



Order F20-18

MINISTRY OF FINANCE (PUBLIC SERVICE AGENCY)

Laylí Antinuk
Adjudicator

April 29, 2020

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Summary: The applicant asked the BC Public Service Agency (PSA) for records related to a workplace investigation that occurred in the aftermath of the well-known Ministry of Health firings. The PSA withheld all the responsive records under ss. 14 (solicitor client privilege), 13 (advice and recommendations) and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that s. 14 applied to all but three of the records, two of which the PSA also withheld under s. 22. The adjudicator ordered the PSA to disclose the record not covered by s. 14 to the applicant. The adjudicator also ordered the PSA to produce the remaining two records to the commissioner under s. 44 and will remain seized of the matter until she makes a final decision respecting s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 4(2), s. 8(1)(c), s. 14, s. 22, s. 44(1)(b), and Schedule 1.

INTRODUCTION

[1] The applicant asked the BC Public Service Agency (the PSA)¹ for records related to a workplace investigation that occurred in the aftermath of the well-known Ministry of Health firings. The PSA withheld all the responsive records under ss. 14 (solicitor client privilege), 13 (advice and recommendations) and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA or the Act).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the PSA's decision. Mediation did not resolve

¹ The PSA is part of the Ministry of Finance. For convenience, I have used the term PSA to refer to the public body in this inquiry.

the matter and the applicant requested an inquiry. Both parties provided submissions for the inquiry.

ISSUES

[3] The PSA withheld all the responsive records under s. 14, so I will first decide whether s. 14 authorizes the PSA to refuse access to the information in dispute. The PSA bears the burden of proving that s. 14 applies.²

[4] The PSA also withheld some records under ss. 13 or 22. Therefore, if I decide that s. 14 does not apply to any of these records, I will then consider ss. 13 or 22. The PSA bears the burden of proving that s. 13 applies.³ It also bears the burden of proving that all information withheld under s. 22 is personal information.⁴ However, the applicant bears the burden of proving that disclosure of any personal information withheld under s. 22 would not constitute an unreasonable invasion of third party personal privacy.⁵

DISCUSSION

Background

[5] In 2012, the Ministry of Health fired several employees in response to certain allegations of wrong-doing.⁶ In 2015, a Committee of the Legislative Assembly referred this Ministry firing matter to the Ombudsperson for investigation and reporting. The Ombudsperson's office performed an investigation and presented its report titled *Misfire: the 2012 Ministry of Health Employment Terminations and Related Matters* (the Misfire Report) to the Legislature in April 2017. In response to the findings and recommendations in the Misfire Report, the PSA decided it needed:

1. Comprehensive legal advice about personnel matters; and
2. To perform an investigation (the investigation) in relation to the key government officials involved in the Ministry of Health firings.

[6] The purpose of the investigation was to determine if the employer had just cause to discipline any of the employees who played a role in the firings.⁷ A law

² Section 57(1) of FIPPA. Whenever I refer to section numbers throughout the remainder of this order, I am referring to a section of FIPPA unless otherwise stated.

³ *Ibid.*

⁴ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.

⁵ Section 57(2).

⁶ The information in this paragraph comes from the Assistant Deputy Minister's Affidavit #1 at paras. 8-10, 12-13 and Exhibit B.

⁷ The information in this paragraph comes from the applicant's Affidavit #1 at para. 6 and Exhibits B and C.

firm retained by the PSA (external counsel)⁸ conducted the investigation with oversight and support from the PSA. As part of the investigation, external counsel interviewed the applicant.

Records in dispute

[7] The records in dispute relate to the investigation and comprise 362 pages⁹ of emails (many with attachments), a draft document, and a legal opinion. As noted above, the PSA withheld all the records under s. 14 and only applied ss. 13 and 22 to some of the records.

[8] The PSA did not provide the OIPC with any of the records at issue because it asserts that solicitor client privilege applies to them all. Instead, it proffered affidavit evidence from the Assistant Deputy Minister responsible for human resources management at the PSA, as well as a table of records (table) describing the records.¹⁰

Solicitor client privilege – section 14

[9] Section 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.¹¹ The PSA claims legal advice privilege over the information in dispute.¹²

[10] Legal advice privilege arises out of the unique relationship between client and lawyer.¹³ The Supreme Court of Canada describes its purpose in the following terms:

Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent... The privilege is essential if sound legal advice is to be given in every field... Without this privilege clients could never be candid and furnish

⁸ When I say “external counsel” I mean either the specific lawyer who conducted the investigation, the law firm he works for, or other lawyers at that law firm who, as indicated in the PSA’s table, also communicated with the PSA at the time in question.

⁹ Given some confusion about the precise number of pages at issue in this inquiry, I wrote to the PSA for confirmation. The PSA provided affidavit evidence confirming that the responsive records in dispute for this inquiry comprise a total of 362 pages. I accept that affidavit evidence – specifically, paragraphs 11-14 of the Assistant Deputy Minister’s Affidavit #2.

¹⁰ The applicant provided a copy of the severed records package initially provided by the PSA, prior to the OIPC’s involvement. This record packages differs from that described in the PSA’s table. The responsive records changed during mediation (OIPC Investigator’s Fact Report). The records in dispute in this inquiry are the records as described in the table the PSA prepared for the purposes of this inquiry and in the Assistant Deputy Minister’s Affidavit #2 at paras. 13-14.

¹¹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [*College of Physicians*].

¹² PSA’s initial submission at para. 12.

¹³ *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 839 [*Solosky*].

all the relevant information that must be provided to lawyers if they are to properly advise their clients.¹⁴

[11] To this end, legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to a communication (and records related to it),¹⁵ the communication must:

- 1) be between a solicitor and client;
- 2) entail the seeking or giving of legal advice; and
- 3) the parties must have intended it to be confidential.¹⁶

[12] The scope of legal advice privilege extends beyond the explicit seeking and giving of legal advice to include communications that make up “part of the continuum of information exchanged [between solicitor and client], provided the object is the seeking or giving of legal advice.”¹⁷ Legal advice privilege also extends to internal client communications that discuss legal advice and its implications.¹⁸

Parties’ positions – legal advice privilege

[13] The PSA says that it retained external counsel on behalf of the Province to provide legal advice on the legal position of the Province in relation to the applicant and others.¹⁹ According to the PSA, the preparation of this legal advice included having external counsel conduct the investigation. The PSA says that it retained external counsel with the understanding that solicitor client privilege applied to all its communications with external counsel that related to the seeking, formulating and giving of legal advice, including all aspects of the investigation.

[14] The applicant acknowledges that external counsel is a solicitor but argues that he was not acting as a solicitor when conducting the investigation.²⁰ As noted above, external counsel interviewed the applicant. The applicant says that in that interview, external counsel specifically said that he had not been retained

¹⁴ *Smith v. Jones*, 1999 CanLII 674 (SCC) at para. 46.

¹⁵ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.

¹⁶ *Solosky*, *supra* note 13 at p. 837.

¹⁷ *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.

¹⁸ *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 12; *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.

¹⁹ The information in this paragraph comes from the Assistant Deputy Minister’s Affidavit #1 at paras. 7, 12-14 and the PSA’s initial submissions at para. 11.

²⁰ Applicant’s response submission at para. 34.

to provide legal advice, but only to conduct the investigation for the PSA.²¹ Given this, the applicant contends that the PSA's suggestion that the records are legal advice is incorrect. The applicant also submits that:

- Legal advice privilege only attaches when legal advice is sought from or provided by the client's lawyer;
- Legal advice privilege only applies to confidential communications between client and solicitor and does not apply to facts that are otherwise discoverable; and
- Notes, documents and communications cannot be cloaked in legal advice privilege simply because a lawyer was involved or handled the documents.

External counsel's role

[15] Before I turn to an examination of the specific records at issue, I will first address the question of external counsel's role at the time the records came into existence: did external counsel act as a lawyer or simply an investigator at the time in question?

[16] The courts have long accepted that lawyers often have to undertake investigative work in order to give accurate legal advice. In this regard, investigation can play an integral part in a lawyer's role. On this point, the Manitoba Court of Appeal states:

...legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services.²²

[17] The BC Court of Appeal explains how legal advice privilege is affected when a lawyer performs an investigative role:

Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the 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 her client.²³

²¹ The information in this paragraph comes from the applicant's Affidavit #1 at para. 9 and Exhibit C; and the applicant's response submission at paras. 20-22, 24 and 34.

²² *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 at para. 19.

²³ *College of Physicians*, *supra* note 11 at para. 32.

[18] The access request at issue in this inquiry centres specifically on records related to an investigation conducted by a lawyer. The PSA asserts that external counsel conducted the investigation in his role as legal counsel for the PSA. According to the PSA, the investigation pertained to the legal advice it asked external counsel to provide.²⁴ In the PSA's words, "the investigation was directly related to, and was part of the [PSA's] request for legal advice needed to assess the Province's legal position with respect to employees, including the applicant."²⁵

[19] However, as mentioned above, the applicant alleges that external counsel explicitly said that he had not been retained to provide legal advice, but rather "solely to conduct the investigation."²⁶ The applicant also draws my attention to paragraphs 6 and 7 of the investigation's terms of reference which state:

Throughout the investigation and its completion the procedures will be reviewed by counsel and legal advice and opinions will be obtained where appropriate.

The investigation will be conducted by [external counsel] retained by the Public Service Agency. The Public Service Agency will provide additional support for the investigation as required.

The applicant submits that the terms of reference make a clear distinction between external counsel – the specifically identified, named law firm that would conduct the investigation – and other, unspecified lawyers simply referred to as "counsel" who would provide legal advice and opinions as necessary. The applicant says the terms of reference "clearly differentiates the investigation from the legal advice that may be obtained by the Province."²⁷

[20] In order to resolve this apparent conflict in the evidence and because of the vital importance of solicitor client privilege to our justice system, I offered the parties an opportunity to provide additional submissions and evidence specifically related to the applicant's claims about what external counsel said in their interview. The PSA responded with additional submissions and a second affidavit from its Assistant Deputy Minister. The applicant did not provide any further information.

[21] The PSA's additional evidence is that the Assistant Deputy Minister contacted external counsel to discuss the interaction described by the applicant.²⁸ External counsel told the Assistant Deputy Minister that he clearly

²⁴ Assistant Deputy Minister's Affidavit #1 at para. 13.

²⁵ PSA's reply submissions at p. 1.

²⁶ Applicant's Affidavit #1 at para. 9.

²⁷ *Ibid* at para. 7.

²⁸ The information in this paragraph comes from the Assistant Deputy Minister's Affidavit #2 at paras. 7-9.

informed the applicant and the applicant's lawyer (the lawyer) at the beginning of their interview that the Province had retained him to provide advice about whether the Province had just cause to discipline or take any other action against certain employees identified in the Misfire Report. External counsel also said that he recalled having a conversation with the lawyer about the applicant's desire to negotiate a severance package to end the applicant's employment with the Province. External counsel said that he responded by saying that such discussions went beyond the terms of his retainer with the Province. External counsel denied ever telling the applicant or the lawyer that he was not retained to provide legal advice, but says that he did say that the negotiation of a severance package went outside the scope of his retainer.

[22] In its additional submissions, the PSA confirms that it retained external counsel solely to provide legal advice on the legal position of the Province with respect to certain employees. The PSA says that it did not retain external counsel to provide advice on or negotiate severance packages.

[23] The evidence leads me to conclude that external counsel conducted the investigation in order to ascertain the facts necessary to formulate his legal advice. I note that the table clearly indicates that external counsel did, in fact, provide the PSA with legal opinions.²⁹ Additionally, I accept the PSA's evidence about what external counsel said in his interview with the applicant (and why). Taking all this into account, I find that external counsel conducted the investigation in his role as a lawyer in order to provide the PSA with legal advice.

[24] With this in mind, I turn to the records in dispute. For the reasons that follow, I find that legal advice privilege applies to all but three of the records.

Records to which privilege applies

[25] I will begin with the records that I find legal advice privilege applies to. I have categorized these records as follows:

- A legal opinion from external counsel;
- Emails exclusively between the PSA and external counsel;
- Internal PSA emails; and
- Emails between the PSA and other Provincial government employees.

²⁹ Records at pp. 33-80, 88-137 and 138-141.

Legal opinion

[26] The PSA's table describes one of the records as a legal opinion from external counsel with a draft investigation plan.³⁰ According to the table, this record totals approximately 50 pages and includes an investigation schedule and materials for consideration in the investigation. For the reasons that follow, I find that disclosing any part of this information would reveal confidential solicitor client communications.

[27] Starting with the legal opinion itself, legal advice privilege undoubtedly protects a legal opinion that a lawyer writes for a client. By its very nature, a legal opinion reflects a lawyer's legal analysis and advice to her client and thereby relates to and would reveal confidential solicitor client communications.³¹ In this case, the table says that external counsel wrote this legal opinion and the applicant has not contested this particular piece of evidence. Therefore, I accept that external counsel did provide this legal opinion to the PSA. With all this in mind, I find that the disclosure of the legal opinion at issue would reveal privileged communications between the PSA and external counsel; therefore, privilege applies. Accordingly, s. 14 authorizes the PSA to withhold this legal opinion.

[28] I also find that legal advice privilege applies to the materials for consideration in the investigation included with the legal opinion. External counsel undoubtedly exercised expertise and judgment when deciding what materials he should append to the legal opinion that he provided to the PSA. As such, I find that the materials included with the legal opinion reveal external counsel's analysis and advice to the PSA respecting the investigation.

[29] I also find that legal advice privilege applies to the investigation schedule included with the legal opinion. I note that the PSA tasked external counsel with identifying and recommending the individuals who should be the subjects of the investigation,³² and I infer that the investigation schedule contains information about who external counsel wanted to interview and when. Given this, I find that disclosing the investigation schedule would reveal external counsel's legal advice about who the PSA should include in the investigation. Therefore, I find that legal advice privilege applies to the schedule.

[30] To summarize, I find that s. 14 authorizes the PSA to withhold the legal opinion and all the materials included with it.

³⁰ Records at pp. 33-80.

³¹ For similar reasoning, see Order 01-10, 2001 CanLII 21564 (BC IPC) at para. 68.

³² Assistant Deputy Minister's Affidavit #1 at para. 17.

Emails exclusively between the PSA and external counsel

[31] According to the table, many of the emails/email strings at issue involve only the PSA and external counsel. These emails/email strings consist of the following:

- External counsel providing the PSA with material related to the investigation and legal opinion.³³
- The PSA and external counsel discussing the PSA's instructions to external counsel.³⁴
- The PSA requesting that external counsel provide legal advice about attached materials.³⁵
- The PSA telling external counsel about matters directly related to the legal advice it sought about the investigation.³⁶
- The PSA providing external counsel with confidential draft communications connected to the investigation and directly related to seeking legal advice.³⁷

All these emails/email strings meet the three criteria required for legal advice privilege to apply. The PSA's evidence shows that these records consist of written communications between the PSA and external counsel that entail the seeking and giving of legal advice. These emails exclusively involve the PSA and external counsel which – when paired with the sensitive and potentially litigious nature of the investigation – leads me to conclude that the PSA and external counsel intended to keep these emails confidential.

[32] I also find that the attachments to these particular emails/email strings entail the giving or seeking of legal advice based on the evidence before me. For example, the largest record involved in this inquiry is an email from the PSA to external counsel with over 200 pages of attachments. The PSA's table identifies and describes each one of these attachments, providing information as to the date the attachment was created, its length, subject matter and general substance. The evidence establishes that the PSA sent these materials to external counsel with a request that he provide legal advice about them. I conclude s. 14 applies to these attachments because legal advice privilege protects all the information clients provide to their lawyers for the purposes of obtaining legal advice.³⁸

³³ Records at pp. 1-2.

³⁴ Records at pp. 30-32.

³⁵ Records at pp. 145-277.

³⁶ Record at p. 322.

³⁷ Records at pp. 358-362.

³⁸ Order 00-38, [2000] B.C.I.P.C.D. No. 41 at p. 14.

Internal PSA emails

[33] The majority of the emails at issue in this inquiry consist of internal PSA communications.³⁹ In these internal emails, PSA employees share and discuss legal advice, investigation related materials, and attached communications received from external counsel.

[34] As set out above, the courts have consistently held that legal advice privilege extends to internal client communications that discuss legal advice and its implications.⁴⁰ Given this, I find that legal advice privilege extends to the internal PSA emails (and their attachments) because they contain or would reveal privileged communications the PSA had with external counsel. Therefore, s. 14 authorizes the PSA to withhold the internal emails.

Emails between the PSA and other Provincial government employees

[35] The PSA also claims legal advice privilege over three communications that include Provincial government employees who do not work for the PSA. I find two of these communications privileged for the reasons that follow.⁴¹

[36] The first communication consists of an email sent by the PSA's Assistant Deputy Minister to the PSA's Deputy Minister, external counsel and two Ministry of Health (Ministry) employees. The Assistant Deputy Minister attaches a letter for discussion and the evidence indicates that he included external counsel for the purpose of seeking legal advice. The second communication consists of an email string between the PSA's Deputy Minister and the Deputy Minister of the Office of the Premier (the Premier's Office).⁴² In this email string, the two Deputy Ministers discuss external counsel's legal advice to the PSA, and the PSA's Deputy Minister shares a five page legal opinion from external counsel as an attachment.

[37] The presence of non-PSA employees in these two communications raises the issue of client identity. Is the client in this case the PSA itself or is the client the Province? The PSA asserts that it retained external counsel on behalf of the Province to provide legal advice related to the findings in the Misfire Report.⁴³

³⁹ The internal emails discussed in this section appear at pp. 3-14, 15-29, 88-137, 138-141, 143-144, 297-317, 318-319, 320-321, 325-327, 328, 329-331, 332-335, 339-342 and 343-357 of the records.

⁴⁰ *Supra* note 18.

⁴¹ Records at pp. 81-87 and 336-338. A third email that involves a non-PSA Provincial government employee appears at pp. 323-324; however, for the reasons set out in paragraphs 50-52 below, I have found that legal advice privilege does not apply to this email.

⁴² The PSA's table includes the names of the PSA and the Premier's Office employees involved in this particular email string. I take notice of the fact that these two named individuals were the Deputy Ministers of the PSA and the Premier's Office at the time of the email exchange.

⁴³ Assistant Deputy Minister's Affidavit #1 at paras. 7 and 13.

More specifically, the PSA says it sought legal advice from external counsel “on behalf of the Province in order to assess the legal position of the Province in respect of the employees at issue.”⁴⁴

[38] Based on the facts before me, I accept that the PSA retained external counsel on behalf of the Province. Therefore, in the particular circumstances of this case, I am satisfied that the client is the Province. I make this finding for the following reasons.

[39] First and most importantly, under the *Public Service Act*, the PSA bears responsibility for personnel management across the public service.⁴⁵ This means the PSA takes care of personnel management for – and therefore serves and supports – the Premier’s Office and all the Provincial ministries, including the Ministry. Additionally, in this case, the PSA has established that it required comprehensive legal advice on behalf of the Province relating to personnel matters identified in the Misfire Report.⁴⁶

[40] Furthermore, the terms of reference (terms) for the investigation state that the PSA’s Deputy Minister would brief other Deputy Ministers on the investigation as necessary.⁴⁷ The terms also state that legal advice and opinions would be obtained throughout the investigation and upon its completion as needed. Putting this together, the terms clearly imply that the plan from the outset was for government leaders from different ministries and offices across the Province to share and discuss legal advice related to the investigation. I note that this appears to be precisely what occurred in the email exchange between the PSA’s Deputy Minister and the Deputy Minister of the Premier’s Office. In my view, by explicitly allowing this type of information sharing between leaders of the Provincial government, the terms imply that the entire Provincial government had an interest and stake in the legal advice the PSA received related to the investigation.

[41] Taking all this into account and considering the totality of the circumstances, I am satisfied that the PSA retained external counsel on behalf of the Province and that the Province itself is the client on the particular facts of this case. With this in mind, I turn to the two specific communications mentioned above that involve the Ministry employees and the Premier’s Office.

[42] As noted above, the first consists of an email sent by the PSA’s Assistant Deputy Minister to the PSA’s Deputy Minister, external counsel and two Ministry employees. The PSA employee who wrote the email included external counsel for the purpose of seeking legal advice. For this reason, I am satisfied that this

⁴⁴ PSA’s reply submission at p. 2.

⁴⁵ See ss. 2, 3(a), 5(3) and 22 of the *Public Service Act*, RSBC 1996, c. 385.

⁴⁶ Assistant Deputy Minister’s Affidavit #1 at para. 10.

⁴⁷ Applicant’s Affidavit #1 at Exhibit C, p. 2.

written communication, which involved solicitor and client, entailed the seeking of legal advice. I am also satisfied that the participants in this communication intended to converse confidentially. The terms specify that the investigation would focus on employees that played a role in the Ministry firings. Given this, I infer that at least some of the subjects of the investigation worked for the Ministry. Therefore, the Ministry had a direct and specific interest in the legal advice obtained by the PSA. In these circumstances, it makes sense to me that the PSA included two Ministry employees in a communication it had with external counsel about the investigation. This fact, paired with the sensitive and potentially litigious nature of the investigation, leads me to conclude that the participants in this communication intended to keep their discussion confidential. Therefore, I find that legal advice privilege applies to this email, so the PSA can withhold it under s. 14.

[43] I turn now to the email string between the Deputy Ministers of the PSA and the Premier's Office in which they discuss and share external counsel's legal advice. I find that the email string contains and would reveal privileged communications that the PSA had with external counsel. Further, given my findings respecting client identity, my reasoning related to the internal PSA emails applies here. For all these reasons, I find that legal advice privilege applies to the email string between the PSA and the Premier's Office. As such, the PSA can withhold this record under s. 14.

Records to which privilege does not apply

[44] I will now discuss three records that I find legal advice privilege does not apply to, namely:

- An email with attached audio voicemail;
- A draft document; and
- A forwarded email from a member of the public.⁴⁸

Email with audio voicemail

[45] The PSA claims legal advice privilege over an email string that it describes as ending with an email between PSA employees and attaching an audio voicemail message forwarded by external counsel.⁴⁹ The table does not say that this email string entails or relates to legal advice. Nor has the PSA asserted or provided evidence to establish that this email string forms part of the continuum of communications in which legal advice was sought and offered. Additionally, the attached audio voice mail is not *from* external counsel, but rather has been *forwarded by* external counsel, meaning that it does not contain a communication from external counsel himself. The PSA has not explained why external counsel

⁴⁸ These records appear at pp. 142, 278-296 and 323-324, respectively.

⁴⁹ Table at Exhibit A to the Assistant Deputy Minister's Affidavit #1.

forwarded this audio voicemail and has not claimed that it relates in any way to the legal advice external counsel was retained to provide.

[46] In my view, the PSA has not proffered adequate evidence to establish that this email string or its attached voice mail message entails legal advice or otherwise forms part of the continuum of communications related to that legal advice. Therefore, I am not satisfied that legal advice privilege applies to this record. Accordingly, the PSA cannot withhold it under s. 14. I note that the PSA has not applied ss. 13 or 22 to this record, so I will not discuss it again.

A draft document

[47] The PSA also claims legal advice privilege over an undated record described as a private and confidential draft “subject to legal review” by external counsel.⁵⁰ The PSA has not explained who wrote this draft document or what it pertains to. More importantly, the PSA has not asserted – or provided evidence to show – that the draft contains or would reveal legal advice. Furthermore, the PSA has not proffered any evidence about whether or not external counsel ever actually received or gave advice about this draft.

[48] The mere fact that a draft was or will be “subject to legal review” does not suffice to establish that legal advice privilege applies to it. In my view, knowing only that external counsel has reviewed or might review a draft in future does not allow someone to infer what external counsel and the PSA might have said to each other about the draft, or what legal advice external counsel might have provided about it, if any. As noted above, the three part test for legal advice privilege prescribed by the Supreme Court of Canada requires: (i) a communication between a client and lawyer; (ii) intended by the parties to be confidential; that (iii) entails the seeking or giving of legal advice.⁵¹ While the PSA does describe this draft as confidential, its evidence does not satisfactorily explain how the draft entails the seeking or giving of legal advice, or qualifies as a communication between solicitor and client.

[49] For these reasons, I am not satisfied that legal advice privilege applies to the draft; accordingly, the PSA cannot withhold it under s. 14. The PSA also asserts that s. 22 applies to this record, so I will consider it again in my s. 22 analysis.

A forwarded email from a member of the public

[50] The last record the PSA claims legal advice privilege over consists of an email from a member of the public that a PSA employee forwards to another PSA

⁵⁰ Table at Exhibit A to the Assistant Deputy Minister’s Affidavit #1.

⁵¹ *Solosky*, *supra* note 13.

employee, a Ministry employee and external counsel. The email from the member of the public relates to one of the subjects of the investigation.

[51] The PSA does not claim that the employee who forwarded the email included external counsel for the purpose of seeking legal advice.⁵² Nor does the PSA claim that the forwarded email relates to, contains or would reveal legal advice. Additionally, nothing in the evidence before me indicates that external counsel provided legal advice about this forwarded email or considered its contents when providing legal advice or conducting the investigation for the PSA. Instead, based on the evidence before me, it appears that the PSA employee who forwarded this email simply included external counsel as part of a group of recipients. The courts have long recognized that a document does not become privileged merely because someone sent a copy of it to a lawyer.⁵³ As stated by Madam Justice Gray:

A lawyer is not a safety-deposit box. Merely sending documents that were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice to a lawyer will not make those documents privileged.⁵⁴

[52] With all this in mind, I find that legal advice privilege does not protect this email, so s. 14 does not apply. However, I will consider this email again below because the PSA also withheld it under s. 22.

Unreasonable invasion of third party personal privacy – section 22

[53] Section 22 requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party's personal privacy. This section does not guard against all invasions of personal privacy; instead, it explicitly aims to prevent only those invasions of personal privacy that would be unreasonable in the circumstances of a given case.⁵⁵

[54] Given my findings respecting s. 14, I need only consider two records in relation to s. 22:

- The email forward (the email) discussed at paragraphs 50 – 52; and

⁵² I find this especially noteworthy because the PSA has used this phrasing to describe other records in the table. For example, when it comes to the email at pp. 336-338 of the records (which I have found privileged), the table says that external counsel "is included [in the email] for the purpose of seeking legal advice." The table makes no such claim when it comes to this forwarded email.

⁵³ *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at para. 61; *Humberplex Developments Inc. v. TransCanada Pipelines Ltd.*, 2011 ONSC 4815 at para. 49; *Imperial Tobacco Canada Limited v. The Queen*, 2013 TCC 144 at para. 57.

⁵⁴ *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at para. 61.

⁵⁵ Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 14.

- The draft document (the draft) discussed at paragraphs 47 – 49.

[55] In making a decision to withhold information under s. 22, a public body must take four steps:⁵⁶

- 1) Determine whether the information at issue is personal information.
- 2) Determine whether any of the circumstances described in s. 22(4) apply. If they do, then disclosure is *not* an unreasonable invasion of personal privacy.
- 3) Determine whether any of the presumptions listed in s. 22(3) apply. If they do, disclosure is *presumed* to be an unreasonable invasion of personal privacy. Presumptions may be rebutted by considering all relevant circumstances (the next step in the analysis).
- 4) Consider the impact that disclosure would have in light of all the relevant circumstances, including those listed in s. 22(2). Do the relevant circumstances weigh in favour of or against disclosure?

In its s. 22 submissions, the PSA does not provide any information about its assessment of whether any circumstances in s. 22(4) exist, whether any presumptions in s. 22(3) apply, or what relevant circumstances might weigh in favour of or against disclosure, such as those outlined in s. 22(2). As the four-part analysis described above implies, each of these aspects of s. 22 play a vital role in answering the question of whether disclosure of personal information in any given case would constitute an unreasonable invasion of personal privacy. If the PSA had provided a copy of the records and submissions respecting ss. 22(2), 22(3) and 22(4), I would have been positioned to consider the application of the typical four-part analysis under s. 22. However, in the absence of such submissions – and, crucially, without also having the records before me – I have had to approach the matter as follows.

Personal information

[56] Section 22 only applies to personal information. Therefore, as indicated above, the first step in any s. 22 analysis requires a determination as to whether the information at issue qualifies as personal information.

[57] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.⁵⁷ Previous orders have held that information is about an identifiable individual when it is reasonably capable

⁵⁶ For example, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

⁵⁷ Schedule 1 of FIPPA contains its definitions.

of identifying an individual alone or when combined with information from other available sources.⁵⁸

[58] As noted, FIPPA excludes contact information from the definition of personal information. FIPPA defines contact information as information to enable an individual at a place of business to be contacted. Contact information includes an individual's name, position or title, business telephone number, address, email or fax number.

[59] The PSA bears the burden of proving that the information withheld under s. 22 qualifies as personal information. Former Commissioner Loukidelis has explained the burden of proof under s. 22 as follows:

...It is up to a public body to establish whether information in requested records is personal information and whether excepted information can reasonably be severed under s. 4(2) of the Act, as part of its burden to prove that an applicant has no right of access to requested records...

The applicant's burden, under s. 57(2), is the burden of proving that disclosure of information the [public body] establishes is personal information would not be an unreasonable invasion of third-party personal privacy under s. 22.⁵⁹

The PSA's evidence and submissions

[60] In its very brief submissions on s. 22, the PSA asserts that the third party personal information:

... is embedded in records that are subject to solicitor-client privilege. Disclosure of the details of the personal information would reveal the content of the records that are subject to solicitor-client privilege. The public body submits that the fact that the personal information is also subject to s. 14 means a determination on whether s. 22 applies is unnecessary.⁶⁰

[61] The PSA's only evidence respecting personal information comes from the PSA's Assistant Deputy Minister who merely states:

The investigation and the legal advice relates to more than one person and contains sensitive personal information about a number of third parties. This information is identified in the records as being subject to s. 22 of FIPPA because disclosure would be an unreasonable invasion of the third parties' personal privacy.⁶¹

⁵⁸ For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.

⁵⁹ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11.

⁶⁰ PSA's initial submissions at para. 40.

⁶¹ Assistant Deputy Minister's Affidavit #1 at para. 19.

[62] The PSA's table indicates which records the PSA has withheld under s. 22, but does not identify what specific information on each page of the records qualifies as personal information. The draft consists of 18 pages and the email consists of two pages, but the PSA has not indicated which of these 20 pages contain personal information or what specific information on each page qualifies as personal information.

Analysis and findings

[63] The evidence and submissions provided by the PSA do not suffice to meet its burden to establish what personal information is involved in relation to these pages of records. As described above, former Commissioner Loukidelis made clear that a public body must establish whether *information* in requested records is personal information *and*, in addition, whether information excepted under s. 22 can reasonably be severed under s. 4(2) of the Act. The PSA has not established that all the information withheld under s. 22 qualifies as personal information nor has it provided any indication as to whether information excepted under s. 22 can reasonably be severed from disclosable information.

[64] Public bodies must apply FIPPA's access exceptions on a considered basis, keeping in mind their s. 4(2) duty to release all information that can reasonably be severed from information protected by FIPPA's exceptions. Furthermore, when a public body refuses access to information, it has a duty under s. 8(1)(c) to give "the reasons for the refusal *and* the provision of this Act on which the refusal is based" (emphasis added). As this language makes clear, a public body cannot simply cite a FIPPA provision when refusing access. It also has a duty to provide reasons explaining how it decided that the cited provision applies to the withheld information.⁶² By requiring public bodies to cite the exception relied on *and* give reasons, I find it clear that the Legislature intended public bodies to provide more than a mere repetition or summary of the language of a cited provision, as the PSA has done here.

[65] Taken together, the PSA's affidavit evidence, table and submissions do not distinguish between information and records, nor do they distinguish between personal information and other, non-personal information that the draft and the email might also contain. For example, I find it reasonable to infer that the email contains the contact information of the individuals involved. Additionally, the material before me does not say anything whatsoever about the PSA's assessment of the various subsections of s. 22 that must be considered in any s. 22 analysis – i.e. ss. 22(4), 22(3) and 22(2).

⁶² Former Commissioner Loukidelis made clear that merely referring to FIPPA's exceptions as the reason for refusing access to information does not discharge a public body's duties under s. 8(1)(c). See Order 00-01, 2000 CanLII 9670 (BC IPC) at para. 4.

[66] To summarize, the PSA has elected not to provide the records for my review and, when it comes to s. 22, has instead proffered only: (a) the general, conclusory and redundant statement that the records contain personal information the disclosure of which would unreasonably invade the personal privacy of third parties; and (b) its submission that a determination under s. 22 is unnecessary because s. 14 applies. These are both statements of opinion on the very issues I must decide in this inquiry. Furthermore, the PSA has not identified which pages of the draft and email contain personal information or what specific information on each page qualifies as personal information. Additionally, the PSA has not shown that it turned its mind to the various subsections of s. 22, or to its ss. 4(2) or 8(1)(c) duties to sever and to provide reasons when it comes to its s. 22 decision.

[67] I recognize that the PSA asserts that legal advice privilege applies to the draft and the email, so it believes a determination under s. 22 “is unnecessary.”⁶³ However, in an inquiry under FIPPA, it falls to the Commissioner to decide all questions of law and fact and dispose of all inquiry issues.⁶⁴ The OIPC Investigator’s Fact Report for this matter sets out these issues for determination:

At the inquiry, the adjudicator will consider whether the public body:

- a. is authorized by sections 13 and 14 of FIPPA to withhold the records at issue; and
- b. is required by section 22 to refuse to disclose the records at issue.⁶⁵

The PSA explicitly accepted the Investigator’s Fact Report as accurate and acknowledged that the inquiry issues include s. 22.⁶⁶ For the reasons set out above, I have determined that s. 14 does not apply to these two records. Therefore, there is no question that I must determine whether s. 22 applies before this inquiry can be completed.

[68] Given the paucity of the PSA’s evidence and submissions respecting s. 22,⁶⁷ I have decided that it is appropriate to make an order for production under s. 44 of the Act. I have also decided that the PSA ought to have the opportunity to fulfill its s. 8(1)(c) duty to give reasons respecting its s. 22 decision. This will better allow the applicant to make an informed effort to discharge the burden of proof placed on applicants in relation to s. 22. Ultimately, this is the most fair and efficient way for me to make a final determination respecting the issues I am duty-bound to adjudicate in this inquiry. In coming to this conclusion,

⁶³ PSA’s initial submissions at para. 40.

⁶⁴ Section 56(1) and 58(1).

⁶⁵ OIPC Investigator’s fact report at para. 6.

⁶⁶ PSA’s initial submissions at paras. 6-7.

⁶⁷ I also note here, in passing, that the PSA’s bare assertion of s. 22’s application, without “reasons for the refusal”, places the applicant in a difficult position, since the applicant bears the burden of establishing that disclosure would not unreasonably invade third party personal privacy.

I have kept in mind the fact that s. 22 protects third party personal privacy, not the PSA's interests directly.

Order for production of records – section 44

[69] As the Commissioner's delegate, I have the authority to order the production of records for the Commissioner's review under s. 44(1)(b). The relevant portions of s. 44 state:

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

...

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

...

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

In this case, I require the PSA to produce copies of the draft and the email for my review with the PSA's s. 22 redactions highlighted or otherwise clearly noted. As required by the Act, the OIPC will receive these records on an *in camera* basis and will not disclose them.⁶⁸

[70] When the PSA produces these two records, it may also provide its reasons respecting the application of s. 22 pursuant to its s. 8(1)(c) duties. If the PSA provides additional submissions in this respect, I will also give the applicant an opportunity to make a response submission. I remain seized of this inquiry and, after the completion of these final steps in the inquiry, will issue a final order under s. 58 respecting these remaining 20 pages of records.

⁶⁸ Under s. 47, the Commissioner must not disclose information obtained in the performance of his duties other than that necessary to conduct the inquiry. He is prohibited from disclosing any information a public body would be authorized to refuse to disclose in records to which access is requested (s. 47(3)(a)). See Order F19-21, 2019 BCIPC 23 at para. 43.

CONCLUSION

[71] For the reasons given above, I make the following orders under ss. 58 and 44 of FIPPA.

[72] I make the following order under s. 58:

- 1) Subject to item 2 immediately below, I confirm in part the PSA's decision to refuse to disclose information to the applicant under s. 14.
- 2) The PSA is not authorized under s. 14 to refuse to disclose the information in the email at p. 142. The PSA must disclose this record to the applicant and must concurrently provide the OIPC Registrar of Inquiries with a copy of the PSA's cover letter and the record when it sends the record to the applicant.

Pursuant to s. 59(1), the PSA must comply with the above s. 58 order by June 11, 2020.

[73] I also make the following order under s. 44(1)(b):

- 1) I order the PSA to produce for the Commissioner's review a copy of the draft at p. 278-296 and the email at p. 323-324, which I have found s. 14 does not apply to.
- 2) The PSA must highlight or otherwise clearly note its s. 22 redactions in the copy of the draft and the email it produces for the Commissioner pursuant to this order.

Pursuant to s. 44(3), the PSA must provide these two records to the Registrar of Inquiries by May 13, 2020.

[74] If the PSA wishes to make additional submissions respecting the application of s. 22 to these two records at that time, it may do so. If the PSA elects to make additional submissions, the applicant will have the opportunity to provide a response. The Registrar of Inquiries will inform the applicant of the deadline for a response if necessary.

April 29, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F17-73057