIPPA to two versions of a draft affidavit in a family court proceeding involving the applicant and his ex-spouse.[9] The draft affidavit was provided by the ex-spouse to the Ministry, with the intention of consulting the Ministry on its proposed contents. The Ministry believes a version of the affidavit was filed in the proceeding, but it cannot verify whether it is the same as one of the draft versions.[10]

[16] The applicant does not make a submission on the application of s. 3(3)(a).

Analysis and conclusions on s. 3(3)(a)

[17] FIPPA does not define "court record", and few orders have considered the meaning of that term. The Ministry points out that the OIPC has interpreted this phrase to mean "a record relating to a court proceeding," and that the draft affidavit fits comfortably within that definition.[11]

[18] Section 3(3)(a)'s predecessor section, the former s. 3(1)(a), provided that FIPPA did not apply to "records in a court file". In analyzing the meaning of that phrase, former Commissioner Flaherty concluded that it referred only to records actually located in a court's file.[12]

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[9] At pages 301-310 and 458-467 of the records package.
[10] Ministry's initial submission at paras 38-40; Affidavit of Social Worker at para 30.
[11] Ministry's initial submission at para 40, citing Order F23-70, 2023 BCIPC 83 (CanLII) at para 32.
[12] Order 234-1998, 1998 CanLII 3535 (BC IPC); see also Order 01-27, 2001 CanLII 21581 (BC IPC) at paras 9-14.

[19] In 2011, the Legislature amended this section to say that FIPPA did not apply to "a court record". In Order F23-70, the adjudicator considered the meaning of the amendment and concluded:

> It is reasonable to infer that the Legislative Assembly would not have changed the term "a record in a court file" to "a court record" without an intention to affect its meaning…This intention to expand the types of records s. 3(1)(a) and now s. 3(3)(a) apply to is also evident from the removal of the words that limited where the records must be located, i.e., "in a court file". This provides greater certainty that the term court records [is] not meant to only apply to court records in the custody or under the control of the courts but also to court records located elsewhere.
>
> Therefore, I am satisfied that the Legislature intended to expand the types of records to which FIPPA does not apply to include court records even when those records [are] not physically located in the court but [are] in the hands of a public body.[13]

[20] The adjudicator considered the meaning of "court record" in some detail. He applied to the modern rule of statutory interpretation and concluded that the grammatical and ordinary meaning of "court record" was a record relating to court proceedings.[14] I adopted this reasoning and conclusion in Order F23-109.[15]

[21] In Order F23-70, the records to which the public body sought to apply s. 3(3)(a) consisted of a search warrant issued by the Provincial Court, a sealing order signed by a justice of that court, and an information package filed with the court in order to obtain the search warrant.[16] In my Order F23-109, the subject record was a set of reasons for judgment issued by the Provincial Court.[17] In both cases, the records at issue fit comfortably into a common-sense definition of "court record" because they were records issued by or filed with the court. Here, however, while the draft versions of the affidavit were prepared for a court proceeding, they were not filed with a court, nor were they issued by a court.

[22] The Supreme Court of Canada has affirmed that the "basic rule of statutory interpretation is that 'the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'".[18]

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[13] Order F23-70, *supra* note 11 at paras 30-31.
[14] *Ibid* at para 23.
[15] Order F23-109, *supra* note 3 at paras 41-42.
[16] Order F23-70, *supra* note 11 at paras 10 and 34-35.
[17] Order F23-109, *supra* note 3 at paras 11 and 42.
[18] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para 36, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at 67; *R. v. Breault*, 2023 SCC 9 at para 25.

[23] Following this rule, for the reasons that follow I find that the proper interpretation of "court record" is narrower than "record relating to a court proceeding".

[24] I consider the definitions used by BC courts helpful in ascertaining the grammatical and ordinary meaning of "court record". For example, the BC Supreme Court's *Policy on Access to the Court Record* defines "court record" in this way:

> "Court record" means the documents in the court file, as well as information about the court proceeding stored by the court. In addition to things that form part of the court file, the following are examples of things that may form part of the court record in a proceeding:
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> - audio recordings of court proceedings;
> - the court clerk's log notes of court proceedings;
> - orders granted by the court;
> - reasons for judgment;
> - records of orders made or granted by the Court, and supporting or related documents; and
> - exhibits.
>
> The court record does not include judges' bench books, scheduling documents, or internal court documents.[19]

[25] The *Record and Courtroom Access Policy* of the BC Court of Appeal, meanwhile, defines "court record" non-exhaustively as follows:

> For greater certainty, the court record includes anything on or by which information is stored that relates to proceedings before the Court of Appeal. The court record includes, but is not limited to:
>
> - records filed [with] or sent to the court;
> - records of the court or tribunal under appeal;
> - orders made or granted by the court, and supporting or related documents, such as reasons for judgment;
> - scheduling or other internal court records, such as those used for case management or through case tracking systems;
> - lower court transcripts filed for an appeal;
> - audio recordings of court proceedings, and
> - clerks' notes from court proceedings.[20]

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[19] Supreme Court of British Columbia, *Policy on Access to the Court Record*, 2022 at 7. Accessed October 22, 2024: https://www.bccourts.ca/supreme_court/media/BCSC_Court_Record_Access_Policy.pdf.

[20] Court of Appeal for British Columbia, *Record and Courtroom Access Policy*, 2024 at 5. Accessed October 22, 2024

[26] In light of these definitions, I conclude that the grammatical and ordinary meaning of "court record" for the purposes of FIPPA includes a record that is generated by or filed with a court, such as an order, a set of reasons, or a filed affidavit. Accordingly, FIPPA does not apply to these kinds of records, regardless of where they are located.

[27] Furthermore, FIPPA's purposes, as set out in s. 2, include making public bodies more accountable to the public by giving the public a right of access to records and specifying limited exceptions to this right of access. If s. 3(3)(a) applied to any record that relates in some way to court proceedings, irrespective of whether they were issued by or filed with a court, it would unnecessarily limit the right of access under FIPPA. Such a broad interpretation of s. 3(3)(a) would mean that there would be no right of access under FIPPA to records in the custody or under the control of public bodies simply because at some point, and in another context, the record was relevant to, or was used in, court proceedings.

[28] To summarize, in my view, the legislature intended the former s. 3(1)(a) to apply to records issued by or filed with a court and held in a court file, and it amended the section to broaden this exemption so it would apply to the same types of records wherever they may be located.

[29] Considering all this, I do not think either version of the unfiled draft affidavit is a "court record" within the meaning of s. 3(3)(a). These draft affidavits were not filed with the court, nor were they issued by the court. Therefore, FIPPA applies and gives the applicant a right of access to these unfiled draft affidavits, subject to any applicable exceptions. The Ministry also applied s. 22(1) to refuse access to these draft affidavits, so I will consider them below under that section.

***The Child, Family and Community Service Act (CFCSA)*[21]**

[30] The Ministry is relying on ss. 77(1) and 77(2)(b) of the CFCSA to withhold information in several other records. Sections 73 to 80 of the CFCSA deal with how the CFCSA interacts with FIPPA. In particular, s. 74 provides that ss. 74 to 79 apply despite FIPPA.

Identity of a person who has made a child protection report – CFCSA s. 77(1)

[31] Section 77(1) protects from disclosure the identity of a person who has made a child protection report to a director under s. 14 of the CFCSA. It provides:

> A director must refuse to disclose information in a record to a person who has a right of access to the record under [FIPPA] if the disclosure could

https://www.bccourts.ca/Court_of_Appeal/practice_and_procedure/record_and_courtroom_access_policy/PDF/Court_of_Appeal_Record_and_Courtroom_Access_Policy.pdf.

[21] RSBC 1996, c 46.

> reasonably be expected to reveal the identity of a person who has made a report under section 14 of [the CFCSA] and who has not consented to the disclosure.

[32] Section 14 requires a person who has reason to believe a child needs protection under s. 13 to "promptly report the matter to a director or a person designated by a director". Section 13 sets out a list of circumstances where a child needs protection.

Parties' positions on s. 77(1)

[33] The Ministry says it is clear on the face of the records that the withheld information could reasonably be expected to reveal the identities of people who have made reports under s. 14 of the CFCSA. It also says that the applicant is a central figure in the events described in the reports, and could use his knowledge of the events to identify reporters whose identities might not be clear to a third party.[22]

[34] Apart from his arguments about the effect of a court order that he says requires disclosure (the Court Order), which I will discuss below, the applicant does not say anything specifically about the application of s. 77(1) of the CFCSA.[23]

Analysis and conclusions on s. 77(1)

[35] Non-disclosure is the default position in the s. 77(1) analysis: unless there is evidence that a person who made a report consents to the disclosure of their identity, the director must refuse to disclose it.[24] There is also no weighing of competing access and privacy concerns, as there is under s. 22(1) of FIPPA.[25]

[36] The information withheld under s. 77(1) consists of parts of reports made to the Ministry, or summaries or compilations of those reports made by Ministry staff.

[37] On my review of the records, I am satisfied that most of the information the Ministry withheld under s. 77(1) would reveal, directly or indirectly, the identity of a person who made a child protection report under s. 14. In most cases, I agree with the Ministry that this is clear on the face of the records. The withheld information includes the reporters' names and other identifying details. There is also some information in the reports that would indirectly reveal a reporter's

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[22] Ministry's initial submission at paras 57-60.
[23] Applicant's response submission at paras 21-22.
[24] Order F21-35, 2021 BCIPC 43 (CanLII) at paras 116-124; Order F23-15, 2023 BCIPC 18 (CanLII) at para 18.
[25] Order F23-15, *supra* note 4 at para 19; Order F21-35, *supra* note 4 at para 130.

identity to the applicant. This is because the reports describe incidents in which the applicant himself was involved. If the details of the reports were disclosed, the reporters' identities would, in my view, be unmistakable to the applicant.

[38] However, I find that s. 77(1) does not apply to a small amount of information the Ministry withheld under that section.[26] The Ministry does not adequately explain, and I am unable to tell, how this specific information could reasonably be expected to reveal any person's identity. This information consists of administrative details like page numbers, biographical information about the applicant himself, generic descriptions of events, and a conclusion reached by a Ministry staff member that, I find, could not reasonably be expected to reveal the identity of a reporter.

[39] In summary, I find that s. 77(1) applies to most, but not all, of the information the Ministry refused to disclose under that provision.

Information supplied in confidence during an assessment or investigation – CFCSA s. 77(2)(b)

[40] Section 77(2)(b) of the CFCSA protects information supplied in confidence during an assessment or investigation. It says:

> A director may refuse to disclose information in a record to a person who has a right of access to the record under [FIPPA] if
>
> …
>
> (b) the information was supplied in confidence, during an assessment under section 16(2)(b.1) or an investigation under section 16(2)(c) [of the CFCSA], by a person who was not acting on behalf of or under the direction of a director.

[41] Section 16(2) sets out what a director may do on receiving a child protection report. In part, it provides that a director may conduct an assessment of the family (s. 16(2)(b.1)) or investigate the child's need for protection (s. 16(2)(c)).

[42] In order for s. 77(2)(b) to apply, there must be evidence showing all of the following:

1. The information must have been provided to the Ministry by a person who was not acting on behalf of or under the direction of a director;

[26] Namely, the information withheld at the bottom of page 359 of the records package, some of the information withheld at the top and bottom of page 360, the middle of page 411, the middle of page 433, the first piece of information withheld on page 497, most of the information withheld on page 498, and the information withheld at the top of page 499.

2. The information must have been provided in the course of an assessment under s. 16(2)(b.1) or an investigation under s. 16(2)(c); and

3. The information must have been supplied in confidence.[27]

Parties' positions on s. 77(2)(b)

[43] The Ministry says that the information it withheld under s. 77(2)(b) was supplied by outsiders during an investigation or assessment. It says that the content of the information itself, as well as the context in which the information was supplied, establish that it was supplied in confidence.[28]

[44] The Ministry also says that s. 77(2)(b) does not involve a weighing of competing privacy and access concerns, so the applicant's knowledge of, or even possession of copies of, the withheld information is not relevant to the s. 77(2)(b) analysis.[29]

[45] To support the Ministry's argument, the Social Worker deposes that the Ministry was conducting both an assessment (under s. 16(2)(b.1)) and an investigation (under s. 16(2)(c)) of the applicant's family at the time the information was supplied, and that the two processes were, as is normally the case, "related and overlapping". She says the withheld information was sought by the Ministry from people who had contact with the family.[30]

[46] The Social Worker also deposes that it is her practice, as well as the practice of other Ministry social workers, who interview collateral sources of information in the course of an assessment or investigation, to advise the source that the information they provide will be treated confidentially by the Ministry.[31]

[47] The applicant does not say anything specifically about the application of s. 77(2)(b).

Analysis and conclusions on s. 77(2)(b)

[48] The information withheld under s. 77(2)(b) consists of letters, emails, and notes of interviews conducted by Ministry staff with third parties.

[49] I find that that most of the information withheld under s. 77(2)(b) was supplied by persons who were not acting on behalf of or under the direction of a director. In addition, while some of the withheld information consists of messages

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[27] Order F21-35, *supra* note 4 at para 134.
[28] Ministry's initial submission at paras 63-65.
[29] *Ibid* at para 66.
[30] Affidavit of Social Worker at paras 21-24.
[31] *Ibid* at paras 26-27.

generated by Ministry employees, I find that the messages consist of information supplied to them by persons who were not acting on behalf of or under the direction of a director in the course of an assessment or investigation.

[50] However, I find that some of the information withheld under s. 77(2)(b) was not supplied to the Ministry, so s. 77(2)(b) does not apply. For instance, some of the information was clearly generated by a Ministry employee acting on behalf of a director, and reflects the employee's observations and conclusions rather than information supplied by outsiders.[32] Some other information appears to have been generated automatically by the Ministry's systems, and in any event does not appear to have been supplied by a person not acting on behalf of a director.[33]

[51] I accept the Ministry's submissions and evidence that it was engaged in an assessment under s. 16(2)(b.1) and/or an investigation under s. 16(2)(c) when the information withheld under s. 77(2)(b) was collected. The applicant has not challenged this claim, and I can readily infer from the circumstances, and from the contents of the withheld information, that such actions were underway.

[52] As for whether the information that was supplied was supplied in confidence, given the context and the content of the information withheld under s. 77(2)(b), and without revealing the withheld information itself, I have no difficulty concluding that it was. I therefore find that the information that was supplied to the Ministry may be withheld under s. 77(2)(b).

[53] In summary, I find that s. 77(2)(b) applies to most, but not all, of the information the Ministry refused to disclose under that provision.

Effect of applicant's court order on application of CFCSA

[54] The applicant provided me with a copy of the Court Order, which is an order of the BC Supreme Court made in 2023 in a family law matter involving him and his ex-spouse.[34] He says that the Court Order supersedes ss. 77(1) and 77(2)(b), and gives him a right to the withheld information that is about his children.[35]

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[32] Namely, the first piece of information withheld on page 272 of the records package, some of the information withheld in the middle of page 353, most of the information withheld on pages 355 and 356, a small amount of the information withheld on page 357, most of the information withheld on page 358, and the first piece of information withheld on page 499.
[33] Some of the information withheld on page 352 of the records package.
[34] The applicant also provided a 2021 order which says: "The Claimant [the applicant's ex-spouse] shall be permitted to solely exercise all parental responsibilities in respect of the Children under section 41 of the *Family Law Act* with the exception that both guardians shall be permitted to request information from third parties including caregivers, medical professionals, counselors, and the like."
[35] Applicant's response submission at paras 21-22.

[55] The applicant relies on s. 79(b) of the CFCSA in support of this position. That section provides that a director may, without the consent of any person, disclose information obtained under the CFCSA if the disclosure is required by an order of a court in Canada to be made to a party to a proceeding.

[56] The relevant parts of the Court Order say as follows:

> 2. The Claimant [the applicant's ex-spouse], and the Respondent [the applicant], are joint guardians of the Children.
>
> …
>
> 5. The Claimant [the applicant's ex-spouse] and the Respondent [the applicant] shall both be entitled to exercise the following section 41 parental responsibility under section 40(2) of the *Family Law Act*:
>
> > j. requesting and receiving from third parties health, education or other information respecting the children [of the applicant and his ex-spouse].

[57] The Ministry says in reply that the Court Order does not compel third parties to provide information at the applicant's request. It says that the Order is not an order requiring disclosure to be made to a party to a proceeding, as contemplated by s. 79(b) of the CFCSA.[36]

[58] In my view, the Court Order does not override ss.77(1) or (2)(b) of the CFCSA. I agree with the Ministry that the Court Order does not require the Ministry to make a disclosure, and is rather an allocation of parental responsibilities. Without more, I am unable to conclude that it is an order requiring disclosure within the meaning of s. 79 of the CFCSA.

Solicitor-client privilege – FIPPA s. 14

[59] The Ministry is relying on s. 14 of FIPPA to withhold a small amount of information in the Social Worker's notes.[37] Section 14 of FIPPA allows a public body to refuse to disclose information that is subject to solicitor-client privilege. The term "solicitor-client privilege" in s. 14 encompasses both legal advice privilege and litigation privilege.[38] I can readily infer from the Ministry's submission that it is relying on the legal advice privilege branch of solicitor-client privilege, and does not intend to rely on litigation privilege: in its submission, the Ministry sets out the test for legal advice privilege, and does not mention litigation privilege.

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[36] Ministry's reply submission at paras 7-12.
[37] On pages 369-370 of the records package.
[38] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.

Evidentiary basis for solicitor-client privilege

[60] The Ministry did not produce the information it withheld under s. 14 for my review. Instead, it provided affidavits from its legal counsel (the Legal Counsel), who it says provided legal advice, and from the Social Worker, who it says requested and received the legal advice.

[61] When read together, ss. 44(1)(b) and 44(2.1) of FIPPA allow me, as the Commissioner's delegate, to order the production of records over which a public body has claimed privilege. However, because of the importance of solicitor-client privilege to the legal system, I will do so only when production is absolutely necessary to decide the question of privilege.[39]

[62] I find that the Ministry's evidence is a sufficient basis on which to decide whether the withheld information is privileged. The Ministry provided affidavit evidence from both the provider and the recipient of the legal advice it says is contained in the withheld information. The Legal Counsel is a practicing lawyer who has a professional obligation to ensure that privilege is properly claimed, and I am required to give some weight to the judgment of a practicing lawyer when adjudicating claims of solicitor-client privilege.[40] Considering all this, I conclude it is not necessary to order the production of the information the Ministry says is subject to privilege.

Legal advice privilege

[63] Legal advice privilege attaches to communications that are between a solicitor and their client, that entail the seeking or giving of legal advice, and that are intended by the parties to the communication to be confidential.[41] Not every communication between a solicitor and client is privileged merely because it is a communication between those parties, but if the above conditions exist, legal advice privilege applies.[42] Legal advice privilege promotes full and frank disclosure between solicitor and client, thereby promoting "effective legal advice, personal autonomy (the individual's ability to control access to personal information and retain confidences), access to justice and the efficacy of the adversarial process".[43]

[64] In addition to the communications set out above, legal advice privilege also applies to the "continuum of communications" related to the seeking and

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[39] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para 15; Order F19-21, 2019 BCIPC 23 (CanLII) at para 61.
[40] *British Columbia (Ministry of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86.
[41] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837.
[42] *Ibid* at 829.
[43] *College*, *supra* note 38 at para 30.

giving of legal advice, including internal client communications that comment on the legal advice received and its implications.[44]

[65] Furthermore, the expression of an intention to seek legal advice may be privileged if its disclosure would reveal actual confidential communication between solicitor and client (for example, in cases where there is evidence that the public body did in fact seek and receive legal advice about the specific legal issue in the withheld information).[45]

[66] The Ministry says that the withheld information consists of notes that reveal:

- an instruction from one Ministry employee to another to seek legal advice in relation to child protection proceedings involving the applicant;
- a Ministry employee's request to the Legal Counsel for that advice; and
- the advice from the Legal Counsel.

[67] The Ministry says that that all of this information is subject to solicitor-client privilege.[46]

[68] The Legal Counsel deposes that he has been counsel to the Ministry since 2013, and that his role includes providing legal advice to Ministry social workers. He says that he has reviewed the information in the Social Worker's notes, that he recalls having been consulted by Ministry social workers about the child protection matter, and believes he provided, via telephone, the advice referred to on those pages.[47]

[69] The Social Worker deposes that she and her supervisor requested and received advice from the Legal Counsel, and that this advice was intended by the parties to be confidential.[48]

[70] The applicant does not specifically address the application of s. 14.

[71] I am satisfied that the elements of legal advice privilege are made out in this case. The Legal Counsel and the Ministry were in a solicitor-client relationship. The withheld information consists of communications between solicitor and client, or, in the case of the communications between Ministry employees, would reveal the substance of solicitor-client communications. The evidence establishes that these communications were intended to be

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[44] *Bilfinger Berger (Canada) Inc v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras 22-24.
[45] Order F17-23, 2017 BCIPC 24 (CanLII) at paras 49-51; Order F24-31, 2024 BCIPC 38 (CanLII) at paras 27-28.
[46] Ministry's initial submission at paras 124-127.
[47] Affidavit of Legal Counsel at paras 3-7.
[48] Affidavit of Social Worker at paras 9-17.

confidential. The Ministry has therefore established that the withheld information is protected by legal advice privilege, and is authorized to refuse to disclose it under s. 14.

Unreasonable invasion of third-party personal privacy – FIPPA s. 22(1)

[72] Section 22(1) of FIPPA provides that a public body must refuse to disclose personal information whose disclosure would be an unreasonable invasion of a third party's personal privacy.

[73] The OIPC's analytical approach to s. 22(1), which I will apply here, is well established:

> This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[49]

[74] The Ministry says that disclosure of the information it withheld under s. 22(1) would be an unreasonable invasion of various third parties' personal privacy.[50] The applicant makes submissions on several specific subsections of s. 22, which I will discuss below.[51]

Is the information personal information? – s. 22(1)

[75] The first step in any s. 22 analysis is to determine whether the withheld information is personal information. Both "personal information" and "contact information" are defined in Schedule 1 of FIPPA:

> "personal information" means recorded information about an identifiable individual other than contact information;
>
> "contact information" means 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

[49] Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.
[50] Ministry's initial submission at para 76.
[51] Applicant's response submission at paras 12-20.

[76] As I noted above, the Ministry has the burden of proving that the information it seeks to withhold under s. 22(1) is personal information. The information the Ministry withheld under s. 22(1) consists of parts of a variety of documents, including social work notes, names and addresses of third parties, unique identifiers of Ministry employees, parts of a BC Hydro invoice, and the two versions of the draft affidavit discussed above under s. 3(3)(a).

[77] The Ministry says that all the information it withheld under s. 22(1) is the personal information of third parties.[52] The applicant does not make a submission about whether the information is personal information.

[78] I find that almost all of the information the Ministry withheld under s. 22(1) is personal information because it is reasonably capable of identifying particular individuals and it is not contact information. However, I find that the page numbers withheld at the bottom of pages 359 and 360 of the records package are not personal information. There is nothing in this information that could identify an individual, and so it cannot be withheld under s. 22(1).

Not an unreasonable invasion of privacy – s. 22(4)

[79] Section 22(4) sets out circumstances where disclosure of personal information would not be an unreasonable invasion of privacy. In particular, it says:

> A disclosure of personal information is not an unreasonable invasion of a third party's privacy if
>
> …
>
> (c) an enactment of British Columbia or Canada authorizes the disclosure,
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[80] The Ministry submits that no provision of s. 22(4) applies.[53] The applicant submits that s. 22(4)(c) applies to information about his children.[54] In addition, although no party raised it, in my view s. 22(4)(e) may apply to a small amount of the withheld information.

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[52] Ministry's initial submission at paras 77-82.
[53] *Ibid* at para 83.
[54] Applicant's response submission at paras 12-16.

An enactment authorizes disclosure – s. 22(4)(c)

[81] Section 22(4)(c) provides that a disclosure of personal information is not an unreasonable invasion of privacy if an enactment of British Columbia or Canada authorizes the disclosure.

[82] The applicant says that s. 22(4)(c) applies because the Court Order was made pursuant to the *Family Law Act* (FLA), [55] and/or is itself an enactment for the purposes of s. 22(4)(c). He points out that s. 41(j) of the FLA says that parental responsibilities with respect to a child include requesting and receiving from third parties health, education or other information respecting the children. He says that the Court Order assigns these responsibilities jointly to him and his ex-spouse, that any information that exists in the responsive records is held by the Ministry because the Ministry deemed it relevant to its assessment of the children's well-being, and that he should therefore have access to information in the Ministry's custody that relates to the children.[56]

[83] In reply, the Ministry says that the Court Order does not compel a third party to disclose information. It says that s. 41 of the FLA does not override the privacy rights set out in s. 22(1) of FIPPA. It points to s. 3(7) of FIPPA, which says: "If a provision of [FIPPA] is inconsistent or in conflict with a provision of another Act, [FIPPA] prevails unless the other Act expressly provides that it, or a provision of it, applies despite [FIPPA]". It says that the FLA does not have such a provision, so FIPPA prevails.[57]

[84] I am not persuaded by the applicant's argument that the Court Order itself is an enactment. BC's *Interpretation Act*[58] defines "enactment" to mean "an Act or a regulation or a portion of an Act or regulation". An "Act" is defined to mean "an Act of the Legislature, whether referred to as a statute, code or by any other name". The Court Order is clearly not an act of the Legislature, so it is not an "Act". A "regulation" is defined to exclude an order of a court made in the course of an action. The Court Order is an order made after trial. I find it to be an order of a court made in the course of an action, so it is not a "regulation". As a result, I find that the Court Order is not an enactment. Even if I were to find it to be an enactment, it does not direct or authorize the Ministry to do anything with respect to the disclosure of third-party personal information, so it would not be an enactment that authorizes disclosure. It is, rather, an allocation of parental responsibilities between parents.

[85] I can also find no provision of the FLA that directs or authorizes the Ministry to disclose third-party personal information. Furthermore, I can find no

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[55] SBC 2011 c 25.
[56] Applicant's response submission at paras 12-16.
[57] Ministry's reply submission at paras 8-11.
[58] RSBC 1996 c 238, s.1

provision of the FLA (and the applicant does not point to any) that expressly provides that s. 41 of the FLA, or an order made under the FLA, apply despite the provisions of FIPPA. I therefore find that s. 22(1) of FIPPA is not overridden by the Court Order.

[86] Considering all this, I cannot conclude that an enactment authorizes disclosure of any of the personal information, and so I find that s. 22(4)(c) does not apply.

Position, functions or remuneration as public body employee – s. 22(4)(e)

[87] Section 22(4)(e) provides that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions, or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[88] Previous orders have established that s. 22(4)(e) applies to personal information that consists of objective, factual statements about what a third party who is a public body employee said and did in the normal course of discharging their job duties.[59]

[89] I find that a small portion of the information withheld on page 272 is a Ministry employee's name, attached to a collection of collateral information about the applicant's family made by that employee. I also find that a small amount of the information withheld on page 352 describes which Ministry employees created and were assigned to a matter. I find that this information is about what public body employees did in the normal course of their duties, and that s. 22(4)(e) applies to those specific pieces of information. The Ministry cannot withhold them under s. 22(1).

Presumed unreasonable invasion of privacy – s. 22(3)

[90] Section 22(3) sets out circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. In particular, it says:

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> > (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
> >
> > …

[59] Order 01-53, 2001 CanLII 21607 (BC IPC) at para 40.

> (d) the personal information relates to employment, occupational or educational history
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

[91] The Ministry says that subsections (a) and (d) apply to various pieces of withheld information.[60] The applicant does not make a submission about any s. 22(3) provision. While no party raised it, in my view s. 22(3)(f) may apply to a small amount of withheld information.

Medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation – s. 22(3)(a)

[92] The Ministry says that "a considerable amount" of the withheld personal information of various third parties would, if disclosed, reveal those third parties' medical histories, medical appointments, and other medical information.[61]

[93] Without revealing the contents of that information, I agree with the Ministry that disclosure of some of the personal information would reveal third parties' medical history and/or treatment within the meaning of s. 22(3)(a), so that disclosure is presumed to be an unreasonable invasion of privacy.

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

[94] Some of the withheld personal information consists of usernames used by Ministry employees as unique employee identifiers, known as Internal Directory and Authentication Service, or IDIR, usernames. Several previous orders have considered these IDIR usernames and concluded that they may form part of a public body employee's employment history under s. 22(3)(d) because the usernames are a unique combination of letters derived from an employee's name, are assigned to them alone, and are used by them as part of their employment.[62] I agree with and adopt this reasoning, and find that s. 22(3)(d) applies to the IDIR usernames.

Third party's finances – s. 22(3)(f)

[95] As I noted above, some of the withheld information consists of portions of a BC Hydro invoice associated with a named third party. Some, but not all, of the

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[60] Ministry's initial submission at paras 84-90.
[61] *Ibid* at paras 85-86.
[62] See, e.g., Order F24-36, 2024 BCIPC 44 (CanLII) at para 89; Order F21-35, *supra* note 4 at para 189 and the orders cited therein.

withheld portions of the invoice describe the third party's liabilities and financial activities, so I find that disclosure of those portions would be a presumptive unreasonable invasion of that third party's privacy under s. 22(3)(f).

[96] I find that no other s. 22(3) presumptions apply.

Relevant factors – s. 22(2)

[97] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information at issue in light of all relevant circumstances, including those set out in s. 22(2). At this stage, presumptions created by s. 22(3) may be rebutted. Section 22(2) provides, in relevant part:

> In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny;
> > …
> >
> > (e) the third party will be exposed unfairly to financial or other harm;
> >
> > (f) the personal information has been supplied in confidence;
> >
> > (g) the personal information is likely to be inaccurate or unreliable;
> >
> > (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

Subjection of activities of public body to scrutiny – s. 22(2)(a)

[98] The Ministry says that s. 22(2)(a) does not apply to favour disclosure, because disclosure of the withheld information would subject the activities of individual third parties, rather than the Ministry, to public scrutiny.[63]

[99] For s. 22(2)(a) to apply, disclosure of the specific personal information at issue must be desirable for subjecting the public body's activities, as opposed to the activities of individuals, to public scrutiny.[64]

[100] I agree with the Ministry that the withheld information relates primarily to the actions, thoughts, and feelings of individual third parties, and that its

[63] Ministry's initial submission at paras 92-94.
[64] See, e.g., Order F23-110, 2023 BCIPC 126 (CanLII) at paras 51-53.

disclosure would not assist the public in scrutinizing the Ministry's activities. I find that disclosure of the withheld personal information would not add anything to the public's understanding of the Ministry's activities, so that s. 22(2)(a) does not apply.

Unfair exposure to financial or other harm – s. 22(2)(e)

[101] Section 22(2)(e) requires the public body to consider whether disclosure of personal information will unfairly expose a third party to financial or other harm.

[102] The Ministry says that if the withheld personal information is disclosed, it will expose the applicant's ex-spouse and children to harassment by the applicant. It says that the records themselves demonstrate the applicant's harassing behaviour, and that this factor should weigh heavily against disclosure.[65]

[103] Based on my review of the withheld information about the applicant's behaviour, I agree with the Ministry that for much of the withheld personal information, disclosure would expose the applicant's ex-spouse and children to harassment. Previous orders have established that harassment is one of the "other harms" contemplated by s. 22(2)(e).[66] I therefore find that this factor weighs strongly against disclosure for much of the withheld personal information.

Supplied in confidence – s. 22(2)(f)

[104] The Ministry says that much of the withheld information was supplied to it in confidence, so that s. 22(2)(f) is a factor weighing against disclosure. It says that its social workers who receive information from third parties provide the third parties with assurances of confidentiality.[67]

[105] For s. 22(2)(f) to apply, there must be evidence that a third party supplied personal information, and at the time the information was provided, there was an objectively reasonable expectation of confidentiality. [68]

[106] I accept the Social Worker's evidence about the assurances of confidentiality the Ministry gives to third parties. Given the nature of the information and the context in which it was supplied, I have no difficulty in concluding that the withheld personal information that was supplied to the Ministry (for example, in the draft versions of the affidavit) was supplied in an

[65] Ministry's initial submission at paras 95-98.
[66] See, e.g., Order 01-37, 2001 CanLII 21591 (BC IPC) at para 42; Order F24-76, 2024 BCIPC 86 (CanLII) at para 55.
[67] Ministry's initial submission at paras 99-100; Affidavit of Social Worker at para 26.
[68] See, e.g., Order F24-66, 2024 BCIPC 76 (CanLII) at para 82.

objectively reasonable expectation of confidence, and that this is a factor weighing against disclosure of that information.

Likely to be inaccurate or unreliable – s. 22(2)(g)

[107] Section 22(2)(g) states that public bodies must consider whether "the personal information is likely to be inaccurate or unreliable".

[108] The applicant says that some information submitted to the Ministry by individuals he identifies by name is false. He says that these individuals "knowingly" supplied false information to the Ministry, and that this false information is likely to "undermine the function and existence" of the Ministry.[69] I understand the applicant to be arguing that s. 22(2)(g) applies to favour disclosure of some or all of the withheld personal information. In reply, the Ministry says that the applicant's submission on this point consists of unfounded speculation.[70]

[109] I agree with the Ministry's submission. The applicant has provided no evidence or argument beyond the allegation that some individuals supplied false information to the Ministry. On my review of the withheld information itself, I can find no indication that any of it is likely to be inaccurate or unreliable. I therefore conclude that s. 22(2)(g) does not apply in favour of the disclosure of any of the personal information. In any event, even if I found that some of the information was likely to be inaccurate or unreliable, this would be a factor favouring withholding, since s. 22(2)(g) is aimed at preventing harm to third parties that can flow from the disclosure of inaccurate or unreliable information about them.[71]

[110] I now turn to consider the application of relevant factors not listed in s. 22(2).

Applicant's own personal information

[111] While neither party directly addressed this point, I consider whether the withheld personal information is the applicant's own personal information is a relevant factor in the s. 22 analysis. Many previous orders have found that where personal information is the applicant's own, this will weigh in favour of disclosure.[72]

[112] Here, I find that much of the withheld information is the joint personal information of the applicant and one or more third parties. Where this is the case,

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[69] Applicant's response submission at paras 19-20.
[70] Ministry's reply submission at para 14.
[71] Order 01-19, 2001 CanLII 21573 (BC IPC) at para 42.
[72] See, e.g., Order F18-30, 2018 BCIPC 33 (CanLII) at para 41; Order F14-47, 2014 BCIPC 51 (CanLII) at para 36; Order F24-59, 2024 BCIPC 69 (CanLII) at para 138.

I consider it to be a factor favouring disclosure. In addition, some of the withheld personal information is solely the applicant's own personal information. Where the personal information is solely the applicant's, I consider this to be a strong factor favouring disclosure.

Applicant's knowledge

[113] The applicant says that he knows the identities of many of the people who supplied information to the Ministry.[73] Previous orders have considered the applicant's knowledge of disputed information as a relevant circumstance that may weigh in favour of disclosure under s. 22(2).[74]

[114] On my review of the withheld information, I can see that its disclosure would reveal the identities of people who supplied information to the Ministry. Based on his participation in the underlying events, and without revealing the disputed information itself, I am satisfied that the applicant does know the identities of many of the people who supplied information. I find this to be a factor favouring disclosure of much of the personal information.

Sensitivity of information

[115] The Ministry submits that the withheld information itself, and the context in which it was created – in the course of the Ministry's provision of "services to a family regarding very sensitive and very personal matters".[75]

[116] Previous orders have found that the sensitivity of disputed information is a relevant factor under s. 22(2).[76] I find that almost all of the withheld personal information is highly sensitive in nature. In general, the information describes people's dealings with the Ministry in the context of a marital separation and child custody and protection issues. I find that this factor weighs strongly against the disclosure of almost all of the personal information. Meanwhile, I find that the personal information that is solely the applicant's is not particularly sensitive.

Requirement to give applicant a summary – s. 22(5)

[117] Section 22(5) requires a public body withholding information about an applicant under s. 22(1) to give the applicant a summary of the information. It says:

> (5) On refusing, under this section [s. 22], to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless

[73] Applicant's response submission at paras 19-20.
[74] See, e.g., Order F21-08, 2021 BCIPC 12 (CanLII) at para 192.
[75] Ministry's initial submission at paras 101-102.
[76] Order F22-31, 2022 BCIPC 34 (CanLII) at para 87.

> a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information

[118] The applicant points out that the Ministry did not provide such a summary. He says that since he knows the identities of the third parties who supplied information, "concern regarding their identification is moot".[77] The Ministry says that while it withheld some information that is about the applicant, it concluded that it was not possible to create a summary of this information without disclosing the identity of the third parties who supplied the information.[78]

[119] Here, I find that s. 22(5)(a) applies. The applicant was intimately involved in the events to which almost all of the withheld personal information relates. I have no doubt that any summary of the information supplied in confidence to the Ministry would reveal to the applicant who supplied it. Even if the applicant knew the identities of all the third parties who provided personal information to the Ministry, s. 22(5) does not contain an exception for this circumstance. For these reasons, I find that the Ministry was not required to prepare a summary of the personal information about the applicant that was supplied to it in confidence.

Summary and conclusions on s. 22(1)

[120] I have found that most of the information withheld by the Ministry under s. 22(1) is personal information. The Ministry cannot withhold, under s. 22(1), the small amount of information that I have found is not personal information. I have found that s. 22(4)(e) applies to a small amount of the personal information, so that its disclosure is not an unreasonable invasion of privacy, and the Ministry cannot withhold it.

[121] I have found that a presumption of unreasonable invasion of privacy has been raised under ss. 22(3)(a), (d), and (f) with respect to some, but not all, of the withheld information. After considering the relevant factors under s. 22(2) (both listed and unlisted), I conclude that these presumptions have not been rebutted. Therefore, I find that disclosing that information would be an unreasonable invasion of a third party's personal privacy.

[122] As for the information that is not subject to a s. 22(3) presumption, I find that disclosure of most of it would be an unreasonable invasion of third-party personal privacy. For most of this information, the relevant factors, considered together, strongly favour withholding. However, for the small amount of personal information that is solely the applicant's, I have found that the fact that it is his personal information is a factor favouring disclosure and conclude that disclosure would not be an unreasonable invasion of a third party's personal privacy.

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[77] Applicant's response submission at paras 17-18.
[78] Ministry's initial submission at paras 108-110.

[123] To conclude, I have found, with respect to most of the personal information, that the applicant has not met his burden of establishing that its disclosure would not be an unreasonable invasion of third-party personal privacy. The Ministry must withhold most of the information it withheld under s. 22(1), with the exception of the information I have found is not personal information, a small amount of the applicant's personal information, and the information to which I have found s. 22(4)(e) applies.

Harm to the security of a computer system – FIPPA s. 15(1)(l)

[124] Section 15(1)(l) provides that the head of a public body may refuse to disclose information if the disclosure could reasonably be expected to harm the security of any property or system, including a computer system.

[125] The IDIR usernames are the only information the Ministry withheld under s. 15(1)(l). However, because I have found that the Ministry must withhold these IDIR usernames under s. 22(1), there is no need to consider them again under s. 15(1)(l), and I decline to do so.

CONCLUSION

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

1. Subject to item 5 below, I require the Ministry to withhold information under s. 77(1) of the CFCSA;

2. Subject to item 5 below, I confirm the Ministry's decision to withhold information under s. 77(2)(b) of the CFCSA;

3. I confirm the Ministry's decision to withhold information under s. 14 of FIPPA;

4. Subject to item 5 below, I require the Ministry to withhold information under s. 22(1) of FIPPA;

5. I require the Ministry to give the applicant access to the information I have found the Ministry is not required or authorized to withhold. I have highlighted this information in green on pages 272, 352, 359-360, 411, and 433 of the copy of the records which is provided to the Ministry with this order.

6. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 5 above.

[127] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by December 23, 2024, 2024.

November 8, 2024

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

OIPC File No.: F22-91462