Office of the Information & Privacy Commissioner for British Columbia

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Order F18-26

MINISTRY OF FINANCE

Lisa Siew
Adjudicator

July 10, 2018

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Summary: An applicant requested a review of the Ministry of Finance's decision to refuse access under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to a number of emails. She alleged that privilege did not apply because the government engaged in unlawful conduct. The applicant also argued that the Ministry of Finance must disclose the withheld information under s. 25 of FIPPA, as it was clearly in the public interest for this information to be released. The adjudicator found that s. 25 did not apply to the records and the Ministry of Finance was authorized to withhold the information under s. 14. The adjudicator was also not convinced that the Ministry of Finance had sought to advance conduct which it knew or should have known is unlawful.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 25 and 44(1).

INTRODUCTION

[1] In 2016, an applicant requested access to all records related to the redaction of a prior access request posted on the provincial government's Open Information website. The Ministry of Finance (Ministry)[1] provided the applicant with some responsive records, but withheld information on the basis section 14

[1] At the time of the applicant's access request, the Ministry of Finance managed the Open Information website and information access operations (IAO). That responsibility currently rests with the Ministry of Citizens' Services.

(solicitor client privilege) and s. 22 (disclosure harmful to personal privacy) of FIPPA applied.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold information from the records under s. 14. She did not request a review of the Ministry's decision regarding s. 22. Mediation failed to resolve the matter and the applicant requested that it proceed to an inquiry under Part 5 of FIPPA.

[3] During the inquiry process, the applicant requested s. 25 of FIPPA (disclosure of information clearly in the public interest) be added as an issue for consideration in this inquiry. The Registrar of Inquiries granted her request and both the applicant and the Ministry made submissions on this issue.

ISSUES

[4] The issues I must decide in this inquiry are as follows:

1. Is the Ministry required by s. 25 of FIPPA to disclose the information at issue because disclosure is clearly in the public interest?

2. Is the Ministry authorized to refuse to disclose the disputed information to the applicant under s. 14 of FIPPA?

[5] The burden of proof under s. 25 was set out in Order 02-38 as follows:

> Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue, and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.[2] [Emphasis in original].

[6] Section 57(1) of FIPPA places the burden on the public body to prove that the applicant has no right of access to all or part of the records in dispute under s. 14 of FIPPA.

DISCUSSION

Background

[7] In 2012, the Ministry of Health terminated the employment of an individual for just cause. This firing and other related matters became the subject of an

[2] Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 39. See also Order F17-56, 2017 BCIPC 61 at para. 10 and Order F17-28, 2017 BCIPC 30 at para. 6.

investigation by the Ombudsperson's Office resulting in a report titled *Misfire: The 2012 Ministry of Health Employment Terminations and Related Matters*.[3]

[8] In 2013, the applicant made an access request to the Ministry for annual statistics by fiscal year showing the total number of individuals hired for a certain position, the total number of work terms, and the number of work terms that were terminated early for just cause. The Ministry provided the applicant with a table containing the requested information and this table was then published by the provincial government on its Open Information website.[4] Sometime after, the original table of information was replaced with a redacted version where the number of work terms terminated for "just cause" each fiscal year was removed from the table.[5]

[9] In 2016, the applicant contacted the Ministry for an explanation on the redaction and voiced her concerns and objections and insisted that the information be restored.[6] The Ministry provided the applicant with the following reason for the severance:

> …We determined that data showing that [an individual] was terminated is personal information based on the media coverage...To ensure that we remained in compliance with Part 3 of [FIPPA], we determined upon legal advice that we were required to remove personal information from the records that were proactively disclosed on the Open Information version."[7]

[10] The applicant was dissatisfied with this response and requested further explanation and action from the Ministry.[8] The applicant asked "to discuss this matter with the government legal counsel who supported removing the essential information from the Open Information site in 2013."[9] Thereafter, it appears a discussion occurred between the applicant and the applicable government

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[3] Applicant's submission at paras. 11 and 22.
[4] "Open Information provides access to the routine release of public information that has been most commonly requested (i.e. travel expenses for Ministers and Deputy Ministers). Additionally, individual requests for specific government information that are processed will also be released for general public viewing on this site." <https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/about-open-information>.
[5] Applicant's submission at para. 22 and Ministry's submission dated May 16, 2018 at para. 10.
[6] Applicant's submission at para. 22 and email from applicant to an IAO manager dated April 26, 2016 (located at Tab 5, page 108 of the Ministry's submission dated December 5, 2017) and email dated April 29, 2016 from applicant to an IAO manager located at pp. 37-38 of the records.
[7] Email from IAO manager to applicant dated May 6, 2016 (located at Tab 5, p. 107 of the Ministry's submission dated December 5, 2017).
[8] Email from applicant to IAO manager dated April 29, 2016 (located at Tab 5, pp. 37-38 of the Ministry's submission dated December 5, 2017).
[9] Email from applicant to IAO Director dated May 11, 2016 (located at Tab 5, p. 22 of the Ministry's submission dated December 5, 2017).

lawyer.[10] As a result of that discussion, the Ministry sought and obtained consent from a third party to publish the redacted information and the information was then republished on the Open Information website.[11]

Records and information in dispute

[11] The applicant requested all records related to the decision to redact the table posted on the Open Information website.[12] The Ministry provided the applicant with some responsive records, but withheld 23 email chains which are the records in dispute for this inquiry.

[12] The Ministry chose not to provide the email chains for my review, a matter that I will discuss in more detail under the s. 14 analysis. Based on the Ministry's submissions and evidence, I have determined that the records at issue can be grouped as follows:

- Emails between a lawyer and Ministry employees.
- Emails between Ministry employees which do not include direct communications with the lawyer. The lawyer is either copied on these emails or they are forwarded to him at a later date.
- An attachment to one of the email chains which consists of two emails.

Section 25 – disclosure clearly in the public interest

[13] Section 25 of FIPPA requires a public body to disclose information without delay, in certain circumstances, despite any other provision of the Act. This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.[13] For this inquiry, the relevant parts of s. 25 are as follows:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
> …

[10] Email from IAO Director to applicant dated June 6, 2016 (located at Tab 5, p. 2 of the Ministry's submission dated December 5, 2017) and affidavit #2 of former IAO Director (now Acting Executive Director, Ministry of Citizens' Services) at para. 12 in Ministry's submission dated May 16, 2018.
[11] Email from IAO Director to applicant dated June 6, 2016 (located at Tab 5, p. 2 of the Ministry's submission dated December 5, 2017) and email from an IAO Manager to third party dated June 6, 2016 and May 30, 2016 (located at Tab 5, pp. 3-4 of the Ministry's submission dated December 5, 2017).
[12] Applicant's FOI Access request submitted to the provincial government on June 3, 2016.
[13] *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.

> (b) the disclosure of which is, for any other reason, clearly in the public interest.[14]

[14] Section 25(1)(b) of FIPPA imposes an obligation on a public body to disclose information where the disclosure is clearly in the public interest. There is a high threshold before disclosure will be considered in the public interest under s. 25.[15] Previous OIPC orders have determined that the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations" where the disclosure is "clearly (i.e. unmistakably) in the public interest."[16]

[15] Analyzing the application of s. 25(1)(b) in a specific situation begins by considering whether the information at issue concerns a subject, circumstance, matter or event justifying mandatory disclosure.[17] Once it is determined that the information is about a matter that may engage s. 25(1)(b), the nature of the information itself should be considered to determine whether it meets the threshold for disclosure.[18]

[16] To determine whether disclosure is clearly in the public interest, former Commissioner Denham said, "disclosure will be required under s. 25(1)(b) where a disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[19] She identified several, non-exhaustive factors that may be considered in making this determination, including whether disclosure would contribute to educating the public about the matter and whether disclosure would contribute in a substantive way to the body of information that is already available about the matter.[20]

[17] Former Commissioner Denham also considered whether there is a competing public interest which weighs against disclosure and noted that such an interest "might be found in the exceptions to disclosure set out in ss. 12 to 21 of FIPPA."[21] She clarified that the importance of considering the exceptions under Part 2 of FIPPA as part of the s. 25(1)(b) determination is "because the

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[14] Although the applicant did not specify whether she was relying on s. 25(1)(a) and/or (b), her submissions fall under s. 25(1)(b) and s. 25(1)(a) is not relevant in these circumstances. Section 25(1)(a) applies to information about a risk of significant harm to the environment or to the health or safety of the public or a group of people.
[15] Investigation Report F15-02, 2015 BCIPC 30, at pp. 28-29; Order 15-64, 2015 BCIPC 70 at para. 12.
[16] Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.
[17] Investigation Report F16-02, 2016 BCIPC 26 at p. 27.
[18] *Ibid*.
[19] *Ibid* at p. 26.
[20] *Ibid* at p. 27.
[21] *Ibid* at p. 38.

exceptions themselves are indicators of classes of information that in the appropriate circumstances may weigh against the disclosure of information."[22]

Parties' position on s. 25

[18] The applicant submits the information in the emails is clearly in the public interest because the public is interested in learning "whether there was any improper interference in the normal FOI process."[23] She says the public has the right to know why an FOI request "concerning the firing of [an individual] for just cause, was censored a few months after having been publicly released, removing the key information on the number of firings for just cause per year."[24] The applicant states that the timing of the censorship is "highly suspicious" since the government was dealing with several wrongful dismissal lawsuits at the time and had not yet "publicly admitted any shortcomings or wrongdoing in the [Ministry of Health] investigation or the firings."[25]

[19] The applicant submits the information in dispute is important because "it relates to holding government accountable for its action during the Health Firings."[26] She says the "health firings" issue is still a public concern and provides links to recent reports on the government's progress in adopting the recommendations in the Ombudsperson's report and a recent news article titled "Government Claims Action on Almost All Recommendations in Botched Health Firings."[27] The applicant also provides links to past media coverage on the history of FOI violations by the government, specifically the "triple delete" email scandal.[28] She specifically questions whether the Office of the Premier was involved in the censoring of the employment information in the table and submits that disclosing the withheld information "is the best chance for the public to learn what was being discussed by government employees" before that information was publicly censored.[29]

[20] The applicant argues that, in this case, even if some of the emails involve legal advice, s. 25 overrides s. 14 and the information should be disclosed because "there is an appearance of improper influence in the handling of FOI information" and "public confidence in the FOI system is supported by

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[22] Investigation Report F16-02, 2016 BCIPC 26 at p. 38.
[23] Applicant's submission at para. 13.
[24] *Ibid* at para. 3.
[25] *Ibid* at para. 6.
[26] *Ibid* at para. 12.
[27] Applicant's submission at para. 14: Andrew MacLeod, *The Tyee* (May 2, 2018).
[28] Applicant's submission at para. 15: Dirk Meissner, "Former privacy commissioner David Loukidelis to review deleted-email report," *CBC News* (Nov 3, 2015). Rob Shaw, "Former political aid George Gretes fined $2,500 for misleading BC's privacy commissioner", *Vancouver Sun* (July 14, 2016).
[29] Applicant's submission at paras. 7, 18-21.

appropriate public interest disclosures."[30] The applicant submits that the "appearance of possible political interference is troubling" and "releasing the records is really the only satisfactory response, in terms of holding government accountable and informing the public."[31]

[21] The Ministry submits that s. 25(1)(b) does not apply because the withheld information in the emails is not clearly in the public interest. The Ministry draws a distinction between the information at issue and information related to the Ministry of Health firings. It says the withheld information relates to the "very discrete issue" of "the Ministry's severing of one record on government's Open Information website" and not the broader issue relating to the Ministry of Health firings.[32]

[22] The Ministry says the applicant's suspicions and allegations of political interference are unfounded and speculative and that it has already explained to the applicant the reasons for the severing. It says Ministry employees became aware that the Ministry might not be in compliance with its disclosure obligations under s. 33 of FIPPA when it publicly posted the table containing the employment statistics on the government's Open Information website.[33] Section 33 restricts the circumstances which permit public bodies to publicly disclose personal information. The Ministry states it decided to remove the original record and post a severed version of the table in order to protect the privacy interests of an individual.[34] The Ministry says it obtained the appropriate consent to re-post the severed information after the applicant questioned the severing of the record.[35]

[23] The Ministry also submits that only the applicant is interested in the information at issue and s. 25 does not apply simply because of the applicant's personal interest in the withheld information.[36] Further, the Ministry says disclosure under s. 25 would override information it claims is subject to s. 14 which is not in the public interest since "it would severely compromise the fundamentals of solicitor-client privilege" and is on a discrete topic that the applicant has not demonstrated is of particular interest to anyone other than herself.[37] The Ministry weighs this consideration as a "substantial factor" in arguing that the records in dispute should not be released under s. 25.[38]

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[30] Applicant's submission at para. 7.
[31] *Ibid* at para. 15.
[32] Ministry's submission dated May 16, 2018 at paras. 10-11.
[33] *Ibid* at paras. 7 and 10.
[34] *Ibid*.
[35] *Ibid* at para. 13.
[36] *Ibid* at paras. 9 and 11.
[37] *Ibid* at para. 11.
[38] *Ibid* at para. 16.

Analysis and findings on s. 25

[24] The Ministry chose not to provide the emails for my review because it asserts those emails are protected by solicitor client privilege. However, I have considered the parties' submissions and the Ministry's description of the withheld information, including its affidavit evidence. The description of the records in the Ministry's submissions and its affidavit evidence is sufficient to allow me to determine whether s. 25 of FIPPA applies to the records. Based on this material, I am not convinced that disclosing the information in dispute meets the required threshold under s. 25(1)(b) of being *clearly* in the public interest.

[25] The applicant has established that there is public interest in the Ministry of Health firings. However, I am not persuaded that there is significant and widespread public concern or interest in why the Ministry posted the full table on the Open Information website, but then subsequently removed the number of work terms terminated for "just cause" from public view. It is the Ministry's position that the withheld emails contain legal advice, and information related to that advice, regarding the public release and redaction of this table on the government's Open Information website. There is no evidence before me that suggests the general public shares the applicant's interest in this information.

[26] Further, I am not convinced that this withheld information would contribute in a meaningful way to educating the public about the Ministry of Health firings. The Office of the Ombudsperson's *Misfire* report outlines the comprehensive and lengthy investigation undertaken by that office and details its findings and recommendations. As noted by the applicant, there is also publicly available information about the government's progress in adopting those recommendations. It is not clear to me that the information at issue would make a meaningful contribution to the body of information already publicly available on the Ministry of Health firings.

[27] The applicant says she suspects there was political interference in the decision to remove the number of work terms terminated for "just cause" from the publicly posted table; however, the applicant's suspicions alone are not enough to meet the threshold for disclosure under s. 25. As noted by former Commissioner Denham in Investigation Report F16-02, the duty to disclose under s. 25 will not be triggered every time someone suspects that a public body is not adequately carrying out its functions.[39] Instead, she noted "there must be an issue of objectively material, even significant, public importance, and in many cases it will have been the subject of public discussion."[40] In this case, I am not persuaded that the issue of how the Ministry handled the public posting of the employment statistics on the Open Information website is one of significant and widespread public importance and concern.

[39] Investigation Report F16-02, 2016 BCIPC 36 at p. 36.
[40] *Ibid*.

[28] The reasons for invoking s. 25(1)(b) must be of sufficient gravity to override all other applicable provisions of FIPPA and that is not the case here with the particular information in dispute. Section s. 25(1)(b) applies only in the clearest and most serious of situations where the disclosure is clearly or unmistakably in the public interest. I find that this case does not meet that threshold.

[29] Considering all the circumstances, I find disclosure of the disputed information is not clearly in the public interest and, therefore, s. 25(1)(b) does not apply.

Section 14 – solicitor client privilege

[30] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The courts have determined that s. 14 encompasses legal advice privilege and litigation privilege.[41] The Ministry is claiming legal advice privilege over information it has withheld in the email chains.

[31] Legal advice privilege applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.[42] However, not every communication between client and solicitor is protected by solicitor client privilege.[43] The courts and previous OIPC orders accept the following test for determining whether legal advice privilege applies:

> 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
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> 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.[44]

[41] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26
[42] *Ibid* at paras. 26-31.
[43] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at page 835-836; Order F17-42, 2017 BCIPC 46 at para. 16.
[44] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22. See also Order F17-43, 2017 BCIPC 47 at paras. 38-39.

Is it necessary to order production of the records withheld under s. 14?

[32] The Ministry chose not to provide the records it is withholding under s. 14 for my review. Instead, it provided an affidavit from a lawyer with the Legal Services Branch of the Ministry of Attorney General[45] who says he reviewed the records being withheld under s. 14. He says the records contain legal advice he provided to clients at the Ministry. His affidavit includes a table describing the records as email chains either ending with, or including, an email between the lawyer and one or more Ministry employees. The table only describes one email in each chain with any detail (i.e. date, subject matter and participants) and it is the email where the lawyer is either the sender or the receiver. Based on the table, I was unable to identify the subject matter, date and participants of the other emails in the chain.

[33] I wrote to the Ministry to ask for more detail because I also identified some inconsistencies in the description of the records regarding the confidentiality of the communications (i.e. some emails involved non-Ministry employees). I also sought more detail about the emails the Ministry said did not involve communications for the purpose of seeking or giving legal advice and those emails it said did not involve the lawyer.[46]

[34] In response, the Ministry did not provide further detail about the records. Instead, it submitted that it had provided sufficient evidence in the lawyer's affidavit and the table to demonstrate that s. 14 applied to the entirety of each email chain.[47] It also said that it was unnecessary for me to receive a description of every email in each email chain since the lawyer was involved in some of the emails.[48] However, the Ministry eventually did provide an additional submission and affidavit explaining there was an error in the table of records and clarifying where several of the email participants worked.

[35] Under s. 44 of FIPPA, the Commissioner has the power to order, for review, the production of the records in dispute in order to conduct an inquiry, but will only do so when necessary to decide the issues. The applicant submits it is necessary in this case to review the records and she says that I have "the right to see all of the withheld information, in order to determine whether there is any evidence of corrupt intent."[49]

[36] Based on my review of the Ministry's description of the records, I conclude it is unnecessary to order production of the records. I find that the description of

[45] Formerly the Ministry of Justice.
[46] Ministry's submission dated December 5, 2017 at para. 46 and affidavit #1 of lawyer at para. 10.
[47] Ministry's submission dated April 23, 2018.
[48] *Ibid*.
[49] Applicant's submission at para. 17.

the records in the Ministry's submissions and its affidavit evidence, including an affidavit from the lawyer directly involved in the communications, is sufficient to allow me to determine whether s. 14 of FIPPA applies to the email chains. The Ministry also provided some background information in its s. 25 submissions which explained some of the circumstances surrounding the creation of these email chains. Based on the Ministry's submissions and evidence, I find that I have sufficient information to decide whether s. 14 applies to the following records:

- There are 16 email chains that end with an email between the lawyer and Ministry employees regarding "FOIPPA request PSA-2013-00007" or "PSA Information Release" or "[employment] terminations."[50] One of these email chains has an attachment which is described as two emails.[51]
- There are seven email chains that include an email between the lawyer and Ministry employees regarding "FOIPPA request PSA-2013-00007" or "PSA Information Release."[52]

Parties' position on section 14

[37] The Ministry submits that it has properly withheld the information at issue under s. 14 of FIPPA on the basis:

- The information consists of written communications between the Ministry and its lawyer, who was acting in a legal capacity, that was made in confidence and which was directly related to the seeking, formulating or giving of legal advice.[53]
- If disclosed, the information would reveal what legal advice the Ministry sought from its lawyer and what advice he provided.[54]

[38] The Ministry also says there are some emails where legal advice is not directly sought or given and others that do not include the lawyer as a sender or recipient (i.e. the lawyer is only copied on some emails).[55] However, the Ministry says the information in these emails is still protected from disclosure under s. 14 on the basis:

[50] These email chains are identified in the table of records as page numbers 7, 8-11, 12-15, 16-18, 19-21, 25-28, 56-58, 59-62, 63-65, 66-67, 72-74, 76-79, 87-90, 95-97, 103-106 and 113-116.
[51] Identified in the table of records as page numbers 63-65.
[52] These email chains are identified in the table of records as page numbers 29-32, 42-45, 46-48, 49-52, 53-55, 80-82 and 83-86.
[53] Ministry's submission dated December 5, 2017 at paras. 38-43.
[54] *Ibid* at para. 44.
[55] *Ibid* at paras. 45-47.

- These communications are part of ongoing communications so that legal advice may be sought and given and form part of the background facts and context to the legal advice;
- An attachment to a privileged communication is privileged because it is part of that privileged communication; and
- If disclosed, the information would allow accurate inferences to be drawn as to the legal advice sought or provided.[56]

[39] The applicant argues that any privilege is "invalidated" because the Ministry engaged in unlawful conduct.[57] I will address that argument after considering whether the Ministry has satisfied its burden under s. 14.

Analysis and findings on s. 14

Emails between lawyer and Ministry employees

[40] Based on the Ministry's submissions and evidence, I am persuaded that the emails where the lawyer is the sender or direct recipient are confidential communications between the Ministry and its legal advisor related to the seeking, formulating and giving of legal advice.

[41] The lawyer's sworn evidence is that these emails consist of his confidential communications with Ministry employees.[58] The Ministry also submits the communications "were made with the expectation of confidentiality and it treated them in that manner."[59] I have also reviewed the emails which were disclosed and considered the additional evidence provided by the Ministry which shows the emails only involved Ministry employees.[60] Considering all this evidence, I am satisfied that these emails were confidential communications.

[42] As for the nature of the communications, the lawyer deposes that the email chains are confidential communications which contain legal advice that he directly provided to Ministry employees.[61] He says the withheld information "relates directly to the seeking, formulating or giving of legal advice from [me], in my role as lawyer, to my clients at the Ministry."[62] The Ministry also provided an

[56] Ministry's submission dated December 5, 2017 at paras. 45-47.
[57] Applicant's submission at paras. 16-17.
[58] Affidavit of lawyer dated December 4, 2017 at paras. 5 and 7 in Ministry's submission dated December 5, 2017.
[59] Ministry's submission dated December 5, 2017 at para. 40.
[60] As noted, the Ministry provided additional information and evidence to demonstrate that only Ministry employees were involved in these email communications: Ministry's submission dated May 9, 2018.
[61] Affidavit #1 of lawyer at paras. 6-7 in Ministry's submission dated December 5, 2017.
[62] Affidavit of lawyer dated December 4, 2017 at para. 7 in Ministry's submission dated December 5, 2017.

affidavit from a former Information Access Operations (IAO) director who explained the chain of events surrounding the removal and re-posting of the table and IAO's work on the matter.[63] This timeline, along with the emails that have been disclosed to the applicant and the description of the withheld information in the table of records, indicates Ministry employees consulted with the lawyer on several topics. Considering all this evidence, I find that solicitor client privilege applies to the emails which directly involved the lawyer as the sender or receiver.

Emails that do not contain legal advice

[43] The Ministry says some of the emails do not contain legal advice and the lawyer was only copied on the email or it was forwarded to the lawyer at a later date.[64] However, the Ministry submits these emails are protected under s.14 because they form part of the continuum of communications between lawyer and client and if disclosed, would allow the reader to draw accurate inferences as to the legal advice sought or provided.[65]

[44] In *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, Voith J. discussed the continuum of communications that may occur in a solicitor-client relationship and why documents in that continuum should be protected:

> [40] …[solicitor client] privilege extends to more than the individual document that actually communicates or proffers legal advice. The reality is that in order for a lawyer to provide advice, he or she will often require history and background from a client. The lawyer will often be asked to provide legal advice that best advances a particular business strategy or objective. He or she may repeatedly contact the client asking for clarification of some issue that is salient to the retainer and to the advice being sought. The first expression of an opinion prepared, whether in a letter or in a commercial document, may elicit further comment from the client and require revision. It is this chain of exchanges or communications and not just the culmination of the lawyer's product or opinion that is privileged.
> …
>
> [46] A further consideration, which is practical in nature, is relevant. Disclosing one part of a string of communications gives rise to the real

[63] Affidavit #2 of former IAO director (now acting executive director, Ministry of Citizens' Services) in Ministry's submission dated May 16, 2018.
[64] Ministry's submission dated December 5, 2017 at paras. 45-46 and affidavit #1 of lawyer at paras. 9-10.
[65] Ministry's submission dated December 5, 2017 at paras. 45-46. In its submission dated April 23, 2018, the Ministry says the following email chains include emails that do not contain legal advice: page number 7, 29-32, 83-86, 87-90, and 113-116. The Ministry says there are a number of emails that do not include its lawyer, but the Ministry only points to three examples: page number 8-11, 12-15, and 16-18.

> risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice. Thus, in *No. 1 Collision Repair and Painting (1982) Ltd. v. Insurance Corporation of British Columbia* (1996), 1996 CanLII 2311 (BC SC), 18 B.C.L.R. (3d) 150, Henderson J., at para. 5, said:
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> > Moreover, I am satisfied that a communication which does not make specific reference to legal advice is nevertheless privileged if it falls within the continuum of communication within which the legal advice is sought or offered: see Manes and Silver, supra, p. 26. If the rule were otherwise, the disclosure of such documents would tend in many cases to permit the opposing side to infer the nature and extent of the legal advice from the tenor of the documents falling within this continuum. Thus the intent of the rule would be frustrated.

[45] The lawyer deposes that the Ministry provided him the emails "as part of the communications between lawyer and client and because they form part of the background facts and context to the legal advice the Ministry" sought from him.[66] The Ministry submits that the emails which were "cc'd" to the lawyer "are part of ongoing communications so that legal advice may be sought and given."[67] It relies on Order F14-35 to argue that the entire email chain is still subject to legal advice privilege even though there are emails not written by or addressed to the lawyer.[68] In Order F14-35, the adjudicator determined that the emails chains at issue were privileged because "of their context as communications that are part of privileged email communications between Ministry staff and its legal counsel, and since they would reveal legal advice."[69]

[46] I accept that the emails which were created before legal advice was sought and forwarded to the lawyer at a later date in order to obtain his legal advice on those matters fall within the parameters of solicitor client privilege. I find these emails consist of an exchange of information between the lawyer and Ministry employees for the purpose of seeking and providing legal advice. Although the lawyer was not originally involved in these emails, they were sent to him and he reviewed them for the purpose of providing legal advice to Ministry employees in regard to the matters discussed in those emails.

[47] As for the emails that were only copied to the lawyer, the courts are clear that an email does not become privileged simply by sending a copy of it to a lawyer.[70] The evidence must establish that the information was provided to the

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[66] Affidavit #1 of lawyer at para. 10 in Ministry's submission dated December 5, 2017.
[67] Ministry's submission dated December 5, 2017 at para. 45.
[68] *Ibid* at paras. 29 and 46.
[69] Order F14-35, 2014 BCIPC 38 at para. 28.
[70] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.* 2006 BCSC 1180 at para. 61; *Humberplex Developments Inc. v. TransCanada Pipelines Ltd*., 2011 ONSC 4815 at para. 49; *Imperial Tobacco Canada Limited v. The Queen*, 2013 TCC 144 at para. 57.

lawyer in a context where it is directly related to the seeking, formulating or giving of legal advice; it is not sufficient that the information is supplied just for the purposes of providing information to a lawyer.[71] In order to make this determination, Ellies J. in the Ontario decision of *Jacobson v. Atlas Copco Canada Inc.* identified the following considerations:

> In determining whether a communication entailed the seeking or giving of legal advice, both the circumstances in which the communication was made and the content of the communication itself are relevant. As Atlas Copco correctly submits, it may not be necessary to consider the content of a communication where the privileged nature of the communication is established solely by evidence of the circumstances surrounding it…[72]

[48] These considerations were followed in previous OIPC orders and I agree with that approach.[73] I also note that the Ministry relies on Order F14-35 to argue that the entire email chain is subject to solicitor client privilege; however, I find that order distinguishable from the present circumstances because the adjudicator in that order was provided with the records and made his determination based on reviewing the contents of those records.[74]

[49] In this case, the Ministry chose not to provide the records for my review and did not list or describe these emails in the table of records so I am left to evaluate whether the privileged nature of the communications is established by the surrounding circumstances and context in which the communications were made. The lawyer copied on the emails does not describe the context or circumstances surrounding the creation of these particular emails. Instead, he says the Ministry provided him those emails to keep him informed so he was in a position to provide ongoing legal advice "with respect to the issue at hand."[75]

[50] However, based on the materials before me, I am able to determine that the withheld emails coincide with the applicant's communications to Ministry employees regarding the redaction of the table posted on the Open Information website. Given this context and chronology, I conclude Ministry employees had internal discussions on the issues raised by the applicant and copied the lawyer on some emails "as part of the continuum aimed at keeping both informed so that advice may be sought and given as required."[76] Therefore, I accept on the particular facts of this case that the emails which the lawyer was only copied on

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[71] *Murchison v. Export Development Canada*, 2009 FC 77 at para. 44; *Canada (Public Prosecution Service) v. JGC*, 2014 BCSC 557 at paras. 16-19; *Belgravia Investments Ltd. v. Canada*, 2002 FCT 649 at para. 46; Order F15-52, 2015 BCIPC 55 at para. 14.
[72] *Jacobson v. Atlas Copco Canada Inc*., 2015 ONSC 4 at para. 14 (references in quote omitted).
[73] Order F15-52, 2015 BCIPC 55 at para. 14 and Order F16-20, 2016 BCIPC 22 at paras. 31-32.
[74] Order F14-35, 2014 BCIPC 38 at paras. 27-28.
[75] Affidavit #1 of lawyer at para. 9 in Ministry's submission dated December 5, 2017.
[76] *Balabel v Air India*, [1988] 2 All ER 246 (CA) at p. 254 quoted in *British Columbia Teachers' Federation v. British Columbia*, 2010 BCSC 961 at para. 29.

and which do not contain legal advice, occur in a context where they were directly related to the seeking, formulating or giving of legal advice.

Attachment to an email chain

[51] Also at issue is an attachment to the email chain identified as page numbers 63-65. The Ministry submits that this attachment is protected by privilege because "attachments to a privileged communication are part of that privileged communication."[77] However, an attachment to a privileged communication does not automatically become privileged because it was exchanged between a solicitor and client and was included with the privileged communication.[78] Instead, it is necessary to determine whether an attachment would reveal communications that are protected by solicitor client privilege or allow one to infer the content and substance of privileged advice.[79]

[52] In this case, the lawyer describes the attachment as two one-page emails which were confidentially forwarded to him by a Ministry employee for the purpose of seeking legal advice from him in his role as the Ministry's lawyer.[80] The Ministry says it provided the lawyer with the attached emails "strictly for the purpose of receiving his legal advice."[81] I accept that these attached emails are directly related to the legal advice that Ministry employees sought from the lawyer and I find that they are protected by privilege. Further, I accept that if these attached emails were disclosed, there is a real risk that a reader could infer the legal advice sought and received by Ministry employees from the lawyer.

[53] In conclusion, I find the Ministry has proven that s. 14 of FIPPA applies to all of the information withheld from the emails chains described in the table of records.

Future crime or fraud exclusion to privilege

[54] The applicant says the Ministry's "refusal to release the requested records has the appearance of a cover-up being protected by a claim of legal privilege."[82] The applicant questions whether the Office of the Premier was involved in the

[77] Ministry's submission dated December 5, 2017 at para. 47.
[78] *Murchison v. Export Development Canada*, 2009 FC 77 at paras. 45-46; *TransAlta Corporation v. Market Surveillance Administrator*, 2014 ABCA 196 at para. 59. Order F18-18, 2018 BCIPC 21; Order F18-19, 2018 BCIPC 22 at paras. 36-40.
[79] *TransAlta Corporation v. Market Surveillance Administrator*, 2014 ABCA 196 at para. 59; *Murchison v. Export Development Canada*, 2009 FC 77 at para. 45; Order F18-19, 2018 BCIPC 22 at para. 40; Order F18-18, 2018 BCIPC 21 at paras. 36 and 39. See also *Newfoundland and Labrador (Information and Privacy Commissioner) v. Eastern Regional Integrated Health Authority*, 2015 CanLII 83056 (NL SC) at paras. 24(9) and 35.
[80] Affidavit #1 of lawyer at para. 8 in Ministry's submission dated December 5, 2017.
[81] Ministry's submission dated December 5, 2017 at para. 47.
[82] Applicant's submission at para. 16.

"censoring" of her access request.[83] She submits that any solicitor client privilege which may have applied to the emails has been "invalidated" because the privilege "does not protect actions that have a corrupt intent, which would be the case here."[84] I understand the applicant to be arguing that solicitor client privilege does not apply to the disputed records because the Ministry allegedly engaged in unlawful conduct.

[55] In response, the Ministry says the applicant's accusations are unfounded and not supported by any evidence.[85] It says that it has already explained to the applicant that its decision to post an edited version of the table was because it became "aware that there might be compliance issues under [FIPPA] with respect to the posting of the record on the Open Information website."[86] The Ministry says that it has also provided sworn evidence that the Office of the Premier was not involved in the matter.[87]

[56] The courts have said solicitor-client privilege does not protect communications where legal advice is obtained to knowingly facilitate the commission of a crime or a fraud.[88] This limitation on solicitor client privilege is commonly referred to as the "future crime or fraud exception."[89] This exclusion may also encompass wrongful acts that are not criminal in nature such as "breaches of contract, and torts and other breaches of duty."[90]

[57] The onus is on the party seeking disclosure of privileged documents to provide "clear and convincing evidence that the solicitor-client communication facilitated the unlawful act or that the solicitor otherwise became a dupe or conspirator."[91] In terms of meeting the burden of proof, in *Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*, Wallace J.A., approved the following statement:

> If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not

[83] Applicant's submission at paras. 18-21.
[84] *Ibid* at para. 17.
[85] Ministry's submission dated May 16, 2018 at paras. 13-15.
[86] *Ibid* at para. 13.
[87] *Ibid* at para. 14.
[88] *R. v. Campbell*, 1999 CanLII 676 (SCC) [*Campbell*] at paras. 55-61; *Solosky v. the Queen*, 1979 CanLII 9 (SCC) [*Solosky*] at pp. 835-836; *Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*, 1987 CanLII 153 (BC CA) *[Pax Management*].
[89] Adam M. Dodek, *Solicitor-Client Privilege* (Ontario: LexisNexis Canada Inc., 2014) at §3.74: the author notes that this limitation is not an exception to privilege, but an exclusion or a "negation" of privilege.
[90] *Campbell*, *supra* note 88 at para. 23, referring to *Goldman Sachs & Co. v. Sessions*, (1999) 38 C.P.C. (4th) 143, 93 A.C.W.S. (3d) 231 at para. 16. Although there is debate on whether the exclusion should be extended to non-criminal, wrongful acts: see Adam M. Dodek, *Solicitor-Client Privilege* (Ontario: LexisNexis Canada Inc., 2014) at §3.80-§3.100.
[91] *Reid v. British Columbia (Egg Marketing Board)*, 2006 BCSC 346 at para. 17. See also *United States of America v. Down*, 2000 BCSC 1532 at para. 18 and *Yougi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2017 BCSC 1587 at paras. 62-63.

> merely an allegation that they were made for the purpose of getting advice for the commission of *a fraud,* but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact….[92] [Emphasis in original].

[58] In *Goldman, Sachs & Co. v. Sessions*, Smith J. said the court "must examine the applicant's case in the light shed by all of the evidence and the surrounding circumstances to determine if it 'gives colour to the charge.'"[93] If the court is persuaded that a *prima facie* case has been made out, then it will order production and "review the documents in question to ascertain whether the exception does in fact pertain or whether the asserted privilege properly exists."[94] I adopt this approach.

[59] I have considered the parties' submissions and evidence to determine whether there is some factual support for the applicant's allegations. In this case, I am unable to conclude that there is any "colour" or "substance" to the applicant's charges.[95] There is nothing in the materials before me or the circumstances of this case which suggests Ministry employees sought to advance conduct which they knew or should have known is unlawful and that the lawyer's advice was obtained in order to facilitate such conduct. Therefore, I decline to exercise my discretion to review the privileged records at issue in order to determine whether the future crime or fraud exclusion applies.

CONCLUSION

[60] For the reasons provided above, under s. 58 of FIPPA, I confirm the Ministry's decision to refuse the applicant access to the disputed information under s. 14.

July 10, 2018

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F16-67461

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[92] *Pax Management*, *supra* note 88 at p. 13, quoting Viscount Finlay in *O'Rourke v. Darbishire and Others*, [1920] A.C. 581 (U.K.H.L.) at p. 604.
[93] *Goldman, Sachs & Co. v. Sessions*, 1999 CanLII 5317 (BC SC) at para. 21.
[94] *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 24 and see also *Pax Management*, *supra* note 88 at p. 13.
[95] *Todoruk v. Trapp*, 2005 BCSC 1702 at para. 24.