Order F26-76

THE BOARD OF EDUCATION OF SCHOOL DISTRICT 08 (KOOTENAY LAKE)

Carol Pakkala
Adjudicator

August 31, 2026

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Summary: An applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The request was for records related to himself and his children. The Board of Education of School District 08 (District) disclosed some responsive records but withheld information in them under various sections of FIPPA. The District also withheld other records in their entirety under s. 14 (solicitor client privilege). The adjudicator found the District was authorized to withhold all of the information and records it withheld under s. 14. The adjudicator also found the District was authorized under s. 13(1), and required under s. 22(1), to withhold all of the information it withheld under those sections.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 13(1), 13(2)(a), 13(2)(n), 14, 22(1), 22(2), 22(2)(a), 22(b), 22(2)(c), 22(2)(e), 22(2)(f), 22(3)(d), 22(4)(e).

INTRODUCTION

[1] An individual (applicant) requested access to records held by the Board of Education of School District 08 (District). The applicant is a current employee of the District and also has children who attended a school operated by the District. The access request is for records related to his relationship with the District as an employee and as a parent.

[2] The District provided the applicant with some responsive records but withheld information in them under ss. 12(3)(b) (local public body confidences), 13(1) (advice or recommendations), 14 (solicitor client privilege), and 22(1) (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[1] The District also withheld another package of responsive records in their entirety under s. 14.

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

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the District's decision.

[4] The OIPC's investigation and mediation process did not resolve the issues. The matter then proceeded to this inquiry in which both parties provided written submissions.

[5] During the submission phase, the District removed its reliance on s. 12(3)(b).[2] Therefore, s. 12(3)(b) is not at issue, and I will not consider it further.

ISSUES AND BURDEN OF PROOF

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

1. Sections 13(1) and 14 authorize the District to refuse to withhold the information and records at issue; and

2. Section 22(1) requires the District to withhold the information at issue.

[7] Section 57 sets out who has the burden of proving that an applicant should or should not be given access to a particular piece of information. The District has the burden of proving it is authorized to withhold the information in dispute under ss. 13 and 14.

[8] The applicant has the burden of proving that the disclosure of personal information the District has withheld under s. 22 would not be an unreasonable invasion of third party personal privacy.[3] However the District also has the initial burden of proving the information at issue under s. 22 is personal information.[4]

DISCUSSION

Background

[9] The District is a public school district established under the *School Act*[5] and it operates schools that provide educational services to students within the Kootenay Lake region.

[10] The applicant is an employee of the District, and a parent of children who attended a District school. The applicant had concerns arising from the experiences of his children at school (school experiences). The concerns involve

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[2] District's initial submission at para 11.
[3] FIPPA, s. 57(2).
[4] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.
[5] RSBC 1996, c. 412

sensitive matters about children. The District conducted a confidential investigation of the school experiences.

[11] Both the applicant and the District had concerns arising from the employment relationship (collectively, the employment experiences). The District also conducted an investigation of the employment experiences.

[12] The two separate District investigations were complicated by the intermingling of the intermingling of the school and employment experiences.[6] These experiences also led to various legal proceedings[7] initiated by the applicant against the District.[8]

Records and information at issue

[13] The responsive records total 846 pages. The District withheld 745 pages in their entirety under s. 14 (the s. 14 Records). The remaining 101 pages of records are emails, letters, meeting notes, terms of reference, statement of events and timeline, and an investigation report (together, the Severed Records). Information was withheld on approximately 27 of those pages.

Preliminary matters

OIPC Guidelines for Written Inquiries – Improper conduct

[14] The District says parts of the applicant's submission contravene the OIPC's *Instructions for Written Inquiries* (Instructions) and asks that I give those parts no weight.

[15] The District says the applicant's materials are "replete with improper commentary, including unfounded allegations and disparaging characterizations of dishonesty, fabrication, collusion and other improper conduct." [9]

[16] The District further says the applicant's numerous allegations are speculative, unfounded and improper, and fall squarely within the type of conduct the OIPC instructs parties to avoid.[10]

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[6] From the submissions for this inquiry, and from the applicant's materials about the other proceedings, I can see that the applicant references both matters in a way that makes their separation complicated. I will discuss the practical effect of this intermingling in my analysis below.
[7] These actions include a civil claim in BCSC Registry No. 23792; a prohibited action complaint WorkSafe BC File # 2022D320; and a human rights complaint Tribunal File # CS008668.
[8] For the purposes of this inquiry, the proceedings relevant to the s. 14 issue include a prohibited action complaint under the *Workers Compensation Act*, RSBC 2019, c 1, and a human rights complaint under the *Human Rights Code*, RSBC 1996, c 210.
[9] District's reply submission at para 4.
[10] *Ibid*.

[17] The Instructions say the following about improper conduct:

> The OIPC has the obligation to protect the integrity of its processes and to ensure that all participants are treated respectfully. All parties to OIPC proceedings, whether represented by lawyers or self-represented, are expected to behave and communicate civilly, respectfully and in compliance with the OIPC's directions. Improper conduct during OIPC proceedings may result in the OIPC imposing restrictions on a party's continued participation in the proceedings and may even result in the cancellation of an inquiry.
>
> Examples of improper conduct include:
>
> - failing to abide by the OIPC's directions during the proceedings;
> - acting in a manner that shows contempt for OIPC's proceedings;
> - using rude, inflammatory, derogatory, disrespectful, inappropriate or threatening language in communications with other parties, their representatives or OIPC staff;
> - disparaging attacks on the character of other parties, their representatives, or OIPC staff;
> - indiscriminate and unfounded allegations that another party, their representative, or an OIPC staff member is acting in an improper manner.[11]

[18] In my view, the applicant's submission contains sufficient examples of improper conduct to warrant comment here. I feel it necessary to do so because it is my responsibility to protect the integrity of the inquiry process.

[19] The applicant's submission and what he calls a "solemn declaration"[12] contain many instances of what I find to be improper conduct. This conduct includes making unsubstantiated allegations against the District and its staff, as well as using unnecessarily inflammatory language.

[20] While certainly not an exhaustive list of what I consider to be improper conduct, some examples from the applicant's submission include accusations of:

- systemic endangerment of vulnerable children;[13]
- procedural obstruction;[14]
- systemic manipulation of oathbound evidence;[15]
- fundamental dishonesty and creation of a catastrophic evidentiary contradiction;[16]

[11] At p. 10. Available at https://www.oipc.bc.ca/documents/guidance-documents/1658.
[12] I put solemn declaration in quotation marks simply to denote the fact that simply calling something a solemn declaration does not make it so. A solemn declaration requires that it be sworn or affirmed and it is not.
[13] Applicant's submission at para 22.
[14] Applicant's submission at para 43.
[15] Applicant's submission at para 47(g).
[16] Applicant's submission at para 47(a).

- creating a legal blockade and deliberate obstruction;[17]
- deliberate obstruction;[18]
- a campaign of institutional harassment;[19]
- institutional wrongdoing and systemic child endangerment;[20]
- spoilation of evidence;[21] and
- creating a procedural fog to mask non-compliance.[22]

[21] The applicant also accuses the District's lawyer affiants, without evidence, of improper conduct i.e., breaching their professional obligations and structural collusion.[23] There are numerous other examples, but I need not name them all here to support my finding of improper conduct.

[22] Improper conduct by one of the parties to an inquiry may result in sanctions, including the imposition of restrictions on continued participation in the inquiry and/or in its cancellation. Since the submissions phase of this inquiry has now closed, I can place no restrictions on the applicant's continued participation.

[23] The District has not asked, and I do not consider it necessary, to cancel this inquiry. Instead, I will do as the District asks and not give any weight to the improper parts of the applicant's submission nor accept any of his speculative or argumentative statements as evidence in this inquiry. I base this decision on the Instructions and on the rules of evidence more generally.

Matters outside the scope of FIPPA

[24] The applicant's submission and attached four-part solemn declaration amount to 682 pages. Most of these pages deal with the underlying issues the applicant has with the District's handling of the school and employment experiences. The resolution of those matters is outside my jurisdiction. While I have reviewed the applicant's submission in its entirety, in these reasons, I only refer to what I have determined is relevant to my analysis and decision.

New issue – s. 6(1)

[25] The applicant devotes considerable attention to s. 6(1) and says "[t]his inquiry is focused on section 6 of FOIPPA and the requirement for an adequate search."[24] The OIPC fact report and notice of inquiry clearly outline the issues to

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[17] Applicant's submission at pars 58-59.
[18] Applicant's submission at para 61.
[19] Applicant's submission at para 71.
[20] Applicant's submission at para 76.
[21] Applicant's submission at para 81.
[22] Applicant's submission at para 111 and applicant's solemn declaration Part 1 of 4.
[23] Applicant's submission at paras 55(a), 56(m) 57
[24] Applicant's submission at para 3.

be decided in this inquiry and s. 6(1) is not one of them. The applicant is therefore raising a new issue.

[26] The process for adding new issues to an inquiry is clearly set out in the Instructions. The applicant is aware of that process because he asked for, and was denied, permission to add s. 25 as an issue.[25] The applicant did not request permission to add s. 6(1); instead, he simply makes arguments about it in his submission.

[27] Previous OIPC orders have consistently held that new issues raised in a party's inquiry submission without the OIPC's prior authorization will not be considered except in exceptional circumstances.[26] The applicant does not identify any exceptional circumstances which would warrant a departure from the OIPC's usual approach. In these circumstances, I decline to add s. 6(1) as an issue in this inquiry.

Admissibility of evidence

[28] Both parties object, in different ways, to the admissibility of each other's evidence in this inquiry. Above, I addressed the portions of the applicant's submission that are improper. I will not consider those portions in my analysis.

[29] I will consider here the admissibility of the applicant's four-part solemn declaration and the District's evidence.

<u>Applicant's solemn declaration</u>

[30] As noted above, the applicant provides what he labelled as a solemn declaration. From this document, I can see the applicant provides his version of events. I can also see that he identifies some instances where information is based on his belief. Finally, I can see that another purpose of the solemn declaration is to describe and attach a variety of documents, most of which relate to the applicant's underlying disputes with the District in other forums.

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[25] Adjudicator Adams's June 8, 2026 decision letter issued after reviewing the submissions of the parties about the applicant's request to add s. 25.
[26] Order F25-87, 2025 BCIPC 101 at para 3 citing for examples where the OIPC has refused to permit a party to add a s. 6(1) issue without prior permission: Order F25-52, 2025 BCIPC 60 (CanLII) at paras 12-15, Order F21-23, 2021 BCIPC 28 (CanLII) at para 7, Order F18-11, 2018 BCIPC 14 (CanLII) at para 3, Order F23-31, 2023 BCIPC 37 (CanLII) at para 5, Order F23-101, 2023 BCIPC 117 (CanLII) at para 9; and Order F24-10, 2024 BCIPC 14 (CanLII) at paras 4-10. See also the Instructions at p. 3. For an explanation of the OIPC's reasons for refusing to add new issues raised for the first time in a party's inquiry submission, see for example Orders F25-59, 2025 BCIPC 68 (CanLII) at paras 15 and 16 and F25-52, 2025 BCIPC 60 (CanLII) at paras 12-15.

[31] The District says most of what the applicant submits in the solemn declaration and extensive attachments to it, is not evidence at all. The District further says the applicant's statements are not supported by any admissible proof and that the proffered exhibits do not support his characterization of them. The District says that to the extent the applicant relies on these speculative or argumentative statements, they should not be accepted or treated as evidence in this proceeding.[27]

[32] I am cognizant of the fact that the applicant is unrepresented in this inquiry. For that reason, I consider it appropriate to allow some flexibility in considering the materials he presents.

[33] I am satisfied that I can separate fact from speculation and argument in what the applicant says in his solemn declaration. I am also satisfied that I can disregard the portions I found above to be improper conduct. Finally, I am satisfied I can review the applicant's proffered exhibits and draw my own conclusions about them without relying upon the applicant's characterization of them.

[34] For all of the above reasons, aside from the improper conduct portions, I will consider what the applicant says in his solemn declaration and its attached exhibits. The weight I give to this information will depend on the extent to which it is factual, supported by the totality of the evidence before me, and relevant to the issues in this inquiry.

District's affidavits

[35] The District provided affidavit evidence from its Director of Human Resources (Director) and its Secretary-Treasurer. The District also provides affidavit evidence from three different lawyers. I refer to these lawyers as Lawyers 1, 2, and 3, and collectively as the Lawyer Affiants.

[36] The applicant says the District's affidavits fail to meet the essential requirements for the admissibility of evidence.[28] I understand the applicant to mean I should disregard all the District's affidavit evidence. I will address the specific issue of the sufficiency of those affidavits for deciding the s. 14 issue below but here I will address the applicant's general evidentiary concerns.

[37] The applicant devotes considerable attention to discrediting the affidavits. While I did carefully review all his concerns, I will not exhaustively detail them here. In a general sense, the applicant says the affiants lack the requisite personal knowledge of the facts, do not attest to the mechanics of an appropriate

[27] District's reply submission at para 5.
[28] Applicant's submission at para 40.

search, and should not be trusted. I will deal with each of these three arguments in turn.

[38] First, on the matter of personal knowledge, from all the information before me, I am satisfied that each of the affiants has the requisite direct knowledge of the facts to which they depose. I am further satisfied that any lack of direct knowledge is properly identified as being based on information and belief. This type of evidence based on information and belief is routinely found in affidavit evidence.

[39] Second, on the matter of not attesting to the mechanics of an appropriate search, as noted above, the search efforts of the District are not at issue in this inquiry. For that reason, I draw no negative inference from the affiants not attesting to the mechanics of a proper search.

[40] Third, the applicant also seeks to discredit the affiants by making a variety of allegations.[29] Many of these unsubstantiated allegations are part of what I found above to be improper conduct and I will not consider them in my analysis below. I comment specifically here on the applicant's argument that the evidence of the Director on a key factual issue is not to be trusted.

[41] The applicant says that in 2023, the Director described an investigation as paused but here, in 2026, as "never proceeded".[30] The applicant says both things cannot be true and are, in fact, diametrically opposed sworn positions. I disagree.

[42] From all of the information before me, I am satisfied that the investigation described by the Director, was paused in 2023. I am also satisfied that as of the date of the affiant's sworn evidence in this inquiry, some 3 years later, that same investigation "never proceeded". Both things can be true, and I am persuaded they are true.

[43] For all of the above reasons, I am not persuaded by the applicant's arguments that I should disregard the District's affidavit evidence. I will consider this evidence in my analysis below. I will weigh this evidence against all the other evidence before me.

Solicitor client privilege - s. 14

[44] The District relies on s. 14 to withhold the s. 14 Records in their entirety. The s. 14 Records consist of emails and attachments. The District also relies on s. 14 to withhold certain information in emails in the Severed Records.

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[29] Applicant's submission at paras 47-57.

[30] Applicant's submission at paras 53(d)-(f). The Director, at para 4 says "[w]hile the Investigation ultimately did not proceed…".

[45] The District did not provide the s. 14 Records or the withheld information in the Severed Records for my review. Instead, the District asks that I decide the s. 14 issue on the basis of its affidavit evidence. I turn next to the question of whether that evidence is sufficient for me to decide the s. 14 issue.

Sufficiency of s. 14 evidence in the absence of disputed records

[46] The District relies on the affidavit evidence from its Secretary-Treasurer and Director, and from the Lawyer Affiants. The applicant says the District must provide me with the records to review.[31]

[47] Section 44(1) gives me the power to order the District to produce the disputed records for my review. Consistent with the OIPC's longstanding approach, I would only order production of records that are claimed to be privileged if absolutely necessary to decide the issues in dispute. This cautious approach recognizes that the confidentiality of solicitor client communications is essential to the proper functioning of the legal system.[32]

[48] The Supreme Court of Canada has explained that without the assurance of confidentiality, clients cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive.[33] Even the courts will decline to review solicitor client documents when adjudicating claims of privilege unless there is evidence of the necessity to do so in order to fairly decide the case.[34]

[49] I acknowledge that the applicant looks unfavourably on the District's decision not to provide the records for my review during this inquiry. The applicant says production of the records for my review is necessary to satisfy the requirements of transparency and procedural fairness.[35] However, in this case and for the following reasons, I find that a production order under s. 44(1) is not necessary or appropriate.

[50] As noted above, I am not persuaded by the applicant's attempts to discredit the District's affidavit evidence. I see nothing in what the applicant submitted to convince me that the District's evidence is not credible or that it is unreliable.

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[31] Applicant's submission at para 91.

[32] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII) [*Calgary*], at paras 34 and 40; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII) at para 9; *R. v Fox*, 2026 SCC 4 (CanLII) [*Fox*] at para 40.

[33] *Calgary*, ibid, at para 34; *R v. McClure,* 2001 SCC 14 (CanLII), at para 2; *Fox, ibid* at para 40.

[34] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 (CanLII) [*Finance*] at para 51.

[35] Applicant's submission at para 211.

[51] The affidavits of the District's Secretary-Treasurer and its Director address the client side of the solicitor client relationship. The affidavits of the Lawyer Affiants address the solicitor side of that relationship. As practicing lawyers, the Lawyer Affiants are officers of the court with a duty to ensure that privilege is properly claimed.[36]

[52] Summarizing in a general way, the evidence of the Lawyer Affiants is that they were directly involved in many of the communications contained in the responsive records. The Lawyer Affiants describe the records in the body of their affidavits, and also say they are accurately described in the two Tables of Records provided in this inquiry.

[53] Having reviewed the Tables of Records, I find that for each record the District provides the page numbers, date, type of record, FIPPA exception applied to withhold information, and a brief description summarizing the basis for the privilege claim.

[54] Between the Tables of Records, the information in the bodies of all of the affidavits, in the Severed Records, and the submissions of the parties, I have sufficient detail about the disputed records to understand their nature, purpose, context, and who was involved.

[55] Therefore, for the reasons given above, I am satisfied the affidavit evidence is sufficient and that I have the information I need to decide if s. 14 applies without needing to review the records themselves.

The basis of the s. 14 claim

[56] Section 14 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.[37]

[57] The District relies on both legal advice and litigation privilege in this inquiry.

Legal advice privilege

[58] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[38]

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[36] *Finance, supra* note 35 at para 86.
[37] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para 26.
[38] *College, ibid* at para 31.

[59] Legal advice privilege attaches to communications that:

- are between a solicitor and their client (or their agent);
- entails the seeking or providing of legal advice, and
- are intended by the solicitor and client to be confidential.[39]

[60] Not every communication between a solicitor and client is privileged merely because it is a communication between those parties, but if the above three conditions exist, legal advice privilege applies.[40]

[61] In addition to the communications set out above, legal advice privilege also applies to the "continuum of communications" related to the seeking and giving of legal advice, including the information furnished by the client to the lawyer as part of seeking legal advice and to internal client communications that comment on the legal advice received and its implications.[41]

Parties' submissions – legal advice privilege

[62] The District says its evidence clearly establishes that the s. 14 Records meet all three branches of the legal advice privilege test.[42] The District says the bulk of these records are direct communications between the District and Lawyer 1 who was engaged to carry out an investigation and provide legal advice. The District points out that her evidence is that she was asked for, and provided, those services.[43]

[63] The District also says that some of the s. 14 Records are internal communications between District staff which refer to or discuss communications with Lawyer 1 for the purposes of seeking legal advice or compiling materials on which legal advice was being sought.[44]

[64] The District further says that the remainder of the s. 14 Records are direct and confidential communications between the District and Lawyers 2 and 3 whom it engaged to provide legal advice.[45]

[65] The applicant's position is that the privilege claim is "manufactured", not "self-executing", and requires more than an affiant's assertion that it applies.[46]

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[39] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at p. 837.
[40] *Solosky ibid* at p. 829.
[41] *Bilfinger Berger (Canada) Inc v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras 22-24.
[42] District's reply submission at para 13(b).
[43] District's initial submission at para 30.
[44] District's initial submission at para 31.
[45] District's initial submission at para 32.
[46] Applicant's submission at paras 53-56.

[66] The applicant challenges the evidence of the Lawyer Affiants, saying they lack personal knowledge and that privilege does not apply:

- to communications with Lawyer 1 because she was hired as an external investigator, not as a lawyer.[47] He also says she "admits that her 'privileged' records consist of materials compiled by the School District's Human Resources Department." Based on this admission, he says privilege does not apply because when staff compile materials for a lawyer, they are performing an administrative function, not a legal one.[48]
- to communications with Lawyer 2 because she was an associate, not the lead lawyer.[49] He also says she provides no evidence of the legal mandate that allegedly created the privilege.[50]
- to communications with Lawyer 3 because the District was using external legal counsel to launder routine human rights communications into privileged legal advice.[51] He also says Lawyer 3 cannot personally verify that these communications were generated for the purpose of seeking legal advice—having relied instead on a curated package prepared by another lawyer.[52]

[67] The District responds to the applicant's claim that the Lawyer Affiants did not have personal knowledge of the matters to which they were attesting by saying that claim is not correct. The District says it is clear from their affidavits that each had direct knowledge of the nature, purpose, and content of the privileged records to which they have attested.

[68] The District says it is clear from the affidavits that the Lawyer Affiants were each involved in providing the protected legal advice. The District further says its referenced authorities establish clearly that the lawyer who provided the legal advice at issue is the proper and preferred affiant in inquiry proceedings in which section 14 is raised.[53]

[69] In response to the applicant's other arguments about the s. 14 evidence, the District says:

- evidence does not have to come from a lead lawyer over an associate;
- proof of formal retainer agreements with the Lawyer Affiants is not required and would, themselves be privileged;
- the evidence from the staff affiants is based on direct knowledge; and

[47] Applicant's submission at para 26.
[48] Applicant's submission at para 54(i).
[49] Applicant's submission at para 55(g).
[50] Applicant's submission at para 55(f).
[51] Applicant's submission at para 56(a)
[52] Applicant's submission at para 56(f).
[53] District's reply submission at para 13(a).

- the minor discrepancies identified by the applicant are explained by the passage of time and do not give rise to any basis for disregarding this evidence.[54]

[70] In response to the applicant's argument about records being administrative and not legal, the District says it is well established that once a solicitor client relationship is established, privilege applies to the entire "continuum of communications" between the lawyer and client in which legal advice is sought and provided.

[71] The District points out that it is not necessary that a communication contain or request legal advice to fall within the scope of privilege. Privilege attaches to all factual and contextual information provided to or compiled for or by legal counsel for the purposes of providing legal advice, and there is no exclusion for "administrative matters".[55]

[72] In response to the applicant's argument that Lawyer 1 was an investigator, not the District's lawyer, the District says an investigation performed by a lawyer for the purposes of providing legal advice is privileged.[56] The District further says the privileged records are communications, not investigation notes and reports as suggested by the applicant.

[73] The District further replies to the applicant's arguments by saying the evidence demonstrates that the s. 14 Records consist of an exchange of confidential communications and compiled materials about which Lawyer 1 was asked to and did provide legal advice. Such information, it says, is therefore properly protected by privilege. The District says the fact that Lawyer 1 did not ultimately proceed with the investigation through to completion does not negate the privileged nature of the records.[57]

Analysis – legal advice privilege

[74] For the reasons that follow, I find that legal advice privilege applies to the information withheld on that basis.

[54] District's reply submission at paras 13-20.
[55] District's reply submission at para 13(c). The District cites *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority, 2011 BCSC 88 (CanLII) at para 43;* Order F12-05, 2012 BCIPC 6 (CanLII) at para 23*; Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 (CanLII) at paras 22-24; *and British Columbia (Attorney General) v. Lee,* 2017 BCCA 219 at paras 30 – 31.
[56] District's reply submission at para 25 citing *College, supra* note 38. The District also cites Order F14-29, 2014 BCIPC 32 (CanLII)*; Gower v. Tolko Manitoba Inc.,* 2001 MBCA 11*;* Order F15-51, 2015 BCIPC 54; Order F12-05, 2012 BCIPC 6 (CanLII); and Order F16-40, 2016 BCIPC 44 (CanLII).
[57] District's reply submission at para 26.

[75] As noted above, legal advice privilege applies to communications, including those that fall on the continuum of communications, between a solicitor and client that entail the seeking and providing of legal advice, and are intended to be confidential.

[76] I turn next to the specifics of each of the conditions needed for legal advice privilege to apply.

1. Communications between a solicitor and client

[77] From the materials before me, I am satisfied that the information and records withheld on the basis of legal advice privilege consist of both communications and compiled materials attached to communications. I deal first with whether those communications are between a solicitor and client.

[78] I am persuaded by the District's evidence that a solicitor client relationship existed between it and the Lawyer Affiants at all material times.[58] I am also persuaded that most of the communications at issue were between the Lawyer Affiants and the District and that the remainder form part of the continuum of communications protected by legal advice privilege.

[79] I am not persuaded by the applicant's argument that privilege does not apply to Lawyer 1's communications because she was acting as an investigator not as a lawyer. Lawyer 1 confirms that the investigation did not ultimately proceed but she did provide legal advice to the District on certain matters related to the investigation.[59]

[80] The courts have made it abundantly clear that where a lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and the client.[60]

[81] I am also not persuaded by the applicant's argument that privilege does not apply to Lawyer 2's communications because she was an associate rather than the lead lawyer. Lawyer 2 confirms she acts as legal counsel to the District, including in connection with certain matters involving the applicant.[61] The distinction drawn by the applicant has no bearing on the question of privilege.[62]

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[58] The affidavits of the Secretary-Treasurer and Director establish the client side of relationship, and the affidavits of the Lawyer Affiants establish the solicitor side of the relationship.
[59] Lawyer 1's affidavit at para 3.
[60] *College*, *supra* note 38 at para 32 citing *Gower v. Tolko Manitoba Inc*., 2001 MBCA 11 at paras 36-42.
[61] Lawyer 2's affidavit at para 1.
[62] Aside from the fact the lead and associate are both lawyers in the same firm representing the District, privilege also extends to the sharing of privileged information within the same law firm i.e. to assistants, paralegals, etc.

[82] Finally, I am not persuaded by the applicant's argument that the District was using Lawyer 3 to "launder" routine human resources communications into privileged legal advice.[63] Lawyer 3 confirms he acts as legal counsel to the District, including in connection with certain matters involving the applicant,[64] and I accept that evidence.

[83] Based on all of the above, I find that the Lawer Affiants were communicating with the District in the context of a solicitor client relationship.

2. Seeking and providing legal advice

[84] From the materials before me, I am satisfied the communications between the District and the Lawyer Affiants were made for the purposes of seeking and providing legal advice. I am also satisfied that some of the communications were internal District communications relating to the legal advice sought. Finally, I find persuaded that some of the communications have attachments consisting of materials compiled for the purposes of seeking legal advice.

[85] Lawyer 1 attaches to her affidavit a Table of Records for the s. 14 Records. The Table of Records describes most of the records as confidential communications for the purposes of seeking or providing legal advice.

[86] Lawyer 1 says she reviewed the s. 14 Records and confirms they contain her communications with the District. She further confirms the Table of Records accurately describes those communications and the basis upon which solicitor client privilege is claimed over them.[65] She says:

> The [s. 14 Records] comprise communication of a confidential nature between me and the School District for the purposes of seeking and providing my legal advice. They also include communications of a confidential nature between members of the School District's Human Resources Department compiling materials for the purposes of seeking my legal advice, and I confirm that such legal advice was sought and provided.[66]

[87] Lawyer 1 also says that an email severed from the Severed Records is one between her and a District employee exchanged on a confidential basis for the purposes of seeking and providing legal advice.[67]

[88] The Director says he compiled certain materials (identified in the Table of Records as such) for the purposes of attaching to an email to get legal advice

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[63] Applicant's submission at para 56 a).
[64] Lawyer 3's affidavit at para 1.
[65] Lawyer 1's affidavit at para 5.
[66] Lawyer 1's affidavit at para 6.
[67] Lawyer 1's affidavit at para 7.

from Lawyer 1.[68] The attachments are described in the Table of Records as draft documents about the subject matter of the legal advice, the disclosure of which would reveal privileged information.

[89] Based on the evidence described above, I find that the communications and the attachments to communications were exchanged between Lawyer 1 and the District for the purposes of seeking and providing legal advice.

[90] Lawyer 2 says she reviewed the s. 14 Records and confirms they contain her communications with the District. She further confirms the Table of Records accurately describes those communications and the basis upon which solicitor client privilege is claimed over them. She says those communications were for the purposes seeking and obtaining her legal advice.[69]

[91] Based on Lawyer 2's evidence, I find that her communications with the District were for the purposes of seeking and providing legal advice.

[92] Lawyer 3 says he reviewed the s. 14 Records and confirms they include a confidential communication with one attachment that was sent to him by the Superintendent[70] for the purposes of seeking his legal advice. He describes the attachment as relating directly to matters on which his legal advice was being sought. He says its disclosure would therefore reveal information about legal advice that was sought and provided. Lawyer 3 says the Director was also copied on that communication.[71]

[93] Based on Lawyer 3's evidence, I find that his communication and the attachment to that communication were for the purposes of seeking and providing legal advice.

[94] Finally, the Table of Records describes internal email communications exchanged amongst District staff. Some of those communications are about compiling information for the purposes of seeking legal advice and others involve forwarding the legal advice received. I also find that all of these communications form part of the continuum of communications relating to the legal advice sought.

3. <u>Intended to be confidential</u>

[95] Each of the Lawyer Affiants describe their communications as confidential.[72] Lawyer 1 also states that the communications between District

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[68] Director's affidavit at para 5.
[69] Lawyer 2's affidavit at para 4.
[70] I understand a superintendent is hired by the board, and I therefore consider the superintendent as the client (District) for the purposes of this analysis.
[71] Lawyer 3's affidavit at para 4.
[72] Lawyer 1's affidavit at para 6, Lawyer 2's affidavit at para 4, and Lawyer 3's affidavit at para 4.

staff compiling information for the purposes of seeking legal advice were exchanged confidentially.[73]

[96] The Director says he reviewed the records and in his evidence about the communications with Lawyer 1, he also confirms the confidential nature of those communications.[74] Similarly, the Secretary-Treasurer confirms that with respect to investigations, the District's practice is to communicate confidentiality expectations to all participants.[75]

[97] Based on all of the above, I am satisfied that the communications at issue – namely, the communications in the s. 14 Records and in the Severed Records - were intended to be confidential.

[98] To summarize my findings above, I find that at the time of the communications in the records; there was a solicitor client relationship between the District and the three Lawyer Affiants. I find the Lawyer Affiants were acting as the District's lawyers when they were communicating with the District's staff about the matters addressed in the records. I further find that these communications were about seeking and providing of legal advice and were intended by the Lawyer Affiants and the District to be confidential. For these reasons, I find that legal advice privilege applies to all of the information and records the District withheld on that basis.

[99] The applicant says the District has waived its privilege over some or all of these communications, so I turn next to the issue of waiver.

Waiver – legal advice privilege

[100] Waiver of privilege is established through proof of either of the following two scenarios:

1. The possessor of the privilege knows of the existence of the privilege and has demonstrated a clear intention to waive that privilege (i.e. express waiver); or

2. In the absence of an intention to waive privilege, where fairness and consistency require disclosure (i.e. implied waiver).[76]

[73] Lawyer 1's affidavit at para 6.
[74] Director's affidavit at para 5.
[75] Secretary-Treasurer's affidavit at para 15.
[76] *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

Parties' submissions - wavier

[101] The applicant says the District's reliance on the contested records in various proceedings constitutes waiver of privilege.[77] In particular, the applicant says the Secretary-Treasurer's evidence about the investigation is pejorative, makes claims of misconduct by him, and relies on the investigation record.[78]

[102] The applicant says his waiver argument is supported by the evidence in his solemn declaration, and he points to a multi-point paragraph therein that includes the following statement:

> The [District] is effectively attempting to maintain the protection of solicitor-client privilege over records related to a non-existent, abandoned investigation by pretending that the process is still live. This inconsistency exposes the [District's] reliance on Section 14 privilege as a mechanism for the bad-faith withholding of information rather than a legitimate protection of legal advice.[79]

[103] I understand the applicant's position is the District waived privilege over the investigation records of Lawyer 1 because the investigation did not proceed. Alternatively, I understand his position is that the District's references to the existence of the investigation and its status as live/active, paused/abandoned or never proceeded amounts to waiver by reliance.

[104] The District replies to the applicant's arguments by pointing out that the burden of proof of waiver is on the applicant. The District says the applicant has provided no evidence that would establish waiver.

[105] The District refutes the applicant's position that waiver is established simply by its references to the investigation for which Lawyer 1 was engaged. It says waiver by reliance requires that a party has put the content of the legal advice in issue, not by simply acknowledging that legal advice was sought or by describing the work that counsel performed.[80]

Analysis - waiver

[106] Given the importance of solicitor client privilege in the functioning of the legal system, evidence justifying a finding of waiver, whether express or implied, must be clear and free of ambiguity.[81] The party asserting waiver has the burden of showing that there has been a waiver.[82]

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[77] Applicant's submission at para 26(j).
[78] Applicant's submission at para 47(e).
[79] Applicant's solemn declaration at para 171.
[80] District's reply submission at paras 27- 32.
[81] *Maximum Ventures Inc. v de Graaf et al.*, 2007 BCSC 1215 at para 40.
[82] *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22.

[107] The applicant has not persuaded me that the District waived privilege. The applicant provides no evidence to establish waiver. Instead, he relies on his own speculation and the evidence of the Secretary-Treasurer.

[108] I reviewed the Secretary-Treasurer's affidavit, and it is not evident to me that she revealed any legal advice. She merely refers to the fact that an investigation took place, without revealing the details of that investigation.[83] She also references seeking and receiving advice from the Lawyer Affiants.[84] It is well-established that privilege is not waived by disclosing only the mere fact of receiving legal advice and relying upon it.[85]

[109] I considered the applicant's arguments about the status of the investigation as live, paused or abandoned. In my view, this status is not relevant to whether or not the District waived privilege. Legal advice privilege protects advice and lasts indefinitely.

[110] I conclude the applicant has failed to meet his burden of establishing a waiver of privilege over any of the withheld records and information.[86]

Summary – legal advice privilege

[111] I find that the records and information severed based on legal advice privilege consist of communications and attachments. Most of those communications are directly between a solicitor and their client (or their agent), that entail the seeking and providing of legal advice and were intended by both the solicitor and client to be confidential.

[112] In addition to the communications directly between solicitor and client, I find that legal advice privilege also applies to the communications that form the "continuum of communications" related to the seeking and giving of legal advice. This information includes the compilation of materials attached to an email sent to Lawyer 1 for the purposes of seeking legal advice. I find it also applies to the internal District communications forwarding the legal advice received.

[113] As a result, I find that legal advice privilege applies to all of the information and records withheld on that basis.

[114] I further find the applicant has not established that the District waived legal advice privilege.

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[83] Secretary-Treasurer's affidavit at para 7.
[84] Secretary-Treasurer's affidavit at para 9 a.
[85] *Merritt v. Canada (Attorney General)*, 2020 BCSC 1887 at paras 39 and 44; Order F13-10, 2013 BCIPC 11 at para 54 (and the authorities cited therein).
[86] For a similar analysis, see Order F23-25, 2023 BCIPC 29 (CanLII) at paras 51-57 and Order F21-23, 2021 BCIPC 28 (CanLII) at paras 81-84.

Litigation privilege

[115] As noted above, the applicant has commenced a number of legal actions against the District in a variety of forums. For the purposes of the litigation privilege analysis, the relevant actions are the prohibited action and human rights complaints.[87]

[116] The District claims litigation privilege over two communications between Lawyers 2 and 3 and the District that were copied to a third party. I understand the District to claim litigation privilege rather than legal advice privilege over these communications because of the involvement of the third party, which calls into question their confidential nature.

[117] Litigation privilege is a rule of evidence that protects from disclosure documents or communications that are made for the dominant purpose of litigation.[88]

[118] The purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation.[89] This zone of privacy is a protected space for parties to develop their respective positions and strategies, free from the intrusion of their adversary.[90]

[119] Litigation privilege encompasses communications between a client or his or her solicitor and third parties, if made for the purpose of pending or contemplated litigation.[91]

[120] Litigation privilege ends once the litigation is completed. As explained by the Supreme Court of Canada in *Blank v Canada (Minister of Justice)*, "[o]nce the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification."[92] However, the Court also said that litigation privilege can continue "where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended."[93]

Parties' submissions – litigation privilege

[121] The District says the communications at issue under litigation privilege were exchanged for the purposes of ongoing litigation.[94] The District says it is

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[87] See notes 7 and 8.
[88] *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52 at paras 20 and 23.
[89] *Blank v. Canada (Minister of Justice), [Blank]* 2006 SCC 39 (CanLII) at para 34.
[90] *Raj v Khosravi,* 2015 BCCA 49 at para 7.
[91] *Blank, supra* note 90 at para 27.
[92] *Ibid* at para 34.
[93] *Ibid* at para 38.
[94] District's initial submission at para 39.

clear from the applicant's own materials that all of his legal claims against it are interconnected and closely intertwined.[95]

[122] The applicant says any litigation privilege expired when the prohibited action complaint ended. The applicant also says the prohibited action complaint and the human rights complaint are not closely related proceedings.[96]

Analysis – litigation privilege

[123] The District claims litigation privilege over communications involving Lawyers 2 and 3. These communications involve a third party. Both Lawyers 2 and 3 say those communications were exchanged in contemplation of litigation. Both identify the contemplated litigation as the prohibited action complaint (which has concluded) and the outstanding human rights complaint (which is ongoing).

[124] As I understand them, the various actions filed by the applicant against the District all stem from the intermingling of the school and employment experiences. The materials filed by the applicant make it difficult to parse out the exact factual basis for any of the claims.

[125] From the information before me, I can see that the completed prohibited action complaint was about whether the District's investigation into the employment experiences was retaliatory in nature. I can also see that the ongoing human rights complaint is about whether the District discriminated against the applicant in its handling of both the employment and school experiences.

[126] The question before me, then, is whether the human rights complaint is the type of related litigation contemplated by the Supreme Court of Canada in *Blank*.[97]

[127] Related litigation includes, at minimum, separate proceedings that include the same or related causes of action or proceedings that raise issues common to the initial action and share its essential purpose.[98] The boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted."[99]

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[95] District's reply submission at para 21.
[96] Applicant's submission at para 112.
[97] *Blank*, supra note 90.
[98] *Ibid* at para 39.
[99] *Ibid* at para 40.

[128] *Black's Law Dictionary* defines "cause of action" as "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."[100]

[129] The group of operative facts here involves the intermingling of the student experiences and the employment experiences and the District's investigations into each of these experiences.

[130] To illustrate the intermingling of the student and employment experiences, I point to two examples. First, in a meeting the District scheduled with the applicant to discuss the employment experiences, the allotted time was spent discussing the school experiences.[101] Second, in a meeting with the investigator tasked with investigating the school experiences, the applicant raised matters which included his allegations of harassment and retaliation in the workplace.[102]

[131] The evidence of Lawyers 2 and 3 supports my conclusion about the same group of operative facts giving rise to the applicant's various complaints against the District in different forums.[103] In my view, the complaints share the same essential purpose, i.e., establishing the liability of the District for those experiences.

[132] Based on the totality of the information before me, I find that in the particular circumstances before me, including the complex intermingling of the school and employment experiences, the prohibited action complaint and the human rights complaint are so closely intertwined that the conditions for litigation privilege remain in place while the human rights complaint is ongoing.

[133] I find that the communications at issue were exchanged for the dominant purpose of preparing for the ongoing litigation. For this reason, I find that litigation privilege applies to the communications at issue.

Conclusion - s. 14

[134] For the reasons outlined above, I find that s. 14 applies to all of the s. 14 Records and to the information in the Severed Records the District withheld on that basis.

[135] I turn next to the information in the Severed Records that the District withheld under s. 13.

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[100] *Black's Law Dictionary*, 10th ed, "cause of action."
[101] Severed Records, p. 85.
[102] Investigator's report at p. 9 of the Severed Records.
[103] Lawyer 2's affidavit at para 5 and Lawyer 3's affidavit at para 5.

Advice or recommendations – s. 13

[136] The District applied s. 13(1) to some of the information withheld under s. 14. Since I have found above that all of the information was properly withheld under s. 14, I need not consider whether s. 13(1) also applies to that information.[104]

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

[138] The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of decision and policy making were subject to excessive scrutiny.[105]

[139] The first step in the s. 13 analysis is to determine whether the information at issue would reveal advice or recommendations developed by or for a public body or minister.

[140] "Advice" and "recommendations" have distinct meanings. "Recommendations" involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised."[106]

[141] The term "advice" is broader than "recommendations".[107] Advice includes a communication about which courses of action are preferred or desirable;[108] and an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[109]

[142] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences to be drawn about advice or recommendations.[110]

[143] If I find the information at issue is "advice" or "recommendations", the next step is to determine whether any of the circumstances in ss. 13(2) or 13(3) apply. If information falls within ss. 13(2) or (3), the public body may not refuse to

[104] Records, pp. 39-40.
[105] *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 45 [*John Doe*], interpreting a similar provision in Ontario's *Freedom of Information and Protection of Privacy Act*.
[106] *Ibid* at para 24.
[107] *Ibid* at para 24.
[108] Order 01-15, 2001 CanLII 21569 at para 22.
[109] *College supra* note 38 at para 113.
[110] See for example *John Doe supra* note 106 at para 24; Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII); and Order F21-15, 2021 BCIPC 19 (CanLII).

disclose it, even if it is “advice” or “recommendations” within the meaning of s 13(1).

[144] The information that remains in dispute under s. 13(1) is found in meeting notes, a report, and in an email.

Parties’ submissions – s. 13(1)

[145] The District says it is clear on the face of the Severed Records that it properly applied s. 13(1).[111]

[146] The applicant says that the author of the report on the student experiences was not retained for policy or legal advice.[112] Alternatively, the applicant says the information at issue is factual material under s. 13(2)(a) or was used to make a negative decision that affected him under s. 13(2)(n). Therefore, the applicant argues, the District cannot withhold the information at issue under s. 13(1).

Analysis – s. 13(1)

[147] I have reviewed the information withheld under s. 13(1) and for the reasons that follow, I find that some of it reveals advice or recommendations either directly or by inference.

[148] I can see that the information at issue under s. 13(1) relates to the District’s investigation of the student experiences. Those experiences are highly sensitive in nature both because they involved school aged children and because of their subject matter.

[149] I can see from the context in which the withheld information appears that it includes opinions on the school experiences about which decisions need to be made. I can also see information that consists of, or implies, options for recommended courses of action. I find that this information would reveal advice or recommendations developed by or for the District.[113]

[150] There is other information, however, which I am not convinced would reveal either advice or recommendations. This information includes the observations and comments of individuals identified by their names and initials. For this information, I cannot see, and the District does not say, how this information sets out or implies options for recommended courses of action. I find that s. 13(1) does not apply to it.

[111] District’s initial submission at para 85 f.
[112] Applicant’s submission at para 204.
[113] Severed Records, pp. 10, 17, 18, 19, and 101.

[151] The District also applied s. 22(1) to the information I found above was not properly withheld under s. 13(1) so I consider it further below.[114]

Exceptions to refusing access under s. 13(1) – s. 13(2)

[152] The next step in the s. 13 analysis is to decide whether the information that I have found reveals advice or recommendations under s. 13(1), falls into any of the categories listed in s. 13(2). If s. 13(2) applies, the information cannot be withheld under s. 13(1).

[153] The applicant says ss. 13(2)(a) and 13(2)(n) apply so I consider these provisions below.

<u>Factual material – s. 13(2)(a)</u>

[154] Section 13(2)(a) says that a public body must not refuse to disclose "factual material" under s. 13(1). The phrase "factual material" is not defined in FIPPA.

[155] The courts have interpreted "factual material" to mean "source materials" or "background facts in isolation" that are not necessary to the advice provided.[115] Where facts are selected and compiled by an expert as an integral component of their advice, then this information is not "factual material" under s. 13(2)(a).[116]

[156] I see nothing in the information I found to be advice or recommendations that might be characterized in any way as "factual material". For this reason, I find that s. 13(2)(a) does not apply.

<u>Decision affecting the rights of the applicant – s. 13(2)(n)</u>

[157] Section 13(2)(n) states that the head of a public body must not refuse to disclose under s. 13(1) "a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant."

[158] Previous OIPC orders have found s. 13(2)(n) does not require the disclosure of all records which relate in any way to the exercise of a discretionary power or an adjudicative function, but only those records which contain a decision and the reasons for it.[117]

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[114] Severed Records within pp. 5-8 and 9-19.
[115] *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para 94.
[116] Order F23-82, 2023 BCIPC 98 at para 36.
[117] Order F20-37, 2020 BCIPC 43 (CanLII) at para 54.

[159] The applicant does clearly say how s. 13(2)(n) applies. From the totality of his submission, I understand him to mean he is entitled access to any information affecting the rights of himself and his family. The District says s. 13(2)(n) does not apply.

[160] I have reviewed the information that I found above is advice or recommendations. None of that information amounts to a decision about the applicant, or any accompanying reasons, as is required under s. 13(2)(n). Therefore, I find s. 13(2)(n) does not apply.

<u>Information in existence for 10 or more years – s. 13(3)</u>

[161] Section 13(3) says that information that has been in existence for more than 10 years cannot be withheld under s. 13(1). I can see, from the dates specified in the in the records, that the information at issue has not been in existence for more than 10 years, so I find that s. 13(3) does not apply.

Conclusion – s. 13(1)

[162] In conclusion, I find that s. 13(1) authorizes the District to refuse to disclose some, but not all, of the information it withheld under that exception. The District also applied s. 22 to the information I found it was not authorized to refuse to disclose under s. 13(1). I will consider the severing of that information again below.

Unreasonable invasion of third party personal privacy - s. 22

[163] The District relies on s. 22 to withhold information, including that which it withheld under ss. 13 and 14. I will not consider the application of s. 22 to the information I found above was properly withheld under ss. 13 and 14.

[164] The remaining information for my consideration under s. 22 is found in meeting notes, an investigation report, a statement and timeline, and in email communications.

[165] Section 22 requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[166] A third party is defined in FIPPA as any person, group of persons or organization other than the person who made the access request or the public body.[118]

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[118] Schedule 1.

[167] Previous orders have considered the proper approach to the application of s. 22 and I apply those same principles here.[119]

Personal information

[168] Section 22 only applies to personal information, so the first step in a s. 22 analysis is to decide if the information in dispute is personal information.

[169] FIPPA defines personal information as “recorded information about an identifiable individual other than contact information.” Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”[120] Whether information is “contact information” depends upon the context in which it appears.[121]

[170] I will first consider whether the information in dispute is about identifiable individuals. I will then consider whether any of the information that I find is about identifiable individuals is contact information.

Parties’ positions - personal information

[171] The District says the information it withheld under s. 22(1) is about identifiable individuals. The District says the authorities establish that “personal information” is to be interpreted as expansive in nature and deliberately broad. The District urges me to consider the “mosaic effect” as a relevant factor in deciding whether seemingly non-personal information is personal information.[122]

[172] The District says that prior orders support that the type of information it withheld under s. 22(1) is personal information. The District points to prior orders deciding this issue in the context of employment and workplace investigation records.[123]

[173] The applicant says the District, in citing its list of authorities for the definition of personal information, fails to distinguish between personal conduct and official, institutional conduct. The applicant further says the information of individuals acting in an official capacity is not “personal information”.[124]

[119] Order F15-03, 2015 BCIPC 3 (CanLII) at para 58 sets out a summary of the steps in a s. 22 analysis which I follow here.
[120] FIPPA, Schedule 1.
[121] Order F20-13, 2020 BCIPC 15 (CanLII) at para 42.
[122] District’s initial submission at para 50 citing Order F24-86, 2024 BCIPC 98 at para 29 and Order F21-08, 2021 BIPC 12 at paras 96-98.
[123] District’s initial submission at paras 51-56 and the orders cited therein.
[124] Applicant’s submission at para 161.

Analysis - personal information

[174] The information withheld under s. 22 is about the student experiences and the investigation into those experiences. The withheld information includes names, initials, information about interviewees, and interview comments in the form of transcribed notes and sentences in an investigation report.

[175] After reviewing the withheld information, I am satisfied that all of it is about identifiable individuals. This information is clearly attributable to particular individuals, including District employees and students, because the individuals are either directly named or referenced by their initials.

[176] The information about these individuals includes things these individuals said and did. For example, the transcribed notes and sentences in the investigation report about the student experiences describe what identifiable persons said in that investigation.

[177] I am satisfied that all of the information withheld under s. 22(1) is personal information because it is recorded information about identifiable individuals. Further, I can see that none of this information is contact information.

[178] I note here that the applicant's arguments about information not being "personal" because it relates to official conduct are not relevant to whether the information is "personal information" for the purposes of s. 22(1). These arguments are, however, relevant to the application of s. 22(4)(e), to which I turn next.

Not an unreasonable invasion of third party personal privacy - s. 22(4)

[179] The next step in the s. 22 analysis is to determine whether the personal information falls into any of the categories set out in s. 22(4) and therefore its disclosure is not an unreasonable invasion of a third party's personal privacy.

[180] The District says none of the categories listed in s. 22(4) are applicable in this case.[125]

[181] The applicant says the District argues that any mention of an individual in an investigative record qualifies as personal information. The applicant says this argument is an over-extension of the law. He further says to be "personal information" it must relate to an individual in their private capacity.[126]

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[125] District's initial submission at para 60.
[126] Applicant's submission at para 161.

[182] I will consider s. 22(4)(e) because of what the applicant says about employees acting in an official capacity.[127]

Third party's position, functions, or remuneration – s. 22(4)(e)

[183] Section 22(4)(e) says that it is not an unreasonable invasion of a third party's personal privacy to disclose information about their position, functions or remuneration as an officer, employee or member of a public body.

[184] Past orders have established that s. 22(4)(e) applies to objective, factual statements about what a third party public body employee did or said in the normal course of their duties.[128] It does not apply where the information is not exclusively about the employees' positions, functions or remuneration.[129]

[185] In my view, the information at issue does not relate to the routine work of District employees. I can see that it is not exclusively about the positions, functions or renumeration of any of the District's employees. Instead, it is about their participation into the investigation of the student experiences.

[186] The student experiences are sensitive in nature and involved events outside of the school setting. I cannot say more about the school experiences and still maintain the personal privacy of the third parties.

[187] While I appreciate the school experiences also involve the District's handling of them, I am not persuaded they relate to the routine work of District employees. For this reason, s. 22(4)(e) does not apply.

[188] I have reviewed the other provisions in s. 22(4) and find that none apply.

Presumed unreasonable invasion of third party personal privacy - s. 22(3)

[189] The third step in the s. 22 analysis is to determine whether any presumptions set out in s. 22(3) apply.

[190] 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.

[191] The District says s. 22(3)(d) applies, so I consider that provision below.

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[127] The applicant does reference s. 22(4)(e) at para 187 of his submission.
[128] Order F24-10, 2024 BCIPC 14 (CanLII) at para 45; Order F09-15, 2009 BCIPC 58553 (CanLII) at para 15; and Order F14-41, 2014 BCIPC 44 (CanLII) at para 24.
[129] Order F23-92, 2023 BCIPC 108 (CanLII) at para 46.

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

[192] Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to the third party's employment, occupational or educational history.

[193] The District says s. 22(3)(d) applies to the personal information of the students and to the personal information of the individuals participating in the investigation process.[130]

[194] The District says that previous orders have consistently held that an individual's participation in a workplace complaint or investigation process constitutes information falling within the scope of s. 22(3)(d).[131]

[195] The applicant does not comment specifically on the application of s. 22(3)(d).

[196] Previous orders have found that the term "employment history" includes descriptive information about an individual's workplace behaviour or actions in the context of a workplace complaint investigation or disciplinary matter.[132]

[197] Previous orders have also found that a complainant's allegations and evidence about what another individual said or did in the workplace is part of that individual's employment's history under s. 22(3)(d).[133]

[198] Consistent with previous orders, I find that s. 22(3)(d) applies to the information that reveals certain District employees' involvement in the investigation of the student experiences as well as to what they said. This information is about their employment history; therefore, its disclosure is presumed to be an unreasonable invasion of the personal privacy of those individuals.

[199] Previous orders have also found that details of an individual's interactions with personnel at their educational institution form part of their educational history. For that reason, s. 22(3)(d) applies to them.[134]

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[130] District's initial submission at paras 63-64.
[131] District's initial submission at para 51.
[132] Order 01-53, 2001 CanLII 21607 at para 32.
[133] Order F25-12, 2025 BCIPC 14 (CanLII) at para 56 citing for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at para 38; Order F21-43, 2021 BCIPC 42 at para 42; and Order F23-56, 2023 BCIPC 65 at para 77.
[134] Order F23-101, 2023 BCIPC 117 (CanLII) at para 160, Order F18-19, 2018 BCIPC 22 (CanLII) at para 53, Order F20-06, 2020 BCIPC 7 at para 36, and Order F23-60, 2023 BCIPC 70 (CanLII) at para 26.

[200] Consistent with those previous orders, I find that s. 22(3)(d) applies to the information about the students' interactions with District employees.

[201] For the above reasons, I find that s. 22(3)(d) applies to all of the personal information. For clarity, this information was withheld from meeting notes, an investigation report, a statement and timeline, and email communications.

[202] Since I have found that s. 22(3)(d) applies, the disclosure of any of the third party personal information is presumed to be an unreasonable invasion of their personal privacy.

[203] I have considered whether any of the other s. 22(3) provisions might apply to any of the information withheld under s. 22(1) and find they do not.

Relevant circumstances – s. 22(2)

[204] The final step in the s. 22 analysis is to consider all relevant circumstances, including those listed in s. 22(2), before determining whether the disclosure of personal information would be an unreasonable invasion of personal privacy. It is at this stage of the analysis that any presumptions under s. 23(3) may be rebutted.

[205] The District says the circumstances listed in ss. 22(2)(e) and 22(2)(f), as well as the sensitivity of the information, support its withholding of much of the information at issue.

[206] The applicant says that ss. 22(2)(a), (b), and (c), and his prior knowledge all support disclosure of the personal information.[135] I turn to those circumstances next.

<u>Disclosure desirable for public scrutiny – s. 22(2)(a)</u>

[207] Section 22(2)(a) requires a public body to consider whether disclosure of personal information is desirable for the purpose of subjecting the activities of a public body to public scrutiny. In doing so, this section highlights the importance of fostering accountability.[136]

[208] The applicant does not directly say how s. 22(a) applies. Based on his submission, I understand him to mean that disclosure of the information is necessary for transparency and for the accountability of the District. For example,

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[135] Applicant's submission at para 187. I note that for 187 (a)-(c), the applicant references s. 22(4) but his description of those sections makes it clear he meant s. 22(2).
[136] Order F05-18, 2005 CanLII 24734 (BCIPC) at para 49.

he says it is important to ensure public processes are not conducted in the dark.[137]

[209] The District says the applicant has used, and continues to use, legal proceedings to invite public scrutiny of his complaints and concerns about the District. The District says the applicant does not require disclosure of third party personal information to pursue those aims.[138]

[210] 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.[139]

[211] The third parties' personal information that is withheld here is very specific to them and reveals very little about the District's activities. Therefore, this information is more directly related to the conduct and accountability of these third parties rather than the conduct and accountability of the District. For this reason, I find s. 22(2)(a) is not a relevant circumstance weighing in favour of disclosure of third party personal information.

Promoting public health and safety – s. 22(2)(b)

[212] Section 22(2)(b) requires a public body to consider whether disclosure would be likely to promote public health and safety.

[213] The applicant does not identify a harm to health and safety or explain how disclosure of the records will prevent this harm from occurring. From the totality of his submission, I conclude he means disclosure would make the public aware of what he perceives to be the "systemic and operational failures" of the District.[140]

[214] There is insufficient evidence before me, to establish that there were systemic and operational failures of the District related to public health and safety. Further, even if I were so persuaded, the applicant has not adequately explained how disclosure of the information in these records would promote public health and safety in the future.

[215] For the reasons above, I find that s. 22(2)(b) is not a relevant circumstance weighing in favour of disclosure.

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[137] Applicant's submission at para 168.
[138] District's reply submission at para 53.
[139] Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.
[140] Applicant's submission at para 22.

Fair determination of the applicant's rights – s. 22(2)(c)

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

[217] Previous orders have said that s. 22(2)(c) applies where all four of the following circumstances exist:

> 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
>
> 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
>
> 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and
>
> 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[141]

[218] The applicant says the active human rights tribunal proceeding directly engages s. 22(2)(c).[142]

[219] The District responds to the applicant by saying he has not explained how s. 22(2)(c) applies and has not met his burden in regard to the specific personal information at issue.[143]

[220] The District also says the applicant has not explained why the disclosure process at the Human Rights Tribunal is not sufficient for him to obtain a fair hearing.[144] I am not persuaded the applicant needs to provide such explanation.

[221] Section 22(2)(c) is not about whether an applicant can get the information from somewhere else. Former Commissioner Loukidelis rejected "the notion that discovery under the *Rules of Court* or some other process displaces the right of access under the Act or should prevent it from operating."[145] For this reason, I will not further consider the District's argument about the sufficiency of the Human Rights Tribunal disclosure process.

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141 Order 01-07, 2001 CanLII 21561 (BCIPC) at para 31. See also Order F16-36, 2016 BCIPC 40 (CanLII) at para 60.
142 Applicant's submission at para 145.
143 District's reply submission at para 56.
144 District's reply submission at para 55.
145 Order F16-36, 2016 BCIPC 40 (CanLII) at para 60 citing Order 02-23, 2002 CanLII 42448 (BC IPC) at para 18.

[222] For the test under s. 22(2)(c), I am satisfied that the first two elements are met because the applicant's human rights complaint is ongoing. I am not however, persuaded that the third and fourth elements are met.

[223] The applicant does not say, and I cannot see, how the specific personal information in the records has some bearing on, or significance for, a determination of his human rights complaint.

[224] The personal information at issue under s. 22 is largely found in the investigator's report on his investigation of the school experiences. Most of the contents of that report were released to the applicant, including the investigator's conclusions about what happened.[146] I can also see that the findings about the impact of the student experiences on the applicant were also released to him.[147]

[225] In my view, it is the details that were already released to the applicant, not the third party personal information, that may have some bearing on his human rights complaint. Even so, the applicant does not adequately explain how any of the information in his records bears on his human rights complaint.

[226] I am not persuaded that disclosure of any of the third party personal information might assist the applicant in a fair determination of his human rights complaint.

[227] For reasons above, I find that s. 22(2)(c) is not a circumstance weighing in favour of disclosure.

<u>Unlisted relevant circumstances – s. 22(2)</u>

[228] Previous orders have routinely said that "all the relevant circumstances" in s. 22(2) include, among other circumstances, an applicant's prior knowledge. The applicant's submission identifies prior knowledge as a relevant circumstance.[148]

[229] Previous orders indicate that an applicant's prior knowledge information can be a relevant factor weighing in favour of disclosure.[149] The weight to be placed on this factor depends on the actual nature and extent of the applicant's prior knowledge.[150]

[230] While the applicant references the circumstance of prior knowledge in his submission, he does not actually say or identify, and I cannot easily discern, the

[146] Severed records pp. 16-17
[147] Severed Records, p. 19.
[148] Applicant's submission at para 174.
[149] See, for example, Order F21-08, 2021 BCIPC 12 at para 192 (and the cases cited therein); and Order F21-28, 2021 BCIPC 36 at paras 53-69.
[150] Order F21-28, 2021 BCIPC 36 (CanLII) at para 58 citing *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at paras 619-620.

personal information about which he claims to have prior knowledge.[151] For that reason, I am not satisfied that any such prior knowledge weighs in favour of disclosure of any of the withheld personal information.

Conclusion on relevant circumstances

[231] I found above that none of the factors, listed or unlisted, under s. 22(2) are relevant circumstances weighing in favour of disclosure. For this reason, it is unnecessary for me to also consider the factors listed in ss. 22(2)(e) and 22(2)(f) or the sensitivity circumstance raised by the District as weighing against disclosure. For completeness, I did consider them briefly, and in my view, they all weigh against disclosure.[152]

Conclusion - s. 22

[232] I found all the information withheld by the District under s. 22(1) is personal information. I found that s. 22(4)(e) does not apply to any of it. I also found that s. 22(3)(d) applies to all of the personal information so disclosing that information is presumed to be an unreasonable invasion of third party personal privacy.

[233] After considering all of the relevant circumstances under s. 22(2), I concluded that none weigh in favour of disclosure. I find the presumption under s. 22(3)(d) is not rebutted.

[234] I am not persuaded that disclosure of any of the withheld personal information would *not* be an unreasonable invasion of a third party's personal privacy.

[235] For all of the above these reasons, the District is required to withhold the personal information it withheld under s. 22(1).

CONCLUSION

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

1. I confirm the District's decision to withhold all of the information that I found it is authorized by ss. 13 and 14 of FIPPA to refuse access to.

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[151] Applicant's submission at para 174.

[152] Section 22(2)(e) weighs against disclosure because it would unfairly expose third parties to other harm as evidenced by the applicant's existing unsubstantiated allegations and improper conduct in this inquiry. Section 22(2)(f) weighs against disclosure because the evidence shows the participants in the investigation reasonably expected their personal information to be kept confidential. Sensitivity weighs against disclosure of much of the personal information because I can see that it describes a third party's thoughts and feelings in the context of a complaint investigation. For a similar finding see Order F23-56, 2023 BCIPC 65 (CanLII) at para 90.

2. I require the District to refuse access to all of the information I found it is required by s. 22(1) to refuse to disclose.

August 31, 2026

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

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