Office of the Information & Privacy Commissioner for British Columbia

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Order F18-18

MINISTRY OF ATTORNEY GENERAL

Chelsea Lott
Adjudicator

June 5, 2018

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Summary: The applicant requested briefing notes for the attorney general on a specific topic. The Ministry refused to disclose the briefing notes in their entirety under ss. 14 (solicitor client privilege) and 22 (harm to personal privacy) of FIPPA. The adjudicator found that s. 14 applied to all of the information in dispute except for third party correspondence attached to one briefing note. The adjudicator also found that s. 22 did not apply to the correspondence. The adjudicator required the public body to sever the correspondence under s. 4(2) and disclose it to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 4(2), 14 and 22.

INTRODUCTION

[1] The applicant made an access request to the Ministry of Justice, now the Ministry of Attorney General (Ministry), under the *Freedom of Information and Protection of Privacy Act* (FIPPA). She asked for all briefing notes for the solicitor general and attorney general "concerning the Immediate Roadside Prohibition scheme or RoadSafetyBC from December 1, 2015 to the date the documents are prepared for disclosure."[1] The Ministry withheld all of the records pursuant to ss. 14 (solicitor client privilege) and 22 (harm to personal privacy) of FIPPA.

[1] Email from the applicant to the Ministry of Technology, Innovation and Citizens Services dated April 26, 2016.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the issues in dispute and the matter proceeded to inquiry.

ISSUES

[3] The issues in this inquiry are:

1. Is the Ministry authorized to refuse to disclose the information at issue under s. 14?

2. Is the Ministry required to refuse to disclose the information at issue under s. 22?

[4] 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 s. 14. The applicant has the burden of proving that disclosure of any third party personal information in the records would not be an unreasonable invasion of personal privacy under s. 22.

DISCUSSION

Records

[5] The records in dispute are five briefing notes prepared by lawyers with the Ministry of Attorney General for the Attorney General and total 88 pages.[2] Three of the briefing notes have attachments. The Ministry did not provide the OIPC with any of the records it withheld under s. 14; instead it provided affidavit evidence from a paralegal based on her review of the records.[3] In her reply submissions, the applicant argued that the Ministry's evidence was not sufficient for the Commissioner to make a decision regarding the application of s. 14 of FIPPA and that the Ministry had not met its burden of proof.[4]

[6] The Commissioner has the power to review records over which a party has claimed privilege pursuant to s. 44 of FIPPA; however, it is preferable that disputes over legal advice privilege be resolved on affidavit evidence, particularly where there are a large number of records.[5] This is in keeping with the importance of solicitor client privilege to our justice system, as well as the just, speedy and inexpensive determination of disputes. The Commissioner will only

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[2] The Ministry did not provide the dates of the briefing notes.
[3] Affidavit #1 of SR.
[4] Applicant reply to May 1, 2017 submissions at paras 2 and 6.
[5] *Keefer Laundry Ltd v Pellerin Milnor Corp et al*, 2006 BCSC 1180 [*Keefer*] at paras 73–74.

review records over which a party has claimed solicitor client privilege where it is necessary in order to fairly decide the issue.[6]

[7] In *Alberta (Information and Privacy Commissioner) v University of Calgary* [*University of Calgary*], the Supreme Court of Canada suggested that the laws and practice in civil litigation for claiming solicitor client privilege govern the standard of proof that the Commissioner can require when conducting an inquiry as to whether a public body has properly claimed the privilege.[7] In British Columbia, a party claiming privilege over a record must list each document separately and provide the date and a brief description of the document.[8] A party must "describe the documents for which privilege is claimed in a manner that, without revealing privileged information, enables its opponent to assess the claim of privilege."[9] At a minimum, to assess the validity of a claim of privilege the courts have indicated that the description of privileged documents should include the date it was created or sent, the nature of the communication (such as "email" or "memorandum") and the author and recipient.[10] However, there are no steadfast rules and the answer depends on the nature of the case and the nature of the document.[11]

[8] In addition to a proper description of the records, public bodies must provide evidence to substantiate the privilege claim. It is not enough to merely assert that privilege applies.[12] The evidence may include the very records in dispute, with or without affidavit evidence, or it may be that only affidavit evidence is provided.[13] It is also open to the parties to seek the OIPC's consent to submit evidence *in camera* if there is a concern about inadvertently waiving privilege. While the OIPC has a broad discretion to accept hearsay evidence, evidence about the communications should come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication as well as the intentions of the parties to the communication. This makes the evidence more reliable. In addition, it is

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[6] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 68.
[7] *Ibid* at para 70 (majority) and paras 127 and 137 (dissenting reasons by Cromwell J and Abella J but not on this point)
[8] *Supreme Court Civil Rules*, Rules 7-1(1) and (2) and Form 22.
[9] *Gardner v Viridis Energy Inc,* 2013 BCSC 580 (in Chambers) at para 36. See Rule 7-1(7) of the *Supreme Court Civil Rules.*
[10] *Anderson Creek Site Developing Limited v Brovender*, 2011 BCSC 474 at para 114.
[11] *Ibid* at para 113.
[12] *Nelson and District Credit Union v Fiserv Solutions of Canada Inc*, 2017 BCSC 1139 (Master) [*Nelson*] at para 52; *Nanaimo Shipyard Ltd v Keith et al*, 2007 BCSC 9 (Master) at para 29.
[13] *Intact Insurance company v 1367229 Ontario Inc,* 2012 ONSC 5256 at para 22 (stating that a party was required at a minimum to provide a sworn affidavit or *viva voce* evidence setting out the basis of the claim to privilege). See also Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014) at §9.19.

helpful to have evidence from a lawyer, who as an officer of the court, has a professional duty to ensure that privilege is properly claimed.[14]

[9] As discussed, in support of its claim of privilege, the Ministry submitted an affidavit from a paralegal with the Ministry of Attorney General. The paralegal swore that Ministry legal counsel prepared the briefing notes for the Attorney General and that the briefing notes "reveal confidential legal advice" and had not been shared outside of the provincial government.[15] She further swore that the legal counsel created them in their role as legal counsel for the Province.[16] The paralegal's description of the records included the number of pages, the nature of the document (i.e., briefing note), if it included attachments, and the author(s) and recipient.[17] Her description did not include the dates of the records nor did she provide the nature or length of the "attachments."

[10] I sent the Ministry a letter in June 2017 advising that the evidence was not sufficient to decide whether privilege applied. In particular, I raised a concern that the only evidence was from a paralegal based on her review of the records. I afforded the Ministry further opportunity to submit evidence. In response, the Ministry submitted a second affidavit from the paralegal in which she swore to having had conversations with the lawyers who authored the briefing notes about their privileged nature.[18]

[11] I wrote to the Ministry in August 2017, again indicating that the evidence was not sufficient to adjudicate solicitor client privilege. I stated that, as the lawyers were in-house counsel, I required evidence on the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought and rendered to determine whether the lawyers were giving legal advice or some other form of advice.[19] I also requested further information about the nature of the attachments and pointed out that I would have to consider whether the severance provision of FIPPA, s. 4(2), could be applied. Lastly, I expressed concern about the weight I could give to the paralegal's affidavit evidence. I again afforded the Ministry an opportunity to submit further evidence.

[12] In September 2017, the Ministry amended its initial submissions and tendered four affidavits from lawyers who authored the briefing notes. In

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[14] *Nelson*, *supra* note 12 at para 54 wherein Master Harper noted counsel's professional duty to properly claim privilege.
[15] Affidavit #1 of SR at paras 4 and 7.
[16] *Ibid* at para 5.
[17] *Ibid*.
[18] Affidavit #2 of SR at para 3.
[19] In my letter, on this point, I cited *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 [*Pritchard*] at para 20.

response, the applicant argued that the affidavit evidence remained insufficient for me to make an informed decision.

[13] After reviewing these four affidavits, I continued to have questions about the attachments to the briefing notes, which in my view were too vaguely described to ascertain whether the attachments were privileged.[20] This resulted in the Ministry submitting better descriptions of the attachments and a further affidavit. The Ministry's response provided that one of the attachments was also a briefing note (with attachments) which was responsive in its own right.[21] For ease of reference I will refer to it as the fifth briefing note.

[14] I concluded that I now had sufficient evidence to make a determination regarding all of the records except the fifth briefing note and in particular its attachments. The Ministry had described the fifth briefing note as five pages in length with 31 pages of attachments consisting of "correspondence which helped inform our legal advice as well as previous legal advice [Legal Services Branch] lawyers provided to RoadSafetyBC."[22] Having already extended the Ministry numerous opportunities to provide information and evidence about the attachments, I determined that it was necessary to review the fifth briefing note in order to fairly assess solicitor client privilege.[23] Pursuant to s. 44(1), I ordered the Ministry to produce the fifth briefing note and its attachments.

[15] Rather than produce the fifth briefing note and its attachments to this Office, the Ministry made submissions asking that I reconsider my production order. It also submitted an *in camera* description of the attachments. The *in camera* description indicated the date of the correspondence, the parties to the correspondence and the subject of the correspondence. The Ministry also provided the subject matter of the "previous legal advice" mentioned in the earlier description of these attachments.

[16] The *in camera* evidence that the Ministry ultimately provided has been sufficient to enable me to decide the s. 14 issue regarding the fifth briefing note. Although I was troubled by the fact that the Ministry failed to comply with the s. 44(1) order, I concluded that it had adequately complied with the intent of the order.[24] As a result, I felt the Ministry had complied sufficiently with the production order that it was not necessary to apply to the BC Supreme Court pursuant to s. 44(2) to enforce the order.

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[20] My letter dated September 22, 2017; Ministry submissions dated September 26, 2017; My letter dated September 28, 2017; Ministry submissions dated October 2, 2017.
[21] Ministry submissions dated September 26, 2017 and affidavit #1 of JT.
[22] Affidavit #1 of JT at para 4.
[23] Order dated October 5, 2017.
[24] I advised the parties of my decision by letter dated October 18, 2017.

[17] I also note that I concluded that given the importance of solicitor client privilege, it was necessary to afford the Ministry further opportunities to adduce evidence in support of its privilege claim. Although I determined that it was acceptable to do so in this case, public bodies cannot expect this to always be done. Under FIPPA, the legal burden of adducing evidence sufficient to establish the privilege lies on the Ministry, a burden consistent with that in civil litigation, and public bodies must as a rule, put their best foot forward from the very start and tender whatever necessary evidence there is to meet its case. This Office is duty bound to adjudicate matters neutrally and fairly. Its inquiry procedures must be respected and all public bodies, including the Ministry, must provide their best evidence at the outset, in their initial submissions.

[18] Given the number of submissions and affidavits which form the record for this inquiry, I have included as Appendix A to this order, a table which lists all of the material from the parties.

Lawyers' affidavits

[19] The applicant argues that I should give little or no weight to the affidavits of the lawyers because they are nearly identical, vague and lacking in corroborating evidence.[25] The Ministry acknowledges the affidavits are similar but states that it is not realistic to expect differences given they cover the same topics and were prepared by lawyers from its Legal Services Branch (LSB).[26]

[20] The fact that the affidavits are all very similar is not surprising as they were presumably all drafted by the Ministry's counsel for this inquiry. More importantly, given the narrow category of records at issue, it is reasonable for the affidavits to be nearly identical. With respect to their lack of detail, I appreciate that the Ministry must be careful to not provide so much information that it constitutes a waiver of the privilege claimed.

[21] In my view, the lawyers' affidavit evidence was sufficiently detailed to determine the matters in issue. I have considered all of the affidavit evidence submitted by the Ministry and do not attribute less weight to it because of the similarities between the affidavits.

Solicitor client privilege

[22] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to "solicitor client privilege." Section 14 includes legal advice privilege, commonly called solicitor client privilege, as well

[25] Applicant reply to Sept 1, 2017 submissions at paras 1–4. Citing *Petrov v British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 486 at para 33.
[26] Ministry reply submissions dated September 21, 2017 at para 1.

as litigation privilege. The Ministry is claiming legal advice privilege over the entirety of the briefing notes as well as the attachments.

[23] Solicitor client privilege is a foundational legal principle. As Justice Côté for the majority in *University of Calgary* stated, "[t]he importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with "the protection of a relationship that has a central importance to the legal system as a whole."[27] The protection it affords ensures that clients can speak fully and frankly with their lawyers and receive appropriate legal advice. Solicitor client privilege must be jealously guarded and infringed upon only in unusual circumstances.[28] Once privilege has been established, it applies "to all communications made within the framework of the solicitor-client relationship…."[29]

[24] In the context of FIPPA, the purpose of s. 14 is "to ensure that what would at common law be the subject of solicitor-client privilege remains protected."[30] As explained in *Legal Services Society v BC (Information and Privacy Commissioner)*:

> Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.[31]

[25] In *Solosky v The Queen*, the Supreme Court of Canada set out the criteria that must be met for a document to be privileged. It said:

> …privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.[32]

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[27] *University of Calgary*, *supra* note 6 at para 26.
[28] *University of Calgary, supra* note 6 at paras 34–35.
[29] *Descôteaux et al v Mierzwinski,* [1982] 1 SCR 860, 1982 CanLII 22 (SCC) at p. 893.
[30] *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at para 31 relying on *Legal Services Society v British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para 35.
[31] *Legal Services Society v BC (Information and Privacy Commissioner)*, 1996 CanII 1780 (BC SC) at para 26.
[32] *Solosky v The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837, 1979 CanLII 9 (SCC).

[26] As already noted, under s. 57, the Ministry bears the burden of establishing that s. 14 authorizes it to withhold the information that it has withheld. As discussed below, s. 4(2) requires the Ministry's to sever any information that is protected by s. 14 and disclose the remainder, if the protected information can reasonably be severed from the rest.

Briefing notes

[27] I will first consider the briefing notes before turning to their attachments which raise separate issues. The applicant correctly asserts that not all communications between and solicitor and client attracts solicitor client privilege. She cites *R v Campbell* [*Campbell*], in which Mr. Justice Binnie, writing for the court explained:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected…
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.[33]

[28] The applicant submits the Ministry has not provided evidence or argument related to the subject matter of the advice or the circumstances in which it was sought. She argues that as a result, the Ministry has not met its burden to establish solicitor client privilege.[34]

[29] The records at issue are briefing notes, a type of record which could contain policy advice.[35] As indicated in *Campbell*, where government lawyers provide policy advice, it is not subject to privilege. Therefore, the evidence about the subject matter and circumstances of the advice and the relationship between the lawyers and the Ministry must be sufficient to establish that the briefing notes contain legal advice as opposed to policy advice.

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[33] *R v Campbell*, 1999 CanLII 676 (SCC) at para 50. See also *Pritchard, supra* note 19 at paras 19–21.
[34] Applicant reply to May 1, 2017 submissions at para 6.
[35] See for example Order F17-30, 2017 BCIPC 32 and Order F16-26, 2016 BCIPC 28.

[30] The evidence from the authors of the briefing notes is that the briefing notes were communications between solicitors (Ministry legal counsel) and client (the Attorney General on behalf of the Province), which entailed the provision of legal advice and which the parties intended to be confidential.[36] The subject of the briefing notes are matters within the scope of the access request, which was on the topic of the Immediate Roadside Prohibition scheme or RoadSafetyBC.[37] There is nothing in evidence which suggests that the briefing notes contain policy advice.

[31] The Ministry's evidence is sufficient to meet the test for solicitor client privilege set out by the Supreme Court of Canada in *Solosky*. I find that the briefing notes in issue are privileged, such that s. 14 of FIPPA authorizes the Ministry to refuse to disclose them.

[32] As I will discuss more fully below, s. 4(2) of FIPPA requires public bodies to sever information that is exempted from disclosure, if that can be reasonably done, and give the applicant access to the remainder of the requested record. The applicant argues that while some of the information may be privileged legal advice, the Ministry has not established that the entire contents of the records are privileged and cannot be reasonably severed.[38]

[33] The evidence of all of the lawyers is that they consider the entirety of their briefing notes to be confidential written communications for the purpose of presenting legal advice.[39] Given this evidence and that the records are briefing notes, I assume the records are in the nature of legal opinions or memoranda. In my view, it would be inappropriate to require severance to tease apart the legal advice from the remainder of the information in these records. I find that the Ministry is authorized to withhold the entirety of the briefing notes under s. 14.

Attachments to privileged records

[34] I turn to consider the attachments to the briefing notes. The Ministry submits that "the issue in this instance is not whether the attachments would allow an accurate inference of the legal advice in the briefing note - rather, it is the Ministry's position that the attachments themselves are part of the confidential communication between solicitor and client."[40] The Ministry argues that there is no authority which supports the proposition that attachments to otherwise privileged communications are "exempt from solicitor client privilege

[36] Affidavits of AH, MM, LG, PA #1, JT #1 at para 3.
[37] *Ibid* and affidavit of JT #1 at para 4.
[38] Applicant reply to May 1, 2017 submissions at paras 7–8.
[39] Affidavits of AH, MM, LG, PA #2, JT #1 at para 3.
[40] Ministry reply submissions dated November 9, 2017 at para 3.

and therefore releasable in whole or in part."[41] The Ministry further asserts that "the exact nature of the attachments to the briefing notes is not necessary information for the Commissioner in coming to his determination. The briefing notes themselves are privileged and, therefore, so are their attachments."[42]

[35] The applicant submits that the attachments should be disclosed because there is "no evidence as to the nature of the attachments to the Briefing Notes indicating whether their disclosure would or would not be likely to reveal any of the legal advice given to the client."[43]

[36] As I will discuss further, there is ample support for the view that attachments or enclosures are not automatically privileged because they are appended to an otherwise privileged communication. The test in every case is whether the attachments themselves, in the context of the particular facts, are protected by solicitor client privilege. Were it otherwise, public bodies could usurp the access provisions of FIPPA by attaching non-privileged but otherwise responsive records to a privileged communication.

[37] It is well established that a document that is not privileged does not become so simply because it is sent or received by a lawyer. As Gray J put it in *Keefer Laundry Ltd v Pellerin Milnor Corp*:

> A lawyer is not a safety-deposit box. Merely sending documents that were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice to a lawyer will not make those documents privileged. Nor will privilege extend to physical objects or "neutral" facts that exist independently of clients' communications.[44]

[38] The same is also true of a document sent by a lawyer to his or her client that does not contain legal advice or is not within the scope of their solicitor client relationship. Such documents are not privileged communications.[45] In other words, a document that was not initially privileged does not suddenly become privileged because it has been sent from or to a lawyer.[46]

[39] In my opinion, the same principles are applicable to attachments to communications. Attachments do not become privileged merely because they are exchanged between a solicitor and client, even if they are attached to a privileged communication. In ordering the disclosure of attachments, the

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[41] Ministry submissions dated October 12, 2017 at p 3.
[42] Ministry submissions dated October 2, 2017 at pp 1–2.
[43] Applicant reply to Sept 1, 2017 submissions at para 17.
[44] *Keefer*, *supra* note 5 at para 61 (in text citation omitted).
[45] *Canada (Public Prosecution Service) v JGC*, 2014 BCSC 557 at para 17.
[46] *Ibid* at para 19 relying on *Taxpro Professional Corp v Canada (Minister of National Revenue)*, 2011 FC 224 at para 38 aff'd 2011 FCA 306.

Federal Court in *Murchison v Export Development Canada* [*Murchison*], discussed the issue at some length:

> In a similar vein, it is my view that a document that would otherwise be subject to disclosure should not be withheld merely because it has been attached to or enclosed with a properly exempted document. This conforms to the notion that "no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer", as it was put by Justice Heneghan of this Court in *Belgravia Investments Ltd. v. Canada*, 2002 FCT 649 (CanLII), at para 46. For example, policies of EDC that are publicly accessible do not become exempt on grounds of solicitor-client privilege merely because they have been enclosed with a letter from the client to the solicitor, even if they may later be considered by the lawyer when providing legal advice to the client. Likewise, privilege does not attach to a document that would otherwise be without exemption, such as a case authority, merely because it is enclosed with a lawyer's opinion letter to his or her client, even if it is a case that the lawyer references in the legal opinion. These attachments and enclosure are discrete documents that, save for an exceptional circumstance where they would truly allow one to infer the content and substance of the privileged advice, must be considered on their own and apart from the correspondence to which they are attached or in which they are enclosed...[47]

[40] In *Murchison*, the court ordered disclosure of attachments and enclosures to privileged emails because they would not permit anyone to infer the legal advice and the privilege "does not extend from the exempted document to the attachment or enclosure."[48]

[41] In *TransAlta Corporation v Market Surveillance Administrator* [*TransAlta*], the Alberta Court of Appeal considered whether certain records fell within the continuum of communication of legal advice and were thus privileged. In finding that an email was privileged but a case attached to the email was not, Mr. Justice O'Brien said:

> In my view, an attachment to a privileged e-mail may be extraneous to the content of that e-mail which means it is still necessary to review the attachment to determine its connection to the e-mail before deciding whether it is also privileged.[49]

[42] The Ministry relies on Order 00-38, in which Commissioner Loukidelis remarked, "I have no doubt that any documents gathered for or attached to a legal

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[47] *Murchison v Export Development Canada*, 2009 FC 77 at para 45.
[48] *Ibid* at para 46.
[49] *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196 at para 59. The court agreed with the chambers judge that the attached case was not privileged because it was publicly available online (at para 62).

opinion prepared by a lawyer for the lawyer's client would be protected by solicitor client privilege."[50] With respect, I disagree with the Ministry's assertion that Order 00-38 is authority for the proposition that any and all attachments to a legal opinion are in effect automatically privileged. I note the Commissioner made that remark in *obiter* and he was not considering attachments to a legal opinion, rather at issue was a collective agreement containing annotations (some of which the Commissioner found revealed legal advice). In addition, when the Commissioner made that remark he referred specifically to *British Columbia (Minister of Environment, Lands and Parks) v British Columbia (Information and Privacy Commissioner)* [*Minister of Environment*].[51] The two disputed records in *Minister of Environment* were not attachments and both independently met the requirements for solicitor client privilege. They were an opinion prepared by a lawyer and minutes of a meeting attended by the lawyer during which he provided legal advice. Further, in *Minister of Environment,* Thackray J (as he then was) noted in *obiter* that there may be cases where severance of a privileged document is appropriate.[52]

[43] I note that the Court of Appeal in *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)* [*College of Physicians*] expanded on what the court in *Minister of Environment* said about severing. In *College of Physicians*, the Court held that a document can be severed where the legal advice is not intertwined with non-privileged information.[53]

[44] These cases undercut the Ministry's position that attachments to a privileged document are themselves automatically privileged. In fact, these and other cases confirm that there are circumstances where attachments may not be privileged even though they are attached to privileged communications.

[45] The Ministry also cites a number of OIPC orders that it says have held that attachments to privileged communications are as a rule themselves privileged.[54] Order 02-01, cited by the Ministry, undermines its argument. In that case, one of the records at issue was a memorandum containing legal advice from in-house counsel for the Law Society to the Law Society's Professional Standards Committee. Three documents were attached to the memorandum. Two of the attachments had already been disclosed by the Law Society in severed form. The Commissioner discussed the third attachment and said this:

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[50] Order 00-38, 2000 CanLII 14403 (BC IPC) at p. 14.
[51] *British Columbia (Minister of Environment, Lands and Parks) v British Columbia (Information and Privacy Commissioner)*, 1995 CanLII 634 (BC SC).
[52] *Ibid* at para 75.
[53] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras 60–71.
[54] Order 02-01, 2002 CanLII 42426 (BC IPC); Order 04-16, 2004 CanLII 7058 (BC IPC); Order F10-20, 2010 BCIPC 31; Order F13-21, 2013 BCIPC 28; Order F16-08, 2016 BCIPC 10.

> The third is a memo from an external member, and official of, the Law Society, giving advice to its in-house counsel about the complaint. That communication is legal advice or, at the least, in relation to the giving or seeking of legal advice. I find that this record, which is a communication between two lawyers within the Law Society chain of command and is specific to legal advice concerning complaints made by the applicant, is protected by legal professional privilege.[55]

[46] The Commissioner's analysis indicates that he considered whether the attachment, as a discrete record, was subject to privilege. He did not conclude it was merely because it was attached to a privileged memorandum.

[47] The same approach was endorsed by Commissioner McEvoy, when he was an adjudicator, in another order cited by the Ministry, Order F10-20. In considering attachments to emails he made the following comments:

> The Ministry also asserted privilege over all or part of attachments to certain emails between the Ministry and Lisa McBain. Without disclosing their contents, I can say that these attachments form part of legal advice sought or given. Again, I am cognizant of the comments in *B. v. Canada* above that not all communications between a lawyer and client are privileged. Simply because a client conveys a record to a lawyer does not make that record privileged. Legal advice privilege only applies to that record if it meets all conditions of the test set out in *B. v. Canada*. Here, the withheld attachments formed part of the communications between lawyer and client and, as noted, clearly relate to the seeking of legal advice in a manner contemplated by the solicitor-client privilege test enunciated above.[56]

[48] In *B v Canada*, referred to immediately above in the quote from Order F10-20, Thackray J considered the overlap between solicitor client privilege and a lawyer's ethical duty of confidentiality to his or her client. He concluded that confidentiality alone is not sufficient to ground a claim of privilege.[57] In his analysis, he held that privilege will only apply where there is a communication directly related to the seeking, formulating or giving of legal advice.[58]

[49] I have also considered the remaining orders cited by the Ministry, Orders 04-16, F13-21 and F16-08. In Order 04-16, Commissioner Loukidelis described the attachments as being "discussed in and forming part of the in-house lawyer's communications."[59] In Order F16-08, the adjudicator concluded, that "based on the context in which the attachments appear, I find that they are privileged because

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[55] Order 02-01, *ibid* at para 69.
[56] Order F10-20, *supra* note 54 at para 15.
[57] *B v Canada*, 1995 CanLII 2007 (BC SC) at paras 27–28.
[58] *Ibid* at para 40.
[59] Order 04-16, *supra* note 54 at para 15.

they are part of the privileged emails."[60] In Order F13-21, the adjudicator did not provide reasons for concluding the attachments in particular were privileged.[61] It is a given that in these, and other cases, the adjudicators found that s. 14 applied based on the evidence before them as to how the attachments were integrated with, or would reveal, the privileged communication.

[50] The Ministry also relies on *McLean v Law Society of British Columbia* [*McLean*], which involved an application for a better description of documents that the Law Society claimed were privileged. The documents were described as attachments to a privileged opinion. Apart from the word "attachment," they were described only by document number and date. Grauer J held that the description was sufficient:

> In relation to the opinion attachments, it is of course open to Mr. McLean to challenge the assertion of privilege over the opinion, and that document is appropriately described. The assertion of privilege over the attachments must stand or fall with the status of the opinion. If the opinion is privileged, then the attachments, *qua* attachments, are clearly privileged as well no matter what they are. It follows in my view that further disclosure that would threaten to vitiate the privilege is not warranted.[62]

[51] This statement must be considered in its context. Prior to reaching his conclusion that the attachments had been adequately described in that case, Grauer J had been assured by the Law Society that attachments which were not in their own right privileged had been listed and disclosed. He stated:

> I am assured by counsel for the Law Society that, to the extent any of these attachments is not independently privileged, that is, by reason other than its inclusion as an attachment to Mr. Bussanich's opinion, it has been separately listed and disclosed. I accept that assurance.[63]

[52] In other words, Grauer J's decision on the attachments was premised on the assurance that any attachments that were not independently privileged would be disclosed, even though they were attached to a legal opinion. Given this factual premise, *McLean* does not support the Ministry's argument that it is authorized to withhold the attachments in issue here. In fact, *McLean* suggests that, in the context of civil litigation, the Ministry would be obliged to

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[60] Order F16-08, *supra* note 54 at para 33.
[61] Order F13-21, *supra* note 54. The adjudicator's analysis is contained in para 28.
[62] *McLean v Law Society of British Columbia*, 2017 BCSC 987 at para 108.
[63] *Ibid* at para 101.

independently produce and disclose non-privileged attachments to the briefing notes.[64]

[53] Although it is not a decisive basis for distinguishing *McLean*, that case did not involve an access request under FIPPA so there was no equivalent to s. 4(2) of FIPPA to be considered. By contrast, the Court of Appeal's decision in *College of Physicians* was a FIPPA case. It is of more assistance on the issue before me because the Court of Appeal clearly indicated that, where part of a record is not privileged, it must be severed and disclosed under s. 4(2) of FIPPA.[65]

[54] I will comment here on the Court of Appeal's decision in *British Columbia (Attorney General) v Lee* [*Lee*], which concerned an email chain which was inadvertently disclosed in response to an access to information request.[66] In that case, the court observed that the critical question is whether communications from a lawyer occurred in the context of a solicitor-client relationship. The court observed, that, "Once privilege has been established, it applies 'to all communications made within the framework of the solicitor-client relationship'."[67]

[55] I do not understand the Court of Appeal's decision in *Lee* to have modified or diminished its decision in *College of Physicians*, which was specifically mentioned in *Lee*. *Lee* does not stand for the proposition that any record or information that a solicitor and client exchange, once a solicitor client relationship has been established, is privileged. There are many cases to the contrary, of which *College of Physicians* is one.

[56] *Lee* involved a string of emails between a government lawyer and client, as well as emails among representatives of the client in which the lawyer's advice itself was discussed. In that case, no doubt, there was a solicitor client relationship, and confidential legal advice was given in the emails themselves. But the present case differs from *Lee* on the facts. Like *College of Physicians*, this case involves, (as I conclude below) discrete, non-privileged parts of records. This case is not like *Lee*, which involved a continuum of communications, a true back-and-forth, that the court decided could not be parsed and separated.

Application of privilege to attachments

[57] I turn now to consider the attachments in the present case. Three of the briefing notes in issue have attachments. The evidence from the lawyers (LG,

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[64] A public body's disclosure obligations under Part 2 of FIPPA are no less. If an attachment exists in a non-privileged form which is also responsive to the FIPPA access request, it must be identified as such and produced independently of its attachment to a privileged record.
[65] *College of Physicians*, *supra* note 53 at para 68.
[66] *Lee*, *supra* note 30.
[67] *Ibid* at para 32.

JT and MM) who authored the briefing notes is, uniformly, that they included attachments to their briefing notes to "further inform" the legal advice in the briefing note.[68]

[58] The Ministry submissions argue that the issue in this case is not whether disclosure of the attachments would allow an accurate inference of the legal advice in the briefing note, rather the Ministry's argument is that the briefing notes are privileged and, therefore, so are their attachments.[69] The Ministry submits that attachments are part of the confidential communications they are attached to and "there is no ability to distinguish between the privileged nature of the body of the briefing note and the attachments."[70] On this basis, the Ministry submits that the Commissioner does not need to know the exact nature of the attachments to decide whether they are privileged.[71] I disagree with the Ministry's characterization of the issues. In my view, the precise issue is whether the attachments, if disclosed, would risk revealing the legal advice in the briefing notes. That is because in the context of FIPPA, as I discuss more fully below, the public body must consider whether the attachments – if they are not themselves privileged – can reasonably be severed under s. 4(2). This is a meaningful difference between document disclosure under access to information legislation versus civil litigation.

[59] The applicant argues there is no evidence that disclosure of the attachments would reveal any of the legal advice given to the client.[72] The applicant submits that the evidence is also insufficient to determine whether any portion of the briefing note can be severed without revealing legal advice contained in the briefing note.[73]

[60] I will first consider whether the attachments are privileged in their own right and if not, I will consider whether they are capable of being severed the under s. 4(2).

Attachments to LG briefing note

[61] LG's evidence is that she prepared the briefing note to provide the Attorney General with "legal advice on law relating to Immediate Roadside Prohibitions."[74] LG's briefing note is seven pages and the attachments are an

[68] Affidavits of MM, LG, JT #1 at para 4.
[69] Ministry submissions dated September 26, 2017 at p. 2; Ministry submissions dated October 2, 2017 at pp 2–3; Ministry submissions dated November 9, 2017 at para 3.
[70] Ministry submissions dated November 9, 2017 at para 5.
[71] Ministry submissions dated October 2, 2017 at p 1.
[72] Applicant reply to Sept 1, 2017 submissions at para 17.
[73] *Ibid* at para 23.
[74] LG affidavit at para 3.

additional 33 pages.[75] In her affidavit, LG explains that she "included attachments to the briefing note to further inform the legal advice … in my briefing note."[76] The Ministry subsequently described the attachments to LG's briefing note as a court decision on which LG has provided legal advice to the attorney general.[77] The Ministry argues that attachments to privileged advice even if publicly available, such as a court decision, are "necessarily privileged" by virtue of being attachments.[78]

[62] In *TransAlta* the Alberta Court of Appeal found that a copy of a regulatory commission decision attached to a privileged email was not itself privileged because it was publicly available.[79] The Ministry argues I should not follow *TransAlta* because it is from another jurisdiction and should not be seen as authority in British Columbia because it is inconsistent with *McLean* and decisions of the OIPC.[80] The Ministry further submits that the court in *TransAlta* did not thoroughly discuss relevant case law regarding solicitor client privilege and attachments or explain how its decision "fits within the framework of determining privilege or, alternatively, is a justifiable departure from it."[81]

[63] I have already indicated that there are no determinative precedents from this Office. As for *TransAlta*, although it is a decision from another jurisdiction, it is an appellate court decision that speaks to the issue in play here. I consider *TransAlta* to be more persuasive than *McLean* given the factual basis for Grauer J's decision. The Ministry suggests that *TransAlta* should be distinguished because the court did not thoroughly discuss solicitor client privilege, however, *TransAlta* contains a detailed discussion about solicitor client privilege and litigation privilege, and refers to *College of Physicians*.[82] *McLean* does not deal with the case law touching on solicitor client privilege at all.

[64] I also note that *TransAlta* has been cited with approval in two decisions by the adjudicators in the Office of the Information and Privacy Commissioner of Alberta.[83] In Order F2017-54, the public body claimed privilege over all emails and attachments. The adjudicator made the general observation that "attachments do not become privileged because they are exchanged between solicitor and client. An attachment will be found to be privileged if the attachment

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[75] LG affidavit at para 4.
[76] *Ibid*.
[77] Ministry submissions dated September 26, 2017 at p 2.
[78] Ministry submissions dated October 12, 2017 at p 2.
[79] *TransAlta*, *supra* note 49 at para 62.
[80] Ministry submissions dated February 21, 2018 at paras 26–27.
[81] *Ibid* at para 27.
[82] *TransAlta, supra* note 49 starting at para 25.
[83] Order F2017-54 (Re), 2017 CanLII 40162 (AB OIPC) at para 116 and Order F2017-57 (Re), 2017 CanLII 46445 (AB OIPC) at paras 98–100. Both decisions are subject to applications for judicial review, which at the time of issuing this order had not been heard.

meets the test for solicitor-client privilege."[84] The adjudicator went on to find that a number of email attachments were not subject to solicitor client privilege in part because of a lack of detail about them, such as the author and purpose of the attachment.[85]

[65] In Order F2017-57, the public body argued that disclosing case law would allow inferences to be drawn as to the subject matter of Crown prosecutors' correspondence, so the case law was privileged. The adjudicator concluded that the correspondence was not privileged but also adopted the reasoning in *TransAlta* to find that the attached case law was not privileged because it was publicly available.[86] While those orders turned on their facts, they show that *TransAlta* has been of assistance in cases under Alberta's *Freedom of Information and Protection of Privacy Act* on the same privilege issue here.

[66] A copy of a court decision, reported or not, is of course not inherently privileged. The situation is quite the opposite given the open court principle. The Ministry has not argued that the court decision attached to LG's briefing note is unreported. I note, however, that even if it were unreported, unreported cases can be obtained from the relevant court in all but a few circumstances (which surely do not apply here). I am not persuaded by the Ministry's argument that by virtue of being attached to a legal opinion, the case law is privileged.

Attachments to JT briefing note

[67] JT's briefing note has two attachments, described as legal advice and correspondence.

[68] JT's evidence is that the appended legal advice was provided by LSB lawyers to RoadSafetyBC. He submitted further details about the legal advice *in camera*.[87] I am satisfied based on that evidence that the attached legal advice meets all of the requirements for legal advice privilege to apply.

[69] As for the attached correspondence, the Ministry's evidence is that it consists of two letters, each between an LSB lawyer and an outside third party. Third party communications are protected by legal advice privilege where the third party is performing a function on the client's or solicitor's behalf which is integral to the solicitor client relationship.[88] There is no evidence that the third party was performing such a function in this case. It is evident from the Ministry's *in camera* evidence that, these letters are not privileged, as the third party in

[84] Order F2017-54, *supra* note 82 at para 116.
[85] *Ibid.* See for example paras: 131, 154, 222 and 433–435.
[86] Order F2017-57, *supra* note 82 at paras 98–100.
[87] Affidavit #2 of JT and *in camera* letter from JT to registrar of inquiries dated January 30, 2018.
[88] *College of Physicians, supra* note 53 at para 50.

question was external to the Ministry and there is no evidence that the third party shared any interests in common with the Ministry. I conclude that the third party communications attached to JT's briefing note are not privileged in their own right or solely because they are attached to a privileged communication.

Attachments to MM briefing note

[70] One of the attachments to MM's briefing note is JT's briefing note and attachments. As such, the same conclusions I have reached regarding JT's briefing note and attachments apply here. However, I must still decide whether the other attachments to MM's briefing note, which are summaries of immediate roadside prohibition cases, are subject to privilege.

[71] I have not been provided with any evidence as to whether MM or another lawyer authored the case summaries. Nor is there any evidence that the case summaries themselves contain legal analysis or advice. They are simply described as summaries of cases, without more. The Ministry also has not indicated whether the case summaries were publicly available or not. If they were publicly available, the reasoning in *TransAlta* would apply here in the same way it did to the court decision attached to LG's briefing note.

[72] I have not been given sufficient evidence to show that the case summaries are themselves, privileged communications.

Conclusion – s. 14

[73] I have concluded that all of the briefing notes are subject to legal advice privilege and may be withheld under s. 14. I have also concluded that the legal advice attached to JT's briefing note is privileged and may be withheld under s. 14. However, the remaining attachments are not, for reasons given above, subject to solicitor client privilege in their own right nor simply because they are "attachments." I will turn to consider whether they can be reasonably severed and disclosed.

Severance – s. 4(2)

[74] Section 4(2) of FIPPA provides for disclosure of part of a record:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[75] The Supreme Court of Canada has made it clear that the purpose of severance provisions in access to information legislation is to "facilitate access

to the most information reasonably possible while giving effect to the limited and specific exemptions set out in the Act."[89]

[76] There is no basis for any suggestion that a privileged record is not subject to severance under s. 4(2). The Court of Appeal made this abundantly clear in *College of Physicians*, where it confirmed that s. 4(2) of FIPPA applies to records that are subject to solicitor client privilege. The Ministry argues that *College of Physicians* stands for the proposition that s. 4(2) only requires severance where the records at issue combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice.[90] This is not what the Court of Appeal held in *College of Physicians*. In *College of Physicians*, the third party communications that the Court found were not privileged were obtained by the lawyer for the purpose of giving legal advice and relied on to render legal advice.[91] Yet the Court of Appeal required that the non-privileged portions of a memorandum be severed from the privileged advice, and the court did so explicitly on the basis of s. 4(2).

[77] More recently, the Court of Appeal in *Lee* has reiterated that severance in the context of privilege can be appropriate:

> The principle that privilege attaches to all communications made within the framework of the solicitor-client relationship does not mean that severance of particular communications within that continuum can never be appropriate.[92]

[78] The Court of Appeal cautioned that severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment.[93]

[79] The Federal Court of Appeal has also established that severance applies to records subject to solicitor client privilege under the federal *Access to Information Act*.[94] The court observed that it is not appropriate to require the severance of material that forms part of the privileged communication by, for example, "requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought."[95] The court stated that the proper test to be applied to severance is whether the information sought to be severed is part of the privileged

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[89] *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 238.
[90] Ministry submissions dated October 12, 2017 at p. 6.
[91] *College of Physicians, supra* note 53 at paras 43 and 67.
[92] *Lee*, *supra* note 30 at para 36.
[93] *Ibid* at para 40.
[94] *Canada (Justice) v Blank*, 2007 FCA 87 [*Blank*] *at* para 13.
[95] *Ibid* at para 13.

communication. If it is, then s. 25 of that Act does not require that it be severed from the balance of the privileged communication.[96]

[80] Considering the above cases, I conclude that any non-privileged information, including attachments, which can reasonably severed from the privileged communication must be severed under s. 4(2) of FIPPA. However, severance can only be accomplished where the portion of a record subject to legal advice privilege is not inextricably linked to the unprivileged portion and where there is no risk that privileged legal advice will be revealed or capable of ascertainment.

[81] I have considered whether the attachments which I have found are not privileged, a court decision, case summaries, and third party correspondence can be severed from the briefing notes. In my view, the court decision and case summaries cannot be severed from their briefing notes because of the risk that they would reveal aspects of the legal advice in the briefing notes.

[82] With respect to the court decision, the Ministry has described the attachment to LG's briefing note as a court decision on which LG has provided legal advice to the attorney general.[97] As LG provided advice on the particular case attached to the briefing note, disclosing the case would reveal the precise topic of LG's legal advice to the attorney general. As discussed, the Federal Court of Appeal has held that it is inappropriate to sever a record to require disclosure of the precise subject matter of a legal opinion, a finding I agree with.[98]

[83] Although I do not have sufficient evidence to determine that the case summaries are on their own privileged, in the context of being attached to a legal opinion, I accept that they were likely the result of research done in order to provide legal advice. A lawyer's choice about which case summaries are relevant and should be attached to a legal opinion could reveal legal advice. As an example, in a personal injury action a selection of cases where the plaintiff was awarded between $10,000–$20,000 for non-pecuniary damages would indicate the lawyer's advice to the client is that non-pecuniary damages would fall in that range.

[84] For these reasons, I have concluded that there is a risk that material aspects of privileged legal advice will be revealed or capable of ascertainment if the court decision and the case summaries are disclosed.

[85] However, I have arrived at a different conclusion regarding the third party correspondence attached to JT's briefing note because I am unable to distinguish

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[96] *Ibid* at para 22.
[97] Ministry submissions dated September 26, 2017 at p 2.
[98] *Blank, supra* note 94 at para. 13.

College of Physicians, which was recently affirmed by the Court of Appeal in *Lee*.[99]

[86] In *College of Physicians*, the records that the Court of Appeal considered included two memoranda (described as documents 3 and 4) prepared by the College's lawyer to summarize information and opinions she had obtained from two medical experts she interviewed. The Court of Appeal concluded that the third party communications were not privileged. In ordering disclosure of third-party communications, Levine J stated:

> In my view, that part of Document 3 that records the communications of the expert to the lawyer and other representatives of the College, and Document 4, are the same as Documents 1, 2 and 5. They are communications by third parties, who were not agents or representatives of the client to obtain legal advice, but provided information used by the lawyer to render legal advice. They are not subject to legal advice privilege.
>
> The two parts of Document 3 are not intertwined. The part of Document 3 that records the lawyer's comments is privileged. I am of the view that the severance provision of the Act may be applied where, as here, part of the document is not subject to legal advice privilege and a separate part is privileged. In such a case, the non-privileged part can "reasonably be severed".[100]

In this case, as in *College of Physicians*, the record contains a discrete portion of information that is solely third party communications. In both cases, the third party communications related to the legal advice. In *College of Physicians*, the communications, "provided information used by the lawyer to render legal advice."[101] In the present case, the communications "further inform the legal advice."[102] Arguably, the third party communications were more integrated with the legal advice in *College of Physicians* than in the case of JT's briefing note.

[87] As discussed, the Ministry's position is that the briefing note is privileged and therefore so is the attachment and that it is not required to go any further to establish the privilege.[103] However, when specifically questioned about how the correspondence on its own could reveal privileged information, the Ministry responded that disclosure of the correspondence, "could reveal privileged information as it raises issues which [JT and NB] provided legal advice on

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[99] *Lee*, *supra* note 30 at para 38.
[100] *College of Physicians, supra* note 53 at paras 67–68.
[101] *Ibid* at para 67.
[102] Affidavit #1 of JT at para 4.
[103] Ministry submissions dated October 2, 2017 at p 2.

in the briefing note and may enable the substance of this legal advice to be ascertained."[104]

[88] Aside from asserting that disclosing the correspondence would reveal the *substance* of legal advice, the Ministry does not explain how that would be possible, nor is it plain and obvious such as with the case law attachments. The evidence of the author is that the correspondence informs the briefing note, not that the correspondence was the precise topic of the briefing note, or that it was even discussed in the briefing note. At most, the author states that disclosure of the correspondence would permit a reader "to accurately infer the nature of the issue dealt with in the [briefing note]."[105] While disclosing the correspondence may confirm the nature of the issue in the briefing note, we already know the general topic because the records are responsive to an access request concerning the Immediate Roadside Prohibition scheme or RoadSafety BC.[106] Importantly, disclosing the third party communications would not reveal the issue dealt with in the briefing note to any greater extent than what the court condoned in *College of Physicians.*

[89] I am bound to follow *College of Physicians* which is the leading authority in this Province on severance of discrete third party communications. As a result, I find that the correspondence attached to JT's briefing note is capable of being disclosed without risk of revealing information protected by solicitor client privilege.

Section 22 – personal privacy

[90] The third party correspondence attached to JT's briefing note is also being withheld under s. 22.[107] Section 22(1) of FIPPA requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. The Ministry says that it is withholding the names of parties involved in legal actions. It is also withholding employment history about third parties.[108]

Preliminary matter

[91] The Ministry submissions state that in the event s. 14 does not apply, it "requests the opportunity to provide additional details regarding the s. 22

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[104] *Ibid.*
[105] Affidavit #2 of JT at para 4.
[106] Email from the applicant to the Ministry of Technology, Innovation and Citizens Services dated April 26, 2016.
[107] As are the other records however as I have concluded that the s. 14 applies to them, I will not consider whether s. 22 also applies.
[108] Affidavit #1 of SR at para 8.

Information if the Commissioner is uncertain on the applicability of s. 22."[109] I am satisfied that the evidence before me is sufficient to make a determination about the application of s. 22 therefore I will not provide the Ministry further opportunity to submit evidence.

Analysis

[92] Numerous orders have considered the application of s. 22.[110] The first step in a s. 22 analysis is to determine if the information in dispute 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."[111] Based on the Ministry's description of the withheld information, I accept that it is personal information as it is about identifiable individuals and is not contact information.

[93] The next 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. It is not apparent that any of the categories of information listed in s. 22(4) apply to the withheld personal information.

[94] The third step in the s. 22 analysis is to determine whether any of the s. 22(3) presumptions apply to the personal information. If so, disclosure is presumed to be an unreasonable invasion of third party privacy. The Ministry submits that s. 22(3)(d) applies. Section 22(3)(d) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

[95] It is not apparent to me that s. 22(3)(d) applies, even after considering the Ministry's *in camera* evidence. However, even if s. 22(3)(d) applies, I find that it is overcome at the fourth step of the analysis, which requires consideration of all relevant circumstances. I cannot reveal the circumstances which support its disclosure because they are based entirely on the *in camera* evidence. I am satisfied that it would not be an unreasonable invasion of third party personal privacy to disclose the correspondence to the applicant.

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[109] Ministry submissions dated May 1, 2017 at para 28.
[110] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[111] See Schedule 1 of FIPPA for these definitions.

CONCLUSION

[96] For the reasons provided above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse to give the applicant access to the information in dispute under s. 14 except for the correspondence attached to JT's briefing note. The Ministry is also not required or authorized to withhold the correspondence attached to JT's briefing note under s. 22.

[97] I require the Ministry to give the applicant access to the correspondence by July 18, 2018. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

June 5, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F16-66376

APPENDIX A

DATE	***DESCRIPTION***
May 1, 2017	Ministry submissions
April 28, 2017	Affidavit #1 of SR
Undated	Applicant reply to May 1 submissions
June 6, 2017	Ministry reply submissions
July 5, 2017	Affidavit #2 of SR
September 1, 2017	Ministry amended submissions
August 25, 2017	Affidavit #1 of PA
August 28, 2017	Affidavit of AH
August 29, 2017	Affidavit of MM
August 31, 2017	Affidavit of LG
Undated	Applicant reply to Sept 1 submissions
September 21, 2017	Ministry reply submissions
September 20, 2017	Affidavit #2 of PA
September 26, 2017	Ministry submissions
September 26, 2017	Affidavit #1 of JT
October 2, 2017	Ministry submissions
October 12, 2017	Ministry submissions
October 11, 2017	Affidavit #2 of JT (with *in camera* portions)
Undated	Applicant reply to Oct 12 submissions
Undated	Applicant additional reply to Oct 12 submissions
November 9, 2017	Ministry reply submissions
January 30, 2018	*in camera* letter from JT to registrar of inquiries
Undated	Applicant submissions re: *TransAlta Corporation v Market Surveillance Administrator*
February 21, 2018	Ministry submissions re: *TransAlta Corporation v Market Surveillance Administrator*