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Order F14-17

MINISTRY OF HEALTH

Ross Alexander
Adjudicator

June 19, 2014

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Summary: An applicant requested records about himself and the British Columbia Onsite Sewage Association from the Ministry of Health. The Ministry withheld responsive records on the basis that: disclosure would reveal policy advice or recommendations (s. 13), solicitor-client privilege applies (s. 14), and disclosure would be an unreasonable invasion of the personal privacy of third parties (s. 22). The adjudicator determined that the Ministry was authorized or required to withhold most of the records under these sections, but it was ordered to disclose some records. The adjudicator also determined the Ministry failed to exercise its discretion for the records withheld under s. 13 and ordered it to do so.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 13, 14 and 22.

Authorities Considered: B.C.: Order F13-10, 2013 BCIPC No. 11 (CanLII); Order F13-05, 2013 BCIPC 5 (CanLII); Order F07-13, 2007 CanLII 30398; Order F12-05, 2012 BCIPC 6 (CanLII); Order F13-29, 2013 BCIPC 38 (CanLII); Order 03-37, 2003 CanLII 49216; Order F09-02, 2009 CanLII 3226; Order 03-22, 2003 CanLII 49200; Order F07-17, 2007 CanLII 35478; Order 04-37, [2004] B.C.I.P.C.D. No. 38; Order F13-09, 2013 BCIPC No. 10; Order F12-08, 2012 BCIPC 12; Order F05-30, 2005 CanLII 32547; Order F08-12, 2008 CanLII 30214; Order 01-07, 2001 CanLII 21561; Order No. 36-1995, [1996] B.C.I.P.C.D. No. 8; Order No. 76-1996, [1996] B.C.I.P.C.D. No. 2; Decision F10-10, 2010 BCIPC 49; Order 00-18, [2000] B.C.I.P.C.D. No. 21. **ALTA.:** Order 2001-002, 2001 CanLII 38115; Order F2008-008, 2008 CanLII 88742.

Cases Considered: *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC); *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *John Doe v. Ontario (Finance)*, 2014 SCC; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII); *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner),* 2010 BCSC 1162; *J. Doe v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 1950.

INTRODUCTION

[1] This inquiry concerns a request for records by an applicant to the Ministry of Health ("Ministry").[1] The request is a broad one relating to the British Columbia Onsite Sewage Association ("Association") and the applicant's membership and role in the Association between January 1, 2004 and January 31, 2010.

[2] The Ministry initially denied access to the responsive records on the basis that all of the information was exempt from disclosure under ss. 12(1), 13(1), 14, 15(1), 16(1), 17(1), 21(1) and 22(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant then made a request for review to the Office of the Information and Privacy Commissioner ("OIPC") about the Ministry's decision to withhold all of the records.

[3] The Ministry has since reconsidered its decision to deny access to the records, and it has provided some of the information contained in the requested records to the applicant. However, OIPC mediation did not resolve the entire dispute, and this matter proceeded to inquiry under Part 5 of FIPPA.

[4] At the time the OIPC issued the notice of inquiry, the Ministry was withholding information under ss. 13, 14, 17 and 22 of FIPPA. However, the Ministry advised during the inquiry process that it is no longer relying on s. 17.

[5] The Ministry continues to withhold the remaining information on the basis that one or more of ss. 13, 14 and 22 applies, which is solicitor-client privilege (s. 14), disclosure that would reveal policy advice or recommendations (s. 13) and disclosure that would be an unreasonable invasion of the personal privacy of third parties (s. 22).

[1] The request was to the Ministry of Healthy Living and Sport, which has since become part of the Ministry of Health. The applicant's initial request was also to the Office of the Comptroller General and Internal Audit and Advisory Services, which are two parts of the Ministry of Finance. The Ministry advises that the Ministry of Finance provided a separate response to the applicant, and that the OIPC is also reviewing the Ministry of Finance's response to the applicant's request. However, the Ministry of Finance's response is not part of this inquiry.

[6] The third parties whose information is at issue were notified of this inquiry and given the opportunity to participate. One third party provided a brief submission objecting to disclosure of his or her personal information under s. 22.[2]

ISSUES

[7] The issues in this inquiry are as follows:

- Is the Ministry authorized to refuse to disclose information because it is subject to solicitor-client privilege under s. 14 of FIPPA?
- Is the Ministry authorized to refuse access to information because disclosure would reveal advice or recommendations under s. 13 of FIPPA?
- Is the Ministry required to refuse to disclose information because it would unreasonably invade a third party's personal privacy under s. 22 of FIPPA?

DISCUSSION

Background

[8] The Ministry is responsible for administrating the *Sewerage System Regulation*, which provides regulatory requirements regarding the construction and maintenance of sewerage systems in British Columbia.[3]

[9] The Association is a non-profit society comprised of onsite wastewater and water system practitioners. The applicant was involved with the Association for a number of years.

[10] Until the *Sewerage System Regulation* was amended in 2009, the Association was designated as the only organization in BC that could provide the required training to qualify people to construct or maintain certain types of sewerage systems. The Ministry provided funding to the Association by way of grants to undertake this work.

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[2] This third party also submits that the records ought to be withheld on the basis that disclosure would be harmful to the financial or economic interests of a public body (s. 17). However, s. 17 is a discretionary provision entitling *public bodies* to withhold information in certain circumstances. The third party is not in a position to rely on s. 17, and I will not consider whether s. 17 applies because the Ministry is no longer relying on this provision.

[3] This is a regulation of the *Public Health Act*.

[11] In 2009, the Ministry requested that the Ministry of Finance ("Finance") conduct a review of the Association's financial statements and other related documents.[4] The Ministry states that it initially requested the review of the Association's financial records because the Association had the sole responsibility for training under the *Sewerage System Regulation* and the Ministry was providing the Association with substantial grant revenue. However, the applicant believes the reason for this review was significantly influenced by one or more complaints.

[12] The result of the review was that Finance requested the RCMP to investigate alleged financial irregularities involving some members of the Association. The RCMP did conduct an investigation, which concluded without any charges being laid.

[13] The applicant states that the investigation caused him significant embarrassment and he vehemently denies any impropriety or wrongdoing. He requested records to better understand what led to the investigations and to find out the nature of the allegations he believes were made, as well as the identity of who made the allegations. For its part, the Ministry does not acknowledge whether there were complaints about either the applicant or the Association.

The Records

[14] The applicant's request for records is broad, encompassing records about him in relation to the Association and about the Association itself between January 1, 2004 and January 31, 2010. As part of his request, the applicant lists the correspondence of specific people and subject matters that he says are captured by his request. The request is to both the Ministry and Finance.[5] However, Finance is not a party to this inquiry, and only the Ministry's response to the applicant is at issue here.

[15] There are a significant number of responsive records, many of which are no longer at issue because they have already been disclosed.[6] Nearly all of the records in dispute are emails.

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[4] This request by the Ministry was to Internal Audit & Advisory Services.

[5] See footnote number 1.

[6] The applicant lists the specific pages he identifies as being in dispute, but adds that additional records may also be in dispute because the Ministry renumbered and reordered the records during the disclosure process. I have reviewed the records and confirm that all of the records listed by the applicant are before me, although the records are numbered and entitled differently in the materials before me (the "Submission Documents") than they were when disclosed to the applicant (entitled "Reconsideration 2012", "Reconsideration (2)" and "Reconsideration #3"). I will consider all of the records from the Ministry's response that were withheld from the applicant. The footnotes will refer to the Submission Documents page numbers with the Reconsideration (2) page numbers in parenthesis, unless otherwise noted.

[16] The Ministry provided one record that it is withholding on the basis that it is unresponsive to the applicant's request.[7] However, part of the applicant's request is for "any correspondence or communication related to [the applicant] and/or the [Association] and in any way whatsoever to" a list of 25 different people. In my view, this record is responsive to the applicant's request since it is correspondence that relates to the Association and one or more of the people listed in the applicant's request. Since this record is a responsive record, I find that the Ministry must disclose it, unless the information falls within an exception to disclosure such as, for example, s. 13.

Preliminary Matter

[17] The applicant identifies certain records he believes are in the Ministry's custody or control that the Ministry neither provided to the applicant in response to his request nor explained why it has failed to disclose these records to him.[8]

[18] For example, one of the records the applicant identifies as missing from the Ministry's response is a report by Finance dated June 11, 2010 about the financial management of the Association, which states on the face of the report that it was copied to the Ministry.[9] The report is not one of the records the Ministry put before me in this inquiry. The applicant knows that this record exists because portions of it have already been disclosed to the applicant by Finance, and he makes a number of specific arguments about why he believes the remaining portions should be disclosed to him.

[19] The Ministry does not explain whether it has the records identified by the applicant in its custody or control, or, if so, why it did not disclose them to him. It submits that the issue of whether it responded to the applicant's request openly, accurately and completely relates to s. 6 of FIPPA, which was not previously identified as an issue in dispute in this inquiry, so this issue is not properly before me. The Ministry does not address the merits of whether the applicant is entitled to the severed versions of the report because the report is not one of the records that formed part of the Ministry's response to the applicant.

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[7] Pages 29-31 of the Submission Documents (pp. 180 to 182 for Reconsideration (2)).

[8] The applicant speculates that the Ministry may have not provided these records because Finance has already released several severed versions of them to him. However, he also points out that the Ministry may have copies of these records with handwritten notations that would make them separate responsive records. His speculation is consistent with the Office of the Chief Information Officer's FOIPP Act Policy and Procedures Manual for how public bodies should process requests where an applicant has made an identical request to more than one public body: http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec10_19/sec11.page?. However, if this is what happened, ss. 6 and 11(2) of FIPPA would require the Ministry to notify the applicant that the Ministry was not providing records for this reason.

[9] The report is a memo from Internal Audit & Advisory Services to the Office of the Comptroller General, entitled: "report – BC Onsite Sewage Association Review – Phase II".

[20] I agree with the Ministry that the issue of whether the Ministry has provided an adequate response to the applicant's request, and the merits of whether the applicant is entitled to the entire report the applicant received from Finance, are not within the scope of this inquiry.[10] I therefore will not consider whether the applicant is entitled to the severed portions of the report. However, assuming the report and other records referenced by the applicant are in the Ministry's custody or control,[11] it is unfortunate that the Ministry did not explain to the applicant at the outset that it was not providing certain responsive records because they form part of Finance's response to the applicant's request for records. If that is the case, the Ministry's omission resulted in the applicant unnecessarily incurring the cost of having his lawyer make submissions on these topics in this inquiry.

Solicitor Client Privilege – s.14

[21] The Ministry is withholding certain records under s. 14 of FIPPA.[12] Section 14 states:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[22] Section 14 encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The Ministry submits that both kinds of privilege apply to the withheld information.

[23] The applicant's submission is that he has not been provided with any description of the material withheld under s. 14, and he is concerned that the records are not properly withheld. He asks that I closely review the records to ensure that the four conditions for legal advice privilege are met for the records, particularly to confirm that the communications are between a client and legal advisor, and that they relate to the seeking, formulating or giving of legal advice.

[24] The parties agree about the applicable principles of solicitor-client privilege as protected by s. 14 of FIPPA. The test for legal advice privilege is as follows:

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[10] Section 6 of FIPPA was not listed in the Notice of Inquiry or the Investigator's Fact Report.

[11] The report states that it was copied to the Ministry, but there is no evidence before me about whether it is in the Ministry's custody or control.

[12] Pages 23, 24, 90 to 92, 98 to 105, 113, 116 to 132, 147 to 153, 181, 182, 185 to 186, and pp. 109 and 110 from Reconsideration (2) that is not numbered as a Submission Document (pp. 9 to 11, 26 to 29, 32, 38 to 46, 60 to 66, 94, 103 to 110, 113 to 119, 154, 174, 175). The applicant's initial submission specifies what pages the Ministry is relying on s. 14 as a basis for withholding the documents. I note that the Ministry is not relying on s. 14 for certain documents identified by the applicant in the records that are before me.

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[13]

[25] The Ministry submits all four of the conditions above apply to the information it is withholding under s. 14. The Ministry describes the records as emails between the Ministry staff and legal counsel that also have "earlier emails" with them.

[26] Nearly all of the information withheld under s. 14 is contained in email chains where (at minimum) the last email communication in the chain is between the Ministry's staff and its legal counsel. Since most of these records are email chains, the last email communication has accompanying earlier emails. There are, however, two emails on pp. 97, 185 and 186[14] where the last email is not between the Ministry's staff and its legal counsel. I will deal with those two emails at the conclusion of this section.

[27] I find that the emails between the Ministry's staff and its legal counsel are of a confidential character between a client and a legal advisor. I also find that they are in direct relation to the seeking, formulating or giving of legal advice. However, as stated above, most of these emails also contain earlier emails.

[28] The applicant specifically drew my attention to the fact that the Ministry is withholding an email communication that is from him,[15] and he questions how the Ministry can withhold a copy of his own email under ss. 13 and 14 of FIPPA. He knows this because the Ministry has disclosed the last page of an email containing is the word "regards" followed by the applicant's name and contact information, but it is withholding the previous pages from him.[16] The page

[13] *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC). For example, see Order F13-10, 2013 BCIPC No. 11 or Order F13-05, [2013] B.C.I.P.C.D. No. 5.
[14] Pages 30, 118 and 119 of Reconsideration (2).
[15] Applicant's initial submissions at para. 45.
[16] Pages 113 and 114 (pp. 31 and 32).

identified by the applicant is the last page at the end of an email chain, and it is part of one of the communications that was described above as an "earlier email".

[29] Previous orders such as Order F07-13 have confirmed that documents enclosed with privileged communications may also be protected from disclosure under s. 14.[17] In this case, I find that the earlier parts of the email chains – the earlier emails – are protected from disclosure under s. 14 because of their context as part of privileged email communications between Ministry staff and legal counsel.[18] This includes the record identified by the applicant that was partially disclosed to him.[19]

[30] The Ministry is withholding a record on p. 97 under s. 14 (and s. 13) that is clearly not a communication between the Ministry and its legal advisor. It is a relatively innocuous email exchange between the Ministry's lawyer and the lawyer for a different party that is adverse in interest to the Ministry regarding the subject matter of the record.[20] I am not satisfied that this email exchange was a confidential communication between a client and a legal advisor. I therefore find that legal advice privilege does not apply to this record.

[31] The Ministry is also withholding an email on pp. 185 and 186 under s. 14 (and s. 22) that is not a communication between the Ministry and its legal advisor. It is an email from a third party who is not a lawyer to a Ministry employee, and it does not appear on its face to be directly related to the seeking, formulating or giving of legal advice. Further, the Ministry did not provide any specific evidence or submissions with respect to this document to satisfy me that it does relate to legal advice. I therefore find that this email is not protected by legal advice privilege.

[32] Given my finding that legal advice privilege does not apply to these two emails and the Ministry's submission that litigation privilege applies, I will now consider whether litigation privilege applies to these emails. The purpose of litigation privilege is "to create a "zone of privacy" in relation to pending or apprehended litigation."[21] Litigation privilege applies to documents that are

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[17] Order F07-13, [2007] B.C.I.P.C.D. No. 18 at paras. 28 to 35.

[18] At least some of the earlier emails are also independent documents that would not be protected from disclosure by s. 14 in a different context and have been previously released by the Ministry to the applicant as independent documents: Confirmed by a March 28, 2014 letter from the Ministry to the Registrar. See Order F12-05, 2012 BCIPC 6, at para. 24.

[19] In this case, considering the content of the page that was disclosed to the applicant and the Ministry's reliance on s. 14 for the substance of the record, I am satisfied that this disclosure was inadvertent and that the Ministry has not waived privilege.

[20] One of the emails is copied to the applicant, and another was copied to multiple people in the Ministry, the Ministry lawyer's office and one person in Finance.

[21] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 34.

created for the dominant purpose of litigation that is ongoing or reasonably contemplated at the time the document comes into existence.[22]

[33] While the Ministry submits that litigation privilege applies, it does not provide any further submissions, or any evidence, on this point. I have reviewed the materials before me with care, and there is no basis for me to properly conclude that litigation privilege applies. Absent evidence and surrounding context on this issue, and given the content of the documents on their face, I am not satisfied that litigation was ongoing or reasonably contemplated at the time the emails were created.[23] I also find that the emails were not created for the dominant purpose of litigation. I therefore find that litigation privilege does not apply, and that the Ministry is not permitted to withhold the two records on pp. 97, 185 and 186 under s. 14.

[34] In summary, I find that s. 14 applies to the records the Ministry is withholding under s. 14, except for two records described above.[24]

Policy Advice or Recommendations – s. 13

[35] I have already found that s. 14 applies to most of the records the Ministry is withholding under s. 13. As such, I will not consider whether s. 13 applies to these records. However, I will consider whether s. 13 applies to records the Ministry withheld under s. 13 but not s. 14, as well as the two records I found that s. 14 did not apply to.

[36] Section 13(1) of FIPPA states that:

> The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[37] As the Supreme Court of Canada recently stated in *John Doe v. Ontario (Finance)*, the purpose of exempting advice or recommendations within government institutions "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[25] The British Colombia Court of Appeal similarly stated in the *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 "recognizes that some degree of deliberative secrecy fosters the decision-making process."[26]

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[22] Order F13-29, 2013 BCIPC No. 38.
[23] Notwithstanding the fact that p. 97 (p. 30) is between lawyers. See Order F13-29 at paras. 23 and 30 regarding the evidence needed to establish litigation privilege.
[24] Pages 97, 185 and 186 (pp. 30, 118 and 119).
[25] 2014 SCC 36 at para. 43.
[26] 2002 BCCA 665 (CanLII) at para. 105.

[38] The applicant questions whether it is appropriate to characterize a complaint to the Ministry as "advice" within the meaning of s. 13. I note however that very little information the Ministry is withholding under s. 13 is information that I would characterize as a complaint.

[39] Based on my review of the records, I find that some of the information the Ministry is withholding under s. 13 is clearly "advice or recommendations" developed by or for a public body under s. 13(1).[27] However, other information withheld under s. 13 requires further consideration. Three of the records that require further consideration are parts of email chains.

[40] The first email chain contains one email that is withheld from the applicant.[28] The withheld email contains draft correspondence. Previous orders have stated that s. 13(1) does not necessarily apply to drafts of documents simply because they are drafts.[29] However, in this case, the draft contains advice or recommendations about how to respond to an issue that is in the form of draft correspondence. I find that it is advice or recommendations within the meaning of s. 13 given the content and context of the information.

[41] The second email chain is between the applicant and the Ministry, in which the Ministry is withholding the two emails that reply to an originating email from the applicant.[30] The applicant is either the author or recipient of each of these emails, and the author, recipient, date and subject lines for all of the emails in the chain have already been disclosed to the applicant. The first reply email is the Ministry's response to the originating email. The second reply email is the applicant's subsequent response. In my view, these two reply emails relate to instructions the Ministry previously gave the Association, not advice or recommendations. I therefore find that s. 13(1) does not apply to these two emails.

[42] For the third email chain, the Ministry is withholding the contents of two emails in the middle of the chain.[31] The last email in the chain is an email from the applicant to the Ministry and a number of other parties, and it has already

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[27] Pages 7, 15, 17, 40 and p. 96 from Reconsideration (2) (pp. 96, 100, 147, 168 and 170).
[28] Page 41 (p. 112). The Ministry has already disclosed parts of the email chain to the applicant.
[29] Order 03-37, 2003 CanLII 49216 at para. 59 to 61.
[30] Pages 56 and 57 (pp. 135 and Reconsideration (2) numbering is not stated in my copy of the records). The Ministry is withholding the originating email (at p. 56) under s. 22. The final reply email is also marked as withheld under s. 21 of FIPPA (disclosure harmful to business interests of a third party). However, it is not apparent on the face of the record how s. 21 applies and the Ministry does not rely on s. 21 in its submissions.
[31] Paras. 94 and 95 (p. 143 and Reconsideration (2) numbering is not stated in my copy of the records). These emails are also marked as having s. 16 of FIPPA apply to the records (disclosure harmful to intergovernmental relations or negotiations), but s. 16 is a discretionary exemption to disclosure and the Ministry does not submit that it seeks to withhold any records under s. 16, so I will not consider this section any further.

been disclosed to the applicant.[32] The information withheld under s. 13 contains a third party's opinions with respect to information provided by another person, all of which the applicant subsequently forwarded to the Ministry. Absent evidence providing context to the information withheld under s. 13, such as why the third parties sent those emails (*i.e.,* was this information developed for a public body?), I am not satisfied based on the materials before me that these two middle emails withheld under s. 13 reveal advice or recommendations developed by or for a public body.

[43] There are also three emails from one or more third parties to the Ministry that the Ministry is withholding under ss. 13 and 22.[33] I find that s. 13(1) does not apply to the information in the first of these emails because its contents reflect a request or instruction the Ministry gave an external third party, not information that reveals advice or recommendations developed by or for the Ministry under s. 13(1).[34]

[44] The second email withheld under ss. 13 and 22 is an email from a third party to the Ministry that contains ideas, suggestions or options that are advice or recommendations.[35] However, for s. 13(1) to apply this information, it must reveal advice or recommendations "developed by or for" a public body or minister.

[45] Previous orders have stated that s. 13(1) can apply to advice or recommendations provided by a private citizen or organization, as long as it is developed by or for a public body.[36] In my view, the information in the email in this case is similar in many respects to the records at issue in Order F09-02, upheld on judicial review in *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)*, in which a public body was authorized to withhold stakeholders' submissions and other advice received by government about possible amendments to legislation.[37]

[46] The possible distinction in this case compared to the case above is that there is no evidence before me about whether the Ministry requested the input contained in the email at issue from the third party who provided it, and, in my view, unsolicited and unexpected advice or recommendations that third parties

[32] The originating email is withheld under s. 22.
[33] Paras. 59 and 96 (pp. 121 and 132).
[34] Para. 59 (p. 132).
[35] Para. 96 (p. 121).
[36] *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162; Order F09-02, 2009 CanLII 3226; Order 03-22, 2003 CanLII 49200 at para. 18.
[37] Order F09-02, 2009 CanLII 3226; *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162.

send public bodies are not necessarily "developed for" public bodies.[38] However, in this case, there are a number of factors indicating that the information was developed for the Ministry, including the actual records before me, the nature of the relationship between the third party who sent the email and the Ministry at the time the email was sent, the ongoing review of the Association at the time, and the regulatory changes that were happening around the time of this email. Therefore, given the content and context of the information at issue, I find that this email is advice or recommendations developed *for* the Ministry under s. 13(1).

[47] The third email is an email chain where the first few emails are withheld under ss. 13 and 22, but the last two emails have already been disclosed to the applicant.[39] Since I find below that s. 22 applies to this information, I am constrained in what I can say about it. However, in my view, some of the withheld information is clearly not "developed by or for" a public body, while the other information is not advice or recommendations under s. 13(1). I therefore find that s. 13 does not apply to this information.

[48] The Ministry has also severed one part of an email between Ministry staff.[40] Previous orders have stated that s. 13(1) applies if disclosure would allow accurate inferences to be drawn about underlying advice or recommendations. I find that this is the case here, and that s. 13(1) applies to this information because disclosure would allow accurate inferences to be drawn about underlying advice or recommendations to the Ministry in relation to a letter received from the Association.[41]

[49] The last record withheld under s. 13 is the record on p. 97 that I previously determined could not be withheld under s. 14.[42] As previously stated, this record contains email correspondence between the Ministry's lawyer and the lawyer for another party. Given the content of this record, it is clear that disclosure of this information would not reveal advice or recommendations developed by or for a public body.

[50] Section 13(1) does not apply if the information falls into an exception specified in s. 13(2). I find that none of the exceptions in s. 13(2) apply to the

[38] For example, see Alberta Order 2001-002, 2001 CanLII 38115 and Alberta Order F2008-008, 2008 CanLII 88742.
[39] Pages 139 and 140 (pp. 47 and 48).
[40] Page 19 (p.172).
[41] This general subject matter is apparent from portions of this record that have already been disclosed to the applicant.
[42] Page 30 of Reconsideration (2).

information that I have determined is advice or recommendations under s. 13(1).[43]

[51] The applicant submits that even where information in a record is advice or recommendations under s. 13, the Ministry is still required to consider whether it *should* withhold the information from the applicant in the circumstances. The applicant states there is no evidence the Ministry has considered that the applicant has a right or interest in knowing about allegations against him (or that reflect badly on him). In support of this position, the applicant referred to Order F07-17 and Order 04-37, in which the public bodies were ordered to consider whether to use their discretion under s. 13(1) to withhold information about the applicants.[44]

[52] Previous orders have stated that in exercising their discretion to refuse access under s. 13(1), public bodies should consider relevant factors such as: the age of the record, its past practice in releasing similar records, the nature and sensitivity of the record, the purpose of the legislation and the applicant's right to have access to his own personal information.[45] The thrust of the applicant's submission is that the Ministry should not rely on s. 13 to withhold information from him that discloses the allegations against him or that reflect badly on him.

[53] The majority of the information I have found to be advice or recommendations is not about the applicant on the face of the records. Nonetheless, I agree with the applicant that it is not apparent whether the Ministry has considered the exercise of its discretion about whether to withhold the information under s. 13.

[54] In summary, I find that s. 13(1) applies to most,[46] but not all,[47] of the information withheld under s. 13. However, the Ministry must consider the exercise of its discretion about whether to withhold the information under s. 13.

Disclosure Harmful to Personal Privacy – s. 22

[55] Numerous orders have considered the analytical approach to s. 22.[48] The public body must first determine if the information in dispute is "personal information" because s. 22 only applies to "personal information" as defined by

[43] I note that the applicant submitted that s. 13(2)(g), which related to final reports and audits, applied to the Finance report that I found was not part of the scope of this inquiry. This provision clearly does not apply to any of the information I am considering under s. 13.
[44] Order F07-17, 2007 CanLII 35478; Order 04-37, [2004] B.C.I.P.C.D. No. 38.
[45] For example, Order F07-17, 2007 CanLII 35478, at paras. 41 to 43.
[46] Pages 7, 15, 17, 19, 40, 41 and 96, as well as page 96 from Reconsideration (2) (pp. 96, 100, 112, 121, 147, 168, 170, and 172).
[47] Pages 57, 59, 94, 97, 139 and 140 (pp. 30, 47, 48, 132, and Reconsideration (2) numbering is not stated in my copy of the records).
[48] Order F13-09, 2013 BCIPC No. 10; Order F12-08, 2012 BCIPC No. 12 et. al.

FIPPA. If so, the public body must consider whether the information meets the criteria identified in s. 22(4). If s. 22(4) applies, s. 22 does not require the public body to refuse to disclose the information. If s. 22(4) does not apply, the public body must determine whether disclosure of the information falls within s. 22(3). If s. 22(3) applies, disclosure is presumed to be an unreasonable invasion of third party privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy.

[56] The Ministry submits that s. 22 applies to some of the records in dispute. Part of the Ministry's submission for s. 22 was provided *in camera*. In its open submissions, the Ministry does not describe the subject matter of the information withheld under s. 22.

[57] The applicant believes that the severed information contains the identity of the person or persons who made allegations against him and the Association, as well as the content of those allegations. He submits that his right to know this information must be balanced against the personal privacy rights of other people. In support of his understanding about the nature of the records at issue, the applicant provided multiple documents in this inquiry that refer to the Ministry and Finance having concerns that there was a misappropriation of funds at the Association.[49]

[58] It is not apparent to me that any of the records before me directly relate to concerns about the misappropriation of funds. However, most of the records do generally relate to the operations of the Association.

Personal Information

[59] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information". Previous orders such as Order F05-30 have concluded that information may be personal information if it is about a small group of identifiable people.[50]

[60] The information withheld under s. 22 is the personal information of third parties,[51] except for one page.[52] Most of the information that is personal

[49] Applicant's affidavit at Exhibit "A", "B", "C", "E" and "G".
[50] Order F05-30, 2005 CanLII 32547.
[51] Pages 34, 48 to 56, 59, 61 to 85, 133 to 146, 154 to 164, 178, 185 to 188, and p. 6 and 52 from Reconsideration (2) (pp. 3 to 6, 12 to 25, 47 to 59, 78 to 82, 84, 86, 89, 118, 119, 122 to 130, 132 to 142 and Reconsideration (2) numbering is not stated in my copy of the records). This includes the records the Ministry decided to withhold under ss. 13 and 22 that I determined the Ministry is not authorized to withhold under s. 13(1). There is an email that is not ostensibly about a third party (Page 96 (p. 121)), but it is still personal information of the third party sending the email in

information is intertwined with the applicant's personal information.[53] The information withheld under s. 22 that is not personal information is an email containing information that is not about an identifiable individual. This email contains the name, telephone number and email address of the author of the email, but this information is not personal information because it is information to enable an individual at a place of business to be contacted, which is not personal information because it is contact information as defined by FIPPA.[54]

[61] With respect to s. 22(4), I find that none of the grounds apply to the information at issue.

[62] For s. 22(3), the provisions that may be relevant are:

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,

[63] The applicant submits that s. 22(3)(b) does not apply because this information was not compiled as part of an investigation into a possible violation of law. Further, neither the Ministry nor the third party take the position that s. 22(3)(b) applies, and I observe that the records at issue under s. 22 do not appear on their face to be compiled for, or to directly relate to, the review of the Association's financial management practices that Finance had the RCMP investigate. Based on the positions of the parties and the materials before me, I find that s. 22(3)(b) does not apply.

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this case because it is clear in the context that disclosing this email would reveal information about this third party.

[52] Page 95 (p. 143).

[53] All records from the footnote 51, except p. 34, (p. 3). This includes one email on p. 56 (p. 135) that is sent by the applicant, which contains a small amount of personal information about third parties in their work capacities. I considered this email at p. 56, the contents of which are known to applicant because he wrote it, and find that disclosure of it to him would clearly not be an unreasonable invasion of the personal privacy of a third party. I also note that this email is part of an email chain containing subsequent emails about the same third parties and subject matter that the Ministry is not withholding under s. 22 (p. 57).

[54] Schedule 1 of FIPPA states: "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.

[64] The Ministry submits that s. 22(3)(d) regarding employment, occupational or educational history is or may be relevant to the information at issue in this case. The applicant, who of course does not have the benefit of knowing the contents of the withheld information, did not provide submissions on this point.

[65] Without disclosing the identities of the third parties, I can say that the personal information at issue relates to the employment, occupational or educational history of third parties. Since I am satisfied that the information at issue relates to employment, occupational or educational history within the meaning of s. 22(3)(d), there is a presumption that disclosure of this information would be an unreasonable invasion of third party privacy.

[66] Section 22(2) states that all relevant circumstances, including those listed in s. 22(2), must be considered. The Ministry identifies ss. 22(2)(a), (c), (e) and (f) as the provisions under s. 22 that may be relevant, but it submits that only some of these provisions apply. The applicant submits that his "right to know" is an important factor to consider and he refers to s. 22(2)(c). The third party's submissions are brief, asserting that ss. 22(2)(e), (f) and (h) are relevant factors to consider without providing details or an explanation for this assertion. The specified portions of s. 22(2) state:

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

[67] The Ministry submits that it was unable to conclude that disclosure of the third party personal information withheld under s. 22 would be desirable for the purpose of subjecting the activities of the Ministry to public scrutiny (s. 22(2)(a)). The applicant did not provide submissions with respect to s. 22(2)(a). Based on my review of the information at issue, I find that s. 22(2)(a) is not a relevant circumstance because while it might potentially serve the applicant's private

interests to receive this information, disclosure would not serve to subject the public body to public scrutiny.[55]

[68] The Ministry says s. 22(2)(c) is or may be relevant to this case, but it provides no further details on this point. The applicant cites s. 22(2)(c) in reply, stating that disclosure will enable him to "have the sullying of his reputation addressed".

[69] Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

> 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.[56]

[70] A significant portion of the information withheld under s. 22 relates to legal rights and obligations of the Association, not the applicant. Further, there is no evidence before me that a proceeding is either underway or contemplated, so I find that circumstances (2) to (4) of the above test are not met, and s. 22(2)(c) is not a relevant factor.

[71] In relation to s. 22(2)(f), I find, based on the content and context of the materials before me, that the third parties supplied the information in confidence. I also note that a third party states in one of the records that the information was being supplied in confidence.

[72] The Ministry's only public submissions relating to disclosure unfairly exposing third parties to financial or other harm under s. 22(2)(e) is that disclosure would identify the third parties involved. It also provides *in camera* submissions on this point. The third party does not provide any information, other than asserting that s. 22(2)(e) is a relevant factor.

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[55] For a similar conclusion, see Order F08-12, 2008 CanLII 30214, at paras. 73 and 74.

[56] Order 01-07, 2001 CanLII 21561 at para. 31 citing Ontario Order P-651, [1994] O.I.P.C. No. 104.

[73] Based on the Ministry's *in camera* submissions and my review of the records, I find that s. 22(2)(e) is a relevant factor in favour of withholding the information because disclosure of their identities may expose the third parties to financial or other harm. I also find that disclosure may unfairly damage the reputation of third parties referred to in the records under s. 22(2)(h). However, I give these factors little weight because I am only satisfied that there would be a small magnitude of potential damage to reputation and harm to the third parties from disclosure of this information.

[74] The applicant's submissions for s. 22 primarily relate to his belief that he has the "right to know" who made allegations against him, and the precise details of those allegations. In support of his position, the applicant primarily relies on the reasoning in Orders No. 36-1995 and No. 76-1996.[57] These orders addressed whether a public body was required to refuse to disclose the identity of a complainant under s. 22. The decision in Order No. 76-1996 relied on the analysis from Order No. 36-1995, and in both cases former Commissioner Flaherty determined that s. 22 did not apply to information that named the complainant.

[75] However, these orders have little persuasive value in this case because there was a judicial review of Order No. 36-1995 in *J. Doe v. British Columbia (Information and Privacy Commissioner)* [*Doe*][58] that was decided after Order No. 76-1996, in which the court quashed the order granting access to the complainant's identity.

[76] Since *Doe*, orders of this office have consistently determined that public bodies are required to withhold complainant names and information identifying a complainant under s. 22. For example, in Decision F10-10 an applicant wanted the names of complainants who made complaints against her to BC Housing. In that case, an inquiry was not held because it was determined that it was plain and obvious that s. 22 applied and there were no arguable issues meriting an inquiry. Adjudicator Michael McEvoy stated in this decision that:

> …Past orders have determined the disclosure of the kind of information at issue here would be an unreasonable invasion of third party privacy and therefore a public body must not release it. Order 00-18, for example, found the public body properly withheld, under s. 22(1), the identity of a complainant to the Motor Vehicle Branch that a person was unfit to drive a car. Commissioner Loukidelis found this information was confidentially provided and no other circumstances weighed in favour of its disclosure. Further, Senior Adjudicator Francis concluded in Decision F08-06 it was plain and obvious that s. 22(1) protected information that included the names of complainants in a municipal property use dispute…[59]

[57] Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order No. 76-1996, [1996] B.C.I.P.C.D. No. 2.
[58] [1996] B.C.J. No. 1950.
[59] Decision F10-10, 2010 BCIPC 49 at para. 14.

[77] In Decision F10-10 the identity of the complainant was withheld under s. 22, notwithstanding the fact there were no s. 22(3) presumptions that disclosure would be unreasonable invasion of personal privacy.[60]

[78] In this case, there is a presumption under s. 22(3)(d) that disclosure of the withheld information would be an unreasonable invasion of the privacy of third parties. Notably, the information was also supplied in confidence (s. 22(2)(f)), which favours withholding the information. I also find ss. 22(2)(e) and (h) regarding disclosure that unfairly exposes a third party to harm, and that may unfairly damage their reputation, also favour withholding the information, although I give these factors little weight. In my view, there are no factors in favor of disclosing the information that are sufficient to rebut the presumption under s. 22(3)(d) that disclosure would be an unreasonable invasion of third party privacy. Further, I find that the circumstances favour withholding the information because disclosure would be an unreasonable invasion of third party personal privacy, even absent the presumption that disclosure would be unreasonable.

[79] Notwithstanding the previous paragraph, s. 22 does not apply to part of an email chain the Ministry is withholding under s. 22.[61] The withheld information is an email the applicant sent to an email distribution list for people in the sewerage industry, as well as a part of the email response. Disclosure of this information is not an unreasonable invasion of the privacy of the person who wrote the email response, since this person knowingly sent this email to approximately 40 disparate people. However, the information includes an example of another third party making a work-related error, and could potentially be an unreasonable invasion of this person's privacy in some circumstances.[62] However, in my view, disclosure of this information to the applicant would not be unreasonable in this case because the applicant already knows the information, he is the author of a portion of this withheld information, and the information has been widely disseminated.

[80] Lastly, the applicant also submits that the Ministry is now severing information under s. 22 at inquiry that it previously provided to the applicant in response to his request for records.[63] The information is part of an email chain that a third party provided to the Ministry containing the third party's opinions

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[60] Also see Order 00-18, [2000] B.C.I.P.C.D. No. 21 in support of the same proposition.

[61] Page 176 to 178 (p. 80 and Reconsideration (2) numbering is not stated in my copy of the records).

[62] It is apparent from the email chain that at least some of the people who received the email were able to identify the person related to the event.

[63] The applicant describes this information at para. 41 of his initial submissions, and he refers to pages 1 to 5 of Reconsideration #3. This information is in multiple records at pages 154 to 164 of the Submission Records (pp. 81, 82, 84, 86, 89 and 91 of Reconsideration (2). Also pp. 1 to 5 of Reconsideration #3, which are the same records as pp. 83, 85, 87, 88 and 90 of Reconsideration (2)).

about how the sewerage regulatory system was working at the time and his suggestions for regulatory change. In voicing his opinions about certain issues, he includes information about his own employment, occupational and educational history, as well as information other people in the sewerage industry. While I have determined that s. 22 applies to this information, to the extent that portions of these pages have already been disclosed, disclosing this information now would not unreasonably invade the privacy of a third party because it has already been disclosed to, and is known by, the applicant.

CONCLUSION

[81] For the reasons given, under s. 58 of the Act, I order that the Ministry is:

a) required to give the applicant a decision under FIPPA about whether he is entitled to have access to the information at pp. 29 to 31 of the Submission Documents by **August 1, 2014**;

b) authorized to refuse to disclose information to the applicant under ss. 13 and 14, subject to (d) and (f) below;

c) required to refuse to disclose information to the applicant under s. 22 of FIPPA, subject to (e) and (f) below;

d) required to exercise its discretion whether to refuse access to the records it is withholding under s. 13(1);

e) required to disclose those portions of the Submissions Records that it has previously disclosed to the applicant in response to his request for records; and

f) required to give the applicant access to the information I have highlighted in a copy of records that will be sent to the Ministry along with this decision by **August 1, 2014**, pursuant to s. 59 of FIPPA. The Ministry must copy me on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

June 19, 2014

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator