Office of the
Information & Privacy
Commissioner
for British Columbia

Protecting privacy. Promoting transparency.

Order F17-43

MINISTRY OF FINANCE

Carol Whittome
Adjudicator

October 2, 2017

CanLII Cite: 2017 BCIPC 47
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 47

Summary: An applicant requested that the Ministry of Finance disclose records relating to his employment. The Ministry disclosed most of the responsive records but withheld some information and records under ss. 13 (advice and recommendations), 14 (solicitor client privilege) and 22 (unreasonable invasion of personal privacy). The adjudicator determined that the Ministry is authorized to refuse to disclose all of the information withheld pursuant to ss. 13 and 14, and required to refuse to disclose the information withheld under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14 and 22; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 7-1 and Form 22.

Authorities Considered: B.C.: Order F14-57, 2014 BCIPC No. 61 (CanLII); Order 00-17, 2000 CanLII 9381 (BC IPC); Order F15-52, 2015 BCIPC 55 (CanLII); F08-05, 2008 CanLII 13323 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order No. 325-1999, 1999 CanLII 4017 (BC IPC); Order 01-53, 2001 CanLII 21607; Order F16-38, 2016 BCIPC 42 (CanLII); Order F16-19, 2016 BCIPC 21 (CanLII); Order F14-47, 2014 BCIPC 51 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order 03-40, 2003 CanLII 49219 (BC IPC); Order F06-11, 2006 CanLII 25571 (BC IPC); Order F15-54, 2015 BCIPC 57 (CanLII); Order F08-02, 2008 CanLII 1645 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII); *Alberta (Information*

and Privacy Commissioner) v. University of Calgary, [2016] 2 SCR 555, 2016 SCC 53 (CanLII); *Anderson Creek Site Developing Limited v. Brovender*, 2011 BCSC 474 (CanLII); *Nanaimo Shipyard Limited v. Keith et al*, 2007 BCSC 9 (CanLII); *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 (CanLII); *R. v. McClure*, 2001 SCC 14 (CanLII); *R. v. B.*, 1995 CanLII 2007 (BC SC); *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 (CanLII); *Canada (Information Commissioner) v. Canada (Minister of Safety and Emergency Preparedness)*, 2013 FCA 104 (CanLII); *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII); *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII); *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 (CanLII); *Raj v. Khosravi*, 2015 BCCA 49 (CanLII); *Sauve v. ICBC*, 2010 BCSC 763 (CanLII); *Hamalainen v. Sippola*, 1991 CanLII 440 (BC CA).

INTRODUCTION

[1] The applicant requested that the Ministry of Finance (Ministry) disclose records relating to his employment. The Ministry released some records but withheld information in them pursuant to ss. 13, 14, 15 (harm to law enforcement) and 22 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information. Mediation failed to resolve all the issues in dispute and they proceeded to inquiry.

[3] During the inquiry process, the Ministry reconsidered its severing decision, released additional information to the applicant, and withdrew its reliance on s. 15. It continued to withhold some information pursuant to ss. 13, 14 and 22.

ISSUES

[4] The issues to be decided in this inquiry are as follows:

1. Whether the Ministry is authorized to refuse to disclose the information at issue under ss. 13 and 14 of FIPPA; and

2. Whether the Ministry is required to refuse to disclose the information at issue under s. 22 of FIPPA.

[5] Section 57 of FIPPA governs the burden of proof in an inquiry. The Ministry has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 13 and 14. However, the applicant has the burden of proving that disclosure of any personal information in the requested records would not be an unreasonable invasion of third party personal privacy under s. 22.

DISCUSSION

Background

[6] The applicant was employed by the Ministry and requested records relating to his employment. The applicant and Ministry are currently involved in a matter before an administrative tribunal (Tribunal). During his employment, the applicant filed a complaint against the Ministry with the Tribunal, and a settlement meeting was scheduled but did not take place. The Tribunal hearing has been held in abeyance but is scheduled to resume.[1] The applicant was also injured at work and filed a Workers' Compensation claim. Ultimately, the Workers' Compensation Appeal Tribunal (WCAT) awarded benefits to the applicant.

Records

[7] The information at issue is contained in 429 pages. Approximately 135 pages were withheld in their entirety pursuant to s. 14. Some of the information in the records withheld under s. 14 is also withheld under ss. 13 and 22. A small amount of information in one record was severed pursuant to ss. 13 and 22.

[8] The Ministry provided the OIPC with the records severed pursuant only to ss. 13 and 22, but did not provide the records severed under s. 14 of FIPPA. I will discuss this further when I address the s. 14 records, below.

Preliminary Issue

[9] The applicant submits that this inquiry should be expanded to include a complaint that the Ministry failed to release an investigation report about bullying allegations (and materials related to that report) that he says is responsive to his access request.[2] The report is not in the records at issue before me. He includes a copy of the front page of the report, which was issued five years ago, and it is not clear to me whether he already has a copy of the full report.[3] Although he does not expressly state it, the applicant is alleging that the Ministry failed in its duty to respond openly, accurately and completely to his request pursuant to s. 6 of FIPPA.

[10] The Ministry opposes expanding the inquiry to include s. 6. It submits that the applicant had an opportunity to raise this issue much earlier when he received the responsive records but he failed to do so.[4]

---

[1] Ministry's submissions, para. 14; Legal counsel affidavit, paras. 5 – 7; Manager's affidavit #1, para. 6.
[2] Applicant's response submissions, para. 45.
[3] Applicant's response submissions, appendix "A".
[4] Ministry's final reply submissions, para. 9, citing Order F06-03, 2006 CanLII 13532 (BC IPC).

[11] The OIPC's practice regarding complaints is to investigate and dispose of them without an inquiry. That process has been bypassed in these circumstances because the applicant raised this complaint for the first time in his inquiry submissions. This is evident from the Investigator's Fact Report, where there is no mention of a s. 6 duty to assist complaint. The applicant has not provided any explanation as to why he did not make a complaint earlier or seek consent from the OIPC to add this new issue to the inquiry. In my view, he had ample time to make a complaint to the Ministry, and subsequently the OIPC, about the fact that the report was not included in the responsive records.

[12] I conclude that expanding the inquiry at this point in order to add s. 6 and seek submissions regarding it would result in a lengthy delay and would not be conducive to the fair, efficient and timely resolution of this dispute under FIPPA. Furthermore, this finding does not prejudice the applicant, as there is nothing preventing him from making a complaint to the Ministry now. Once he receives a response, he can determine whether he wants to make a request to the OIPC to investigate his complaint.

[13] For the above reasons, I have decided that s. 6 will not be added to the issues to be decided in this inquiry.

Section 13 – Advice and Recommendations

[14] The Ministry has withheld information under s. 13 in a report entitled "Targeted Threat Assessment," which was prepared by employees of the Ministry and the Public Service Agency and related to an allegation about the applicant's workplace behaviour.[5]

[15] Section 13 authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body, subject to certain exceptions. The Supreme Court of Canada has stated that the purpose of exempting advice or recommendations from disclosure "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[6] Similarly, the BC Court of Appeal has stated that s. 13 "recognizes that some degree of deliberative secrecy fosters the decision-making process."[7]

[16] Previous orders and court decisions have found that s. 13(1) applies to information that directly reveals advice or recommendations, as well as information that would enable an individual to draw accurate inferences about

---

[5] There is also some information in two other records withheld under s. 13. As I have found that s. 14 applies to the information, I have not considered the application of s. 13.
[6] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), para. 43.
[7] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 105.

advice or recommendations.[8] In determining whether s. 13 applies, the first consideration is whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister." If it would, the second consideration is whether the information is excluded from s. 13(1) because it falls within a category listed in s. 13(2). If it does fall into one of the categories, the public body must not refuse to disclose the information under s. 13(1).

Analysis and Conclusion – Section 13(1)

[17] The applicant submits that the Targeted Threat Assessment report relates only to him so it is not policy advice and recommendations. He says that "by its very nature policy advice is of general application."[9]

[18] The Ministry submits that the withheld information following the subtitle "Recommendations" in the report contains explicit recommendations to the Ministry. The Ministry says the disclosure of the remaining withheld information would allow an accurate inference about those recommendations.[10] In response to the applicant's submissions, the Ministry submits that there is no requirement that information withheld under s. 13 must relate to a general policy and it may still be advice or recommendations even if it relates to a specific decision.[11]

[19] Based on my review of the records, I readily conclude that the information withheld after the "Recommendations" subtitle contains advice and recommendations. The information in dispute is explicit advice and recommendations developed for the Ministry. While I appreciate the applicant's submissions that the withheld information relates only to him and not does contain general policy advice, previous orders have applied s. 13(1) to include advice or recommendations related to an employment decision about a specific individual.[12] Section 13 does not require advice or recommendations to be of broad application. Therefore, I find that s. 13(1) applies to this information.

[20] I also find that s. 13(1) applies to the small amount of remaining withheld information in the Targeted Threat Assessment report. This information does not contain explicit advice or recommendations. However, the BC Court of Appeal has held that "advice" includes an opinion that involves exercising judgment and

---

[8] For example, Order F14-57, 2014 BCIPC No. 61 (CanLII), para. 14 and *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 (CanLII), para. 52.
[9] Applicant's response submissions, para. 17.
[10] Ministry's submissions, paras. 23 and 25; Manager's affidavit #1, para. 15.
[11] Ministry's final reply submissions, para. 1, citing Order F14-57, 2014 BCIPC 61 (CanLII), para. 15.
[12] See, for example, Order 00-17, 2000 CanLII 9381 (BC IPC) and Order F15-52, 2015 BCIPC 55 (CanLII). See also Order F08-05, 2008 CanLII 13323 (BC IPC), para. 17, where the adjudicator found that an applicant's right to his or her own personal information does not trump the public body's right to withhold information pursuant to s. 13.

skill to weigh the significance of matters of fact."[13] The remaining withheld information is this sort of opinion, and it is therefore "advice." Furthermore, disclosure of this information, in my view, would enable an individual to draw accurate inferences about the explicit advice and recommendations withheld after the "Recommendations" subtitle. I therefore conclude that s. 13(1) applies to this information.

Analysis and Conclusion on Section 13(2)

[21] The applicant does not make any specific submissions on s. 13(2). The Ministry submits that there are no factors in this section that apply in these circumstances. I have considered s. 13(2), and I find that there are no factors in s. 13(2) that apply to the information in dispute. The Ministry is therefore authorized to withhold the information pursuant to s. 13(1).

Discretion

[22] Section 13(1) is a discretionary exception, as it says that public bodies "may" refuse to disclose information. Because withholding information under s. 13(1) involves using discretion, a public body must be prepared to demonstrate that it has exercised its discretion appropriately. Assessing whether a public body properly exercised its discretion requires considering whether there is any evidence of: bad faith, the public body taking into account irrelevant circumstances, or the public body failing to take into account relevant circumstances.[14]

[23] The applicant submits that the Ministry failed to properly exercise its discretion in applying s. 13 to the disputed information. He says it either failed to consider, or gave insufficient weight to, the general purposes of FIPPA and the stated legislative purpose that public bodies should make information available to the public.[15]

[24] The Ministry provides an affidavit sworn by the Manager of Employee Relations (Manager) at the Public Service Agency (PSA), who was, at the relevant time, a Senior Labour Relations Specialist at the PSA.[16] The Manager deposes the following:

---

[13] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 113.

[14] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), para. 52; see also *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), para. 71.

[15] Applicant's response submissions, para. 24, citing Order 02-38, *supra*, para. 149.

[16] Manager's affidavit #2, para. 2. I sought further submissions from the Ministry and the applicant regarding the Ministry's use of discretion. The Ministry provided its submissions and the second affidavit and the applicant provided his response. I will refer to these submissions as the Discretion submissions.

- The Ministry has traditionally not released any information from Targeted Threat Assessment reports and that was the Ministry's original position regarding the applicant's access request.

- The Manager recommended that the Ministry exercise its discretion to release all but a relatively small portion of the report.

- The Ministry accepted the Manager's recommendation and exercised its discretion to release a substantial portion of the report to the applicant.

- The advice and recommendations the Ministry continued to withhold are intended to mitigate and/or prevent an incident in the workplace. Release of the remaining withheld information would be "significant and/or sensitive to the Ministry in so far as it would inform the Applicant of the advice and recommendations given to protect employees."[17]

[25] The Ministry also provides a copy of an approval form the Ministry uses to assess severing under FIPPA.[18] That form instructs the individuals who sign off on the final disclosure decision to consider certain factors when exercising their discretion to withhold information.[19] The Ministry says that this form is evidence that the decision-makers considered these factors and exercised discretion to continue to withhold some of the information pursuant to s. 13.[20] The applicant submits that neither the approval form nor the related information in the affidavit provides evidence that the delegated Ministry heads actually considered any or all of these factors.[21]

[26] In my view, the approval form and related affidavit evidence does not provide sufficient evidence that the decision-makers considered the relevant factors when they approved the severing, but rather only that they are instructed to do so. However, based on my review of the withheld information and the other affidavit evidence before me, I am satisfied that the Ministry exercised its discretion when it decided to apply s. 13(1) to only a small portion of the record. There is no evidence before me that the Ministry exercised its discretion in bad faith or that it considered irrelevant or extraneous grounds (or failed to consider relevant grounds) when making its final decision about what to sever from the Targeted Threat Assessment report.

[27] In summary, I find that the Ministry can withhold all of the information it withheld from the Targeted Threat Assessment report pursuant to s. 13(1). As

---

[17] Manager's affidavit #2, paras. 8 and 9.
[18] Manager's affidavit #2, exhibit "A".
[19] These are the same factors set out in Order 02-38, 2002 CanLII 42472 (BC IPC), para. 149.
[20] Ministry's Discretion submissions, para. 24.
[21] Applicant's Discretion submissions, para. 10.

well, I find that the Ministry has exercised its discretion appropriately in these circumstances.

Section 14 – Privilege

Records

[28] The Ministry did not provide me with copies of the records to which it applied s. 14. Instead, the Ministry relies on the contents of affidavits sworn by its legal counsel and the Manager, as well as an Index of Records. The Index of Records sets out the page numbers of the records withheld under s. 14, as well as the date the record was sent or created, the parties involved in the communications (names and titles) and a brief description of the record (such as "email string").

[29] The applicant submits that the OIPC should exercise its discretion to order the records be produced and review the withheld information to determine whether s. 14 applies. He says that "reviewing the material first hand is fundamental to determining whether all of the criteria for privilege have been met in the circumstances" and this "must be a fact-driven exercise."[22] The applicant submits that the Ministry does not have a compelling reason to withhold the records from the OIPC, as doing so "poses no threat to the privilege."[23] Overall, the applicant is concerned that public bodies may inappropriately apply s. 14 to records if the OIPC does not conduct an independent review of the actual records.[24]

[30] The Ministry submits that it is not always necessary for tribunals or courts to review privileged documents in order to determine whether privilege applies unless argument or evidence establishes that it is necessary to do so in order to fairly determine the matter.[25] It says that the applicant has only asserted concerns regarding privilege but he has not provided any specific evidence as to what problems exist with the Ministry's evidence.[26]

[31] For the following reasons, I have determined that the Ministry has provided sufficient evidence for me to make a determination as to whether s. 14 applies to the withheld information.

[32] The Supreme Court of Canada has recently provided guidance to administrative tribunals about ordering production of records in order to

---

[22] Applicant's response submissions, paras. 40 and 41.
[23] Applicant's response submissions, para. 31.
[24] Applicant's response submissions, paras. 29, 32, 42 and 43.
[25] Ministry's final reply submissions, para. 3.
[26] Ministry's final reply submissions, para. 2.

determine whether privilege has properly been claimed.[27] The Court stated that tribunals should not require a more onerous standard than that required by the laws and practice in civil litigation.[28] In BC courts, a party claiming privilege over a record must list each document separately and provide the date and a description of the documents.[29] Courts have indicated that the description of privileged documents should include, at a minimum, the nature of the communication (such as an "email" or "letter") and the author and recipient.[30] Courts also rely on affidavit evidence provided by legal counsel who, as officers of the court, are presumed to have provided the most extensive and explicit description of the document that is possible without revealing privileged information.[31]

[33] However, courts recognize that there are cases where review by the court would be appropriate. This is generally done where there is some evidence that the party claiming privilege has done so inappropriately or incorrectly. For example, a court may order a review of records where the party originally claimed privilege over some documents but later disclosed them.[32]

[34] In this case, the Index of Records lists the page numbers of the documents, a brief document description and the FIPPA exception applied. The document description contains the date of creation and describes the nature of the records as "email strings." The sender and recipient(s) of the emails are also set out. Legal counsel is noted as being a sender or recipient of all of these emails, and the other parties are listed as "several Ministry and PSA [Public Service Agency] employees." In short, the Ministry has described the records in a manner which complies with the standard set out in the *Supreme Court Civil Rules*.

[35] The Ministry also provided affidavit evidence (which I will discuss in further detail, below), sworn by individuals, including legal counsel, who have direct knowledge of the applicant's employment file and the records at issue in this inquiry. In my view, this is detailed evidence provided by individuals who are knowledgeable about the records and the context in which they were created, and there is no compelling evidence or argument that the Ministry has falsely, or otherwise inappropriately or incorrectly, claimed privilege over these records. As well, there are no additional factors which weigh in favour of ordering production in this situation.

---

[27] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 (CanLII) (*Calgary*).
[28] *Calgary*, para. 70 (majority reasons) and paras. 127 and 137 (dissenting reasons by Cromwell J. and Abella J. but not on this point).
[29] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 7-1 and Form 22.
[30] *Anderson Creek Site Developing Limited v. Brovender*, 2011 BCSC 474 (CanLII), para. 114.
[31] *Nanaimo Shipyard Limited v. Keith et al*, 2007 BCSC 9 (CanLII), at para. 27.
[32] For further discussion about reviewing records see, for example, *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 (CanLII), paras. 40 – 44.

[36] In conclusion, I have determined that the Ministry has provided sufficient evidence such that I am able to make a determination as to whether s. 14 applies to the withheld information. Therefore, I do not find it necessary to exercise the authority, pursuant to s. 44 of FIPPA, to order production of these records.

Analysis and Conclusion – Section 14

[37] Section 14 of FIPPA states that a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.[33] The Ministry is claiming legal advice privilege over most of the information it withheld under s. 14, and litigation privilege over the remaining information. I will first address legal advice privilege, below.

Legal Advice Privilege

[38] Legal advice privilege relates to the relationship that exists between a client and his or her lawyer and has been described as being fundamental to our justice system.[34] The test for determining whether legal advice privilege applies has been articulated as follows:

> [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.[35]

[39] The above criteria have been consistently applied in OIPC orders, and I will consider the same criteria here.[36]

---

[33] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.
[34] *R. v. McClure*, 2001 SCC 14 (CanLII), para. 2.
[35] *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22.
[36] See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.

[40] The scope of solicitor client privilege extends beyond merely requesting or providing legal advice and includes communications that are "part of the continuum of information exchanged," provided the object of the communication is to seek or provide legal advice.[37] This continuum of communications can include information the client provides to legal counsel that is related to the advice sought, including purely factual information, as well as internal client communication related to the legal advice received and its implications.[38]

[41] As noted above, the Ministry has provided an affidavit sworn by legal counsel (Lawyer) who currently has conduct of the Tribunal complaint file and is familiar with the subject matter and records related to this inquiry.[39] She notes that she has reviewed all of the records withheld under s. 14 and that the information "consists of confidential email communication between employees of the Ministry as well as the PSA and their legal counsel at that time [original lawyer]," and that the emails were "directly related to the seeking, formulating or providing of legal advice." The Lawyer deposes that it is her belief that the original lawyer at that time was acting in her role as legal counsel in sending and receiving these emails, and that, to the best of her knowledge, the Ministry has not shared this information with anyone outside of the Ministry or the Legal Services Branch whose jobs necessitate knowing this information.[40] The Lawyer also provides details about the types of records withheld under s. 14.[41]

[42] I am persuaded by the Lawyer's affidavit evidence and the information contained in the Index of Records that the records at issue are privileged. The Lawyer has conduct of the Tribunal complaint file and is familiar with the subject matter and records at issue. She deposes that she has reviewed the records and her description of them provides cogent evidence that legal advice privilege applies. For example, the Lawyer describes emails between the original lawyer and the Ministry with respect to matters involving the applicant, and what she deposes persuades me that they are confidential communications between the original lawyer and her client for the purposes of seeking, formulating and providing legal advice. The Lawyer also describes some of the records as "email chains," "attachments to emails" and "emails and other information" that the Ministry sent to the original lawyer for the purpose of seeking, formulating and providing legal advice. In my view, these are part of the continuum of

---

[37] *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 (CanLII), para. 83, citing *Canada (Information Commissioner) v. Canada (Minister of Safety and Emergency Preparedness)*, 2013 FCA 104 (CanLII), para. 28.

[38] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 (CanLII), paras. 22 – 24.

[39] Legal counsel affidavit, para. 7.

[40] Legal counsel affidavit, paras. 8 and 10. I note that the Ministry provided *in camera* submissions regarding why the lawyer with current conduct of the file swore the affidavit, as opposed to the lawyer who originally had conduct of the file. I accept this evidence and do not afford the affidavit information any less weight, particularly in light of legal counsel's current conduct of the file and familiarity with the records.

[41] Legal counsel affidavit, para. 9.

communications between the Ministry and its legal counsel, and legal advice privilege applies to these records. Therefore, the Ministry is authorized to withhold all of these records it says are protected by legal advice privilege pursuant to s. 14.

Litigation Privilege

[43] There is some information from two records that has been withheld because the Ministry says litigation privilege applies. The first record is described as "OHR – All Medical and All Case Notes for an Employee" (Case Notes). The Case Notes contain emails and other information that Ministry employees enter into a central database. One email has been withheld from the Case Notes under s. 14. The second record is described as an email string between a Ministry employee and a PSA employee, and the date of creation is provided along with the description that it contains information "discussing preparation for the [Tribunal hearing]."

[44] Litigation privilege is not directed at or restricted to confidential communications between a client and their lawyer, but rather applies to all communications (including non-confidential ones) between a client and their lawyer or between the client and/or lawyer and third parties, provided it is made for the dominant purpose of pending or contemplated litigation. The object of litigation privilege is to ensure the effectiveness of the adversarial process by allowing parties to prepare their positions in private, without adversarial interference and without fear of premature disclosure.[42] This creates a "zone of privacy" in relation to pending or contemplated litigation, but once the litigation ends, the privilege also ends.[43]

[45] To establish litigation privilege, two elements must be present:

1. litigation was ongoing or was reasonably contemplated at the time the document was created; and

2. the dominant purpose of creating the document was to prepare for that litigation.[44]

[46] There is a low threshold for determining whether litigation is "in reasonable prospect," and it is determined through applying an objective test based on reasonableness.[45] It does not require certainty, but the party claiming privilege

---

[42] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), para. 27.
[43] *Ibid.*, para. 34.
[44] *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259 (CanLII), para. 32; *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 (CanLII), paras. 96 – 99.
[45] *Raj v. Khosravi*, 2015 BCCA 49 (CanLII) (*Raj*), para. 10.

must establish something more than mere speculation or a mere possibility.[46] Courts have stated that the essential question is whether a reasonable person who is aware of the circumstances would conclude that the claim will not likely be resolved without litigation.[47]

[47] The "dominant purpose" test is a more challenging test to meet. It requires the party claiming privilege to prove that the dominant purpose of the document, when it was created or produced, was to obtain legal advice or to conduct or aid in the conduct of litigation.[48] In applying this test, courts have recognized that any document created or produced at a particular time may have more than one purpose, and a finding of dominant purpose "involves an individualized inquiry as to whether, and if so when, the focus of the investigation/inquiry shifted to litigation."[49] This is a factual determination that is made based on all of the circumstances and the context in which the document was produced.[50]

[48] The Manager provides the following evidence:

- at the relevant time, he was a Senior Labour Relations Specialist at the PSA;
- he is familiar with all matters underlying the access request and has reviewed the records at issue in this inquiry;
- he provided advice to the applicant's supervisor regarding the applicant's employment;[51]
- the applicant filed a complaint against the Ministry with the Tribunal in March 2013, and a settlement meeting was scheduled for October 2013 but did not take place. The Tribunal hearing has been held in abeyance but is scheduled to resume later this year; and
- WCAT awarded benefits to the applicant in November 2014.[52]

---

[46] *Ibid.*
[47] *Raj*, *supra*, para. 11, citing *Sauve v. ICBC*, 2010 BCSC 763 (CanLII), para. 30.
[48] *Raj*, *supra*, para. 12, citing *Hamalainen v. Sippola*, 1991 CanLII 440 (BC CA) (*Hamalainen*).
[49] *Raj*, *supra*, para. 17, citing *Hamalainen*, *supra*.
[50] *Ibid.*
[51] I note that the applicant states that this part of the affidavit is inaccurate, as he never directly reported to the individual named as his supervisor: applicant's submission, paras. 35 and 36. The Ministry states that the individual named as the applicant's supervisor was "administratively responsible for the Applicant" and that the applicant's direct manager reported to the named individual: Ministry's final reply, para. 7.
[52] Manager's affidavit #1, paras. 4 – 6. I note the applicant is concerned about the hearsay statements (i.e., information heard by one person about another) in the affidavit: applicant's response, para. 37. Based on *in camera* evidence (Lawyer affidavit, para. 7) and the remaining contents of the Lawyer's affidavit, I am satisfied that legal counsel's evidence is reliable and necessary and I do not accord it less weight in these circumstances.

[49] The Manager states that the dominant purpose of both of the records was to prepare for the Tribunal complaint. Specifically, he says the withheld information from the Case Notes is a confidential email between him and other PSA employees in September 2013 and is about "gathering records in preparation of the [Tribunal] settlement meeting."[53] He states that the dominant purpose of this email was to prepare for the upcoming scheduled Tribunal settlement meeting.[54] I note that the email was created in September 2013, and the Tribunal settlement meeting was scheduled for October 2013.

[50] In my view, there is no question that litigation was "in reasonable prospect," as the applicant filed the complaint with the Tribunal in March 2013 and a settlement meeting was scheduled for October 2013. Therefore, the first part of the test has been met. I also find that the second part of the test has been met. The email withheld from the Case Notes was created in September 2013 and the evidence is that it was sent to facilitate gathering records to prepare for the upcoming settlement discussions. There is no evidence that there is any other competing purpose for the creation of the email. I find that the Ministry has established that the dominant purpose of the email withheld from the Case Notes was to prepare for litigation.

[51] The Manager describes the second record (the email string) as a confidential email communication dated March 2015 involving him and Ministry employees about "the implications of the WCAT decision on the [Tribunal hearing] …."[55] He says that the purpose of this communication was to assist the Ministry "in its tactical preparation for the [Tribunal hearing] in light of the November 2014 WCAT decision."[56] Again, there is no question that litigation was in reasonable prospect, and I find that the email string was created for the dominant purpose of litigation. In making this determination, I have considered the following evidence provided by the Manager:

- the email string was created after the applicant filed a complaint with the Tribunal and after the WCAT decision was rendered, but before the Tribunal hearing proceeded;

- the email string participants were PSA employees, including a Senior Labour Relations Specialist who advised the applicant's supervisor about matters related to the applicant; and

- the only purpose for the email string appears to be to prepare for the Tribunal hearing in light of the recently rendered WCAT decision.

---

[53] Manager's affidavit #1, para. 7.
[54] Manager's affidavit #1, para. 8.
[55] Manager's affidavit #1, para. 7.
[56] Manager's affidavit #1, para. 8.

[52] Therefore, I find the Ministry is authorized to withhold the records it says are protected by litigation privilege under s. 14.

Section 22 – Unreasonable Invasion of Privacy

[53] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[57]

Personal Information

[54] The first step in any s. 22 analysis is to determine if the information is personal information. "Personal information" is defined as "recorded information about an identifiable individual other than contact information." "Contact information" is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[58]

[55] The information withheld under s. 22 is in the Targeted Threat Assessment report and consists of a third party's opinion about the applicant.[59] Based on my review of the records, I find that the withheld information is personal information, as it is information that is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.[60] In my view, the withheld information is the personal information of both the applicant and the third party who is expressing the opinion about the applicant. This is consistent with previous orders, which have stated that an individual's opinion about another individual can constitute the former's personal information to the extent that he or she is identifiable as the one who provided the opinion.[61]

Section 22(4) – disclosure not unreasonable

[56] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If it does, disclosure would not be an unreasonable invasion of personal privacy.

[57] Neither the applicant nor the Ministry made any submissions about the s. 22(4) provisions. I have considered them and find that none of them apply to the information in dispute.

---

[57] See, for example, Order 01-53, 2001 CanLII 21607, p. 7.
[58] See Schedule 1 of FIPPA for these definitions.
[59] There is some information withheld under s. 22 that has also been withheld pursuant to s. 14. I have already determined that s. 14 applies to that information and therefore I do not have to consider it here.
[60] See Order F16-38, 2016 BCIPC 42 (CanLII), para. 112.
[61] See Order F16-19, 2016 BCIPC 21 (CanLII), para. 23, citing Order F14-47, 2014 BCIPC 51 (CanLII), para. 14.

Section 22(3) - presumptions in favour of withholding

[58] The third step in a s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply, in which case disclosure is presumed to be an unreasonable invasion of third party privacy. However, such presumptions are rebuttable.

[59] Section 22(3)(d) applies to personal information that relates to employment, occupational or educational history. The Ministry submits that s. 22(3)(d) applies because the information is about the third party's thoughts and feelings in the context of a workplace incident and investigation.[62] The Ministry states that it performed the Targeted Threat Assessment as part of its internal investigation regarding the applicant, and that the presumption that disclosure would be an unreasonable invasion of privacy outweighs the applicant's interests.[63]

[60] In response, the applicant submits that it is important to note that the employment information in question is his own personal information. He says that this is different from the intended application of s. 22(3)(d), which is "where a third party is making a general FOI request."[64]

[61] Based on my review of the records and withheld information, I find that s. 22(3)(d) does apply to the third party's personal information because the information occurs in the context of a workplace investigation. Previous orders have held that sensitive information about a third party's opinions in the context of a workplace investigation constitutes a third party's employment history.[65] This is precisely the situation in this case, and I find that s. 22(3)(d) applies to the withheld information. Therefore, there is a rebuttable presumption that the third party's personal information should not be disclosed. I will address the applicant's submission about the fact that this is also his own personal information, below.

Section 22(2) - all of the relevant circumstances

[62] The next step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). The applicant submits that s. 22(2)(c) applies, and the Ministry submits that s. 22(2)(f) applies. I will address the applicant's submission first.

---

[62] Ministry's submissions, paras. 59 – 61.
[63] Ministry's submissions, para. 61.
[64] Applicant's response submissions, para. 28.
[65] See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), paras. 40 and 46.

Section 22(2)(c) – fair determination of rights

[63] The applicant submits that the withheld information is relevant to a fair determination of his rights, and therefore s. 22(2)(c) applies.[66] The applicant does not expand on this argument. In response, the Ministry submits that the applicant has not provided evidence as to how s. 22(2)(c) applies to this information or how it would overcome the s. 22(3)(d) presumption.[67]

[64] Previous orders have established that the following four criteria must be met in order for s. 22(2)(c) to apply:

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.[68]

[65] Based on my review of the withheld information and the parties' submissions, it is not apparent to me how disclosure of this information would be relevant to a fair determination of the applicant's rights. Even if I speculate that the applicant is referring to the Tribunal hearing, the applicant has not provided any submissions or evidence about how this information has some bearing on, or significance for, determining the right in question or how disclosure of the information is necessary in order to prepare for the Tribunal hearing or ensure a fair hearing. For these reasons, I find that s. 22(2)(c) does not apply in these circumstances.

Section 22(2)(f) – supplied in confidence

[66] The Ministry submits that s. 22(2)(f) applies to the information, as it says the third party's opinion was supplied in confidence.[69] The Ministry points to language in the Targeted Threat Assessment report, which states that it was provided to the Ministry "in confidence for the sole purpose of addressing safety concerns of employees." The Ministry also says that the third parties interviewed during the investigation are "entitled to rely on the confidential nature of the

[66] Applicant's response submissions, para. 26.
[67] Ministry's final reply submissions, para. 5.
[68] Order 01-07, 2001 CanLII 21561 (BC IPC), para. 31.
[69] Ministry's submissions, para. 63.

investigation to protect their personal information from disclosure."[70] The applicant does not directly address this submission.

[67] In my view, the above-noted language in the report is not compelling evidence that the third party supplied his opinion in confidence to the person who wrote the Targeted Threat Assessment report. Rather, it is evidence that the report was provided to the Ministry in confidence. There is no evidence before me regarding the third party's expectations or understanding regarding confidentiality when communicating with the report writer. However, based on my review of the content and context of the withheld information, I find that the withheld information is sensitive in nature. I am able to infer that a third party would likely not have supplied it to the report writer had that individual known that it would be disclosed to the applicant or to anyone else. I find, therefore, that the third party's opinion was implicitly supplied in confidence for investigative purposes.[71] This is a factor that weighs against disclosure.

Other relevant factors – applicant's own personal information

[68] As noted above, the applicant submits that the employment information in question is his own personal information and he should be entitled to it. I find that this is a relevant factor that weighs in favour of disclosing the information to the applicant.

Section 22(1) – conclusion

[69] I have determined that the information withheld under s. 22 is personal information. I have also determined that the s. 22(3)(d) presumption against disclosure of the information applies, as it relates to a third party's employment history. Further, I found that the information was supplied in confidence, and this is a factor that favours withholding the information.

[70] However, the withheld information is also the applicant's personal information, which weighs in favour of disclosure. Previous orders have stated that it will only be in rare circumstances that disclosure of an applicant's own personal information will be an unreasonable invasion of third party privacy.[72]

[71] Based on my review of the withheld information, I find that it contains fact-specific and unique information such that disclosure of the information will allow the applicant to identify the third party. The third party's personal information is so entwined with the applicant's personal information that it would be impossible to sever the third party's personal information from the applicant's. Therefore, I find that this is one of the rare occasions where disclosing the applicant's own

---

[70] Ministry's submissions, para. 64; Records: p. 106.
[71] See Order 03-40, 2003 CanLII 49219 (BC IPC), para. 25 and Order F15-52, 2015 BCIPC 55 (CanLII), para. 43.
[72] Order F06-11, 2006 CanLII 25571 (BC IPC), para. 77.

personal information would be an unreasonable invasion of a third party's privacy. This is consistent with previous orders that have withheld the same type of information in the context of a workplace complaint.[73]

[72] I have also considered whether s. 22(5) applies in these circumstances. Section 22(5) requires a public body to provide an applicant with a summary of their personal information if it cannot be disclosed under s. 22, except in specific circumstances. One of those circumstances is if "the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information."

[73] In my view, the Ministry could not prepare a meaningful summary of the withheld information about the applicant without revealing the third party's identity. Again, this is because the third party's personal information is entwined with the applicant's and the information contains uniquely fact-specific information that would allow the applicant to identify the third party. Therefore, I find that the exception in s. 22(5)(a) applies and the Ministry is not required to provide the applicant with a summary of his personal information.

[74] In conclusion, after considering the relevant circumstances, I find that the presumption against disclosure under ss. 22(3)(d) has not been rebutted. The third party's personal information cannot be severed from the applicant's and the Ministry is therefore required to withhold the s. 22 information.

CONCLUSION

[75] For the reasons given above, under s. 58 of FIPPA, I order that the Ministry is authorized to refuse to disclose the information withheld pursuant to ss. 13 and 14, and is required to refuse to disclose the information withheld under s. 22.

October 2, 2017

ORIGINAL SIGNED BY

Carol Whittome, Adjudicator

OIPC File No.: F15-63317

[73] See, for example, Order F15-54, 2015 BCIPC 57 (CanLII); Order F08-02, 2008 CanLII 1645 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC).

Office of the
Information & Privacy
Commissioner
for British Columbia

Protecting privacy. Promoting transparency.

Addendum to Order F17-43

MINISTRY OF FINANCE

October 10, 2017

CanLII Cite: 2017 BCIPC 47
Quicklaw Cite: [2017] B.C.I.P.C.D. No. 47

After Order F17-43 was issued, it became apparent that due to an administrative oversight, the Ministry's September 19, 2017 final submission on the issue of the exercise of discretion under s. 13(1) was not before the adjudicator. The submission included a supporting affidavit from the Ministry's Assistant Deputy Minister, Employee Relations, BC Public Services Agency. The OIPC has determined that it will not reopen the inquiry to consider the September 19, 2017 reply submission and affidavit because they only provide further information in support of the adjudicator's decision that the Ministry appropriately exercised its discretion.

October 10, 2017

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F15-63317