OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

Order F20-08

MINISTRY OF FINANCE (PUBLIC SERVICE AGENCY) AND OFFICE OF THE PREMIER

Ian C. Davis
Adjudicator

February 25, 2020

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Summary: The applicant requested access to records relating to investigations into the applicant's conduct while employed by the provincial government. The public bodies refused to disclose the responsive records and information in dispute under ss. 13 (advice or recommendations), 14 (solicitor-client privilege), 15(1)(l) (harm to security of property or system), and 22 (unreasonable invasion of third-party personal privacy). The adjudicator confirmed that ss. 13 and 14 applied to the information withheld under those sections. The adjudicator found that s. 15(1)(l) applied to teleconference participant ID numbers, but not to physical meeting locations. The adjudicator determined that s. 22 applied to most of the personal information withheld under that section, but not to a small amount of third-party personal information related to scheduling.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14, 15(1)(l), 22.

INTRODUCTION

[1] This inquiry concerns three access requests. The applicant made one request to the Public Service Agency (PSA)[1] and the Office of the Premier (OP) separately, and another, different request to the PSA. In all three requests, the applicant sought documents relating to investigations into the applicant's conduct while employed by the Province. The background facts giving rise to this inquiry are set out in a 2017 report of the BC Ombudsperson, titled *Misfire: the 2012 Ministry of Health Employment Terminations and Related Matters* (*Misfire*).[2]

[1] The PSA is part of the Ministry of Finance, but I will refer to the PSA rather than the Ministry.
[2] Online: https://bcombudsperson.ca/sites/default/files/Referral%20Report%20-%20Misfire.pdf [*Misfire*].

[2] Initially, the public bodies refused to disclose all of the responsive records under either s. 13 (advice or recommendations), s. 14 (solicitor-client privilege), s. 15(1)(l) (harm to property or systems), s. 17 (harm to financial or economic interests of public body), or s. 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA or the Act).[3] The public bodies also claimed that some of the records were outside the scope of the Act pursuant to s. 3(1)(c) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the public bodies' decisions. Mediation failed to resolve the matter, and the applicant requested an inquiry.

PRELIMINARY MATTERS

[4] The PSA initially refused to disclose some records under s. 17. Section 17 is stated as an issue in the notice of written inquiry. However, the PSA says in its submissions that it no longer relies on s. 17.[4] Accordingly, I conclude s. 17 is no longer in issue.

[5] As for s. 3(1)(c), the public bodies indicated during the inquiry that they are no longer relying on this section as a basis to withhold records.[5] Given this, I find s. 3(1)(c) is also no longer in issue.

ISSUES

[6] The issues to be decided in this inquiry are:

1. Are the public bodies authorized to refuse to disclose to the applicant any of the information in dispute under ss. 13, 14, or 15(1)(l)?

2. Are the public bodies required to refuse to disclose any of the personal information in dispute under s. 22?

[7] According to s. 57 of FIPPA, the public bodies have the burden of proof under ss. 13, 14, and 15(1)(l). However, based on s. 57(2) of *FIPPA*, the burden of proof is on the applicant to show that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.

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[3] Letters to the applicant from the Ministry of Citizens' Services, Information Access Operations dated February 20, 2018 (OIPC File No. F18-73946 / OOP-2017-73434), February 22, 2018 (OIPC File No. F18-73944 / PSA-2017-73424), and March 5, 2018 (OIPC File No. F18-73941 / PSA-2017-73435).
[4] Public bodies' written submissions dated June 24, 2019 at para. 12.
[5] Email from public bodies to OIPC dated January 30, 2020.

BACKGROUND

Facts

[8] The background facts are set out in the affidavit of the Assistant Deputy Minister of the PSA, Employee Relations and Workplace Health (ADM)[6] and in *Misfire*. The ADM provides a link in his affidavit to the full *Misfire* report and attaches the executive summary as an exhibit.[7] The applicant does not challenge the background facts as set out by the ADM.

[9] On March 21, 2012, the Office of the Auditor General of British Columbia received an anonymous complaint "alleging wrongdoing in relation to contracting and data practices of the Ministry of Health Pharmaceutical Division."[8] The Ministry of Health investigated the complaint (MoH Investigation). The investigation completed in October 2013.[9] The applicant "led the team" that conducted the MoH Investigation.[10]

[10] As a result of the MoH Investigation, the Ministry of Health terminated the employment of six public servants. These individuals then sued their employer (the Province) and settlements were eventually reached. According to the Ombudsperson in *Misfire*, the terminations were unlawful. In *Misfire*, the Ombudsperson identified numerous flaws with the MoH Investigation and the resulting decisions made by the Province.

[11] In addition to the MoH Investigation, the Investigations and Forensics Unit of the Office of the Comptroller General (OCG) investigated the complaint received by the Auditor General (OCG Investigation). The OCG Investigation culminated in a report, finalized in June 2015 (OCG Report).[11] Subsequently, the OCG Report was leaked to the media.[12]

[12] The Privacy Compliance and Training Branch of the Corporate Information and Records Management Office investigated the leak of the OCG Report (PCT Investigation). The PCT Investigation did not establish the source of the leak; however, "it did establish that a number of specific employees shared the OCG Report in a manner that was not authorized under FIPPA, and possibly government policies."[13] The applicant was one of the employees implicated in the unauthorized sharing of the OCG Report.[14]

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[6] Affidavit of ADM at paras. 2, 9-11, 13-14, 21, and 23.
[7] *Ibid* at paras. 18-19.
[8] *Ibid* at para. 11; *Misfire*, *supra* note 2 at p. 70.
[9] *Misfire*, *ibid* at p. 92.
[10] Affidavit of ADM at para. 11.
[11] *Misfire*, *supra* note 2 at pp. XIII, 20, and 302.
[12] Affidavit of ADM at paras. 8-9.
[13] *Ibid* at para. 9.
[14] *Ibid* at para. 10.

[13] The unauthorized sharing of the OCG Report raised issues as to whether the applicant and others had breached the Standards of Conduct for BC Public Service employees and/or other employment obligations.[15] To resolve these issues, the PSA retained external legal counsel (Firm A) to conduct "a human resources code of conduct investigation" (HR Investigation).[16] AZ, a lawyer at Firm A, conducted the HR Investigation and prepared a written report (HR Report).

[14] In addition, the PSA retained a different law firm (Firm B) to investigate and provide legal advice about the legal issues arising from the MoH Investigation, *Misfire*, the OCG Report leak, the PCT Investigation, and the HR Investigation and Report.[17] MH, a lawyer at Firm B, investigated these issues (MH Investigation) and provided a legal opinion (MH Opinion).[18]

[15] The applicant made the three access requests at issue in this inquiry on August 29, 2017.[19] The requests, in summary, are as follows:

1. to the PSA for any and all records relating to the HR Investigation and Report;[20]

2. to the PSA for any and all records relating to the MH Investigation and Opinion;[21] and

3. to the OP for any and all records relating to the MH Investigation and Opinion.[22]

The date ranges for the requests cover five to six months in 2017.

Records and Information in Dispute

[16] The records in dispute are emails or email strings, most with attachments. For each of the three files, the public bodies provided a table of records that provides summary descriptions of the records and lists the FIPPA exceptions applied.

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[15] *Ibid* at para. 13.
[16] *Ibid* at para. 14.
[17] *Ibid* at para. 21.
[18] *Ibid* at para. 23.
[19] Investigator's Fact Reports at para. 1.
[20] OIPC File No. F18-73944 / PSA-2017-73424.
[21] OIPC File No. F18-73941 / PSA-2017-73435.
[22] OIPC File No. F18-73946 / OOP-2017-73434.

[17] During the inquiry, the PSA disclosed to the applicant unsevered copies of transcripts of the applicant's interviews with AZ and MH.[23] Therefore, those records[24] are no longer in dispute.

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[18] Section 14 of FIPPA provides that the head of a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." Section 14 encompasses both legal advice privilege and litigation privilege.[25] The public bodies submit that legal advice privilege applies to the records they are refusing to disclose under s. 14. The applicant did not address solicitor-client privilege in her submissions.

[19] The test for solicitor-client privilege has been expressed in various ways, but the essential elements are that there must be:

1. "a communication between solicitor and client" (or their agent[26]);

2. which "entails the seeking or giving of legal advice"; and

3. which is "intended to be confidential by the parties".[27]

[20] Solicitor-client privilege is so important to the legal system that it should yield only when absolutely necessary to achieve justice.[28] The privilege applies broadly to all communications that fall within the ordinary scope of the solicitor-client relationship.[29] However, communications are not privileged merely because they were sent to a lawyer.[30] The privilege extends to a lawyer's working papers related to the formulating or giving of legal advice.[31] It also extends to communications related to the seeking or giving of legal advice that

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[23] Email from the public bodies to the OIPC dated December 20, 2019.
[24] OIPC File No. F18-73941 / PSA-2017-73435, pp. 1972-2058; OIPC File No. F18-73944 / PSA-2017-73424, pp. 33-52.
[25] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [*College of Physicians*].
[26] *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873; see also Order F19-33, 2019 BCIPC 36 (CanLII) at para. 23.
[27] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837, cited in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 15. See also Order 00-06, 2000 CanLII 6550 (BC IPC) at p. 8 (cited to CanLII), citing *R. v. B.*, [1995] B.C.J. No. 41, 1995 CanLII 2007 (S.C); *Festing v. Canada (Attorney General)*, 2001 BCCA 612 at para. 92.
[28] *R. v. McClure*, 2001 SCC 14 at paras. 32-33; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 14 [*Camp*].
[29] *Pritchard*, *supra* note 27 at para. 16.
[30] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81; *McClure*, *supra* note 28 at para. 36.
[31] *R. v. B.*, *supra* note 27 at para. 22; *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at para. 5.79.

would reveal, directly or through inference, the advice sought or given, even if the communications are not directly between solicitor and client.[32]

Analysis

[21] Based on the tables of records, I find that the information in dispute under s. 14 falls into the following categories:[33]

- **ADM Emails** – emails with attachments between the ADM and lawyers at Firms A or B;[34]
- **Internal Emails** – two emails with attachments between employees of the PSA;[35]
- **OP Records** – emails with attachments from the PSA to the OP.[36]

ADM Emails

[22] The public bodies' evidence in this inquiry consists of the affidavit of the ADM. The ADM deposes that he oversaw the PCT Investigation and the HR Investigation, and was "directly involved in seeking and receiving legal advice" from Firms A and B.[37]

[23] The ADM Emails are written communications between lawyers at Firms A and B and their client, the PSA, as represented by the ADM. I accept the ADM's evidence that the communications were intended to be confidential.[38] I find, based on the table descriptions, that the communications were not shared between anyone other than the lawyers at Firms A and B and employees of the PSA, which supports the conclusion that the communications were intended to be confidential.[39] To the extent that the ADM's or the lawyers' assistants were involved in the communications,[40] I find they acted as agents facilitating the communications between solicitor and client.

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[32] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras. 41, 45 and 50; *Camp*, *supra* note 28 at paras. 46-47; *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at paras. 11-12.
[33] AZ's HR Report and the emails related to the HR Investigation have not been withheld under s. 14. The PSA refused access to that information under ss. 13, 15 and 22.
[34] OIPC File No. F18-73941 / PSA-2017-73435, pp. 1-1839, 1868-2058; OIPC File No. F18-73944 / PSA-2017-73424, pp. 67-89, 173-197.
[35] OIPC File No. F18-73944 / PSA-2017-73424, pp. 118-172.
[36] OIPC File No. F18-73946 / OOP-2017-73434, pp. 1-82.
[37] Affidavit of ADM at para. 2.
[38] *Ibid* at paras. 25-26 and 29.
[39] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis, 2014) at para. 14.49.
[40] E.g. OIPC File No. F18-73941 / PSA-2017-73435, pp. 1645-1665, 1971-2058.

[24] I also find the ADM Emails are communications directly related to the seeking or providing of legal advice. I accept the ADM's evidence in this regard. The ADM deposes, and the table descriptions support, that the PSA sought legal advice from Firms A and B about legal issues arising from the totality of circumstances described in the background above, and that the records in dispute under s. 14 directly relate to that advice.[41] Moreover, the context supports the ADM's evidence. The emails are dated 2017, in the aftermath of the events leading to *Misfire* and the related investigations. I am satisfied these events and investigations gave rise to numerous legal problems, primarily employment-related, for which the PSA sought legal advice to resolve. I find the ADM Emails fall within the scope of the solicitor-client relationship.

Internal Emails

[25] Based on the ADM's evidence, I find the Internal Emails are between PSA employees attaching legal opinions provided by Firm B. For the reasons set out below, I conclude the legal opinions attached to the Internal Emails are privileged. The emails themselves are also privileged. In *Bank of Montreal v. Tortora*, the Court stated that privilege extends to "documents between employees which transmit or comment on privileged communications with lawyers."[42] The Internal Emails are the kind of communications referred to in *Tortora*. Further, I find the Internal Emails were intended to be confidential. They were shared only within the PSA, which is consistent with the confidential manner in which communications between the PSA and Firm B were treated.[43]

Attachments

[26] I find, based on the table descriptions, that the Attachments to the ADM Emails and Internal Emails are legal opinions, background information and other documents related to the legal advice sought by the PSA. The Attachments include interview lists, schedules and transcripts; personnel information; and organizational information.

[27] The records in this category are all attached to records I determined above are privileged. However, if a document is attached to a privileged communication, the attachment is not necessarily privileged. The attachment will only be privileged if it satisfies the test for privilege. For instance, an attachment may be privileged on its own, independent of being attached to another privileged record. Alternatively, an attachment may be privileged if it is an integral part of the privileged communication to which it is attached and it would reveal that communication either directly or by inference.[44]

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[41] Affidavit of ADM at paras. 21-28.
[42] *Tortora*, *supra* note 32 at para. 12.
[43] Affidavit of ADM at para. 26.
[44] See Order F18-19, 2018 BCIPC 22 (CanLII) at paras. 36-40 (and the cases cited therein).

[28] I am satisfied that the Attachments fall within what is commonly referred to as the "continuum of communications in which the solicitor provides advice".[45] The background facts set out above demonstrate that the circumstances leading the ADM to retain Firms A and B were far from straightforward. In order to provide meaningful legal advice to the PSA, the lawyers at Firms A and B had to familiarize themselves with the factual circumstances. They did so largely through the information provided in the Attachments.[46] In that respect, I find the Attachments are directly related to the seeking and providing of legal advice between the PSA and its lawyers and integral to the emails to which they are attached. I accept the ADM's evidence that these records were shared in confidence.[47]

OP Records

[29] Finally, I find the OP Records are emails and attachments from the PSA to the OP forwarding the legal opinions provided by Firms A and B, along with background material relevant to those legal opinions.

[30] I find the background material and legal opinions attached to the emails are clearly privileged as between Firms A and B and the PSA, for the same reasoning as set out above in relation to the ADM Emails and the Internal Emails. The question that arises is whether the PSA waived privilege by emailing the background material and legal opinions on to the OP. I find this issue necessarily arises from the facts and the public bodies' claim of privilege over the OP Records, and is therefore appropriate to consider.[48]

[31] As I read the public bodies' submissions, their position appears to be that waiver does not apply because the OP was not an outsider to the solicitor-client relationship between the PSA and Firms A and B; rather, the OP was a joint client, or part of a single client, namely the Province.[49]

[32] I need not address the issue of whether the provincial government as a whole is one client. In the circumstances, I am satisfied that the OP Records are privileged even if the OP was not, strictly speaking, the client of Firms A and B. The key principles relating to waiver of privilege were recently summarized in *Malimon v. Kwok*:

> Waiver of privilege is ordinarily established when it is shown that the holder of the privilege: (a) knows of the existence of the privilege, and (b) voluntarily evinces an intention to waive the privilege. Waiver may also

[45] *Lee*, *supra* note 32 at para. 33.
[46] Affidavit of ADM at para. 25.
[47] *Ibid*.
[48] See e.g. *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para. 180.
[49] Public bodies' submissions dated June 24, 2019 at paras. 40-41, 53-55.

> occur in the absence of an intention to waive, where fairness and consistency so require. *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.), at para. 6.
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> Generally, disclosure to outsiders of privileged information constitutes waiver of the privilege: Lederman, Bryant and Fuerst, *The Law of Evidence,* 5th ed. at para. 14.168, citing *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.) and *R. v. Kotapski* (1981), 1981 CanLII 3215 (QC CS), 66 C.C.C. (2d) 78 (Que. S. C.).
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> There is no waiver, however, when a privileged document is provided to an outside party on the understanding that it will be held in confidence and not disclosed to others. A stipulation that the document is to be treated in confidence negates an intention to waive the privilege: *K[a]mengo Systems Inc. v. Seabulk Systems Inc. et al* (1986), 1998 CanLII 4548 (BC SC), 86 C.P.R. (3d) 44 (B.C.S.C.) at para. 19-20.[50]

[33] In my view, privilege over the legal opinions and background material sent to the OP was not lost because there is no evidence of an intention to waive privilege. To the contrary, the ADM swears that information was shared "in confidence" between Firms A and B, the PSA and the OP.[51] Following the line of authority discussed in *Kamengo*, I find there was an understanding between the PSA and the OP that the attachments to the OP Emails would be held in confidence. This negates any inference that there was any intention to waive privilege.[52]

[34] I also find the emails that accompanied the attachments are privileged. Part of a communication should only be disclosed when it can be accomplished without "any risk" that privileged information will be revealed, directly or through inference.[53] I find that the purpose of the cover emails was to forward legal opinions and related material on to the OP. Given this strong connection to the privileged attachments, I conclude that the cover emails cannot be disclosed without "any risk" of revealing privileged information.

[35] Finally, I see no basis on which "fairness and consistency" require disclosure of the OP Records, and none was argued.

Conclusion

[36] In summary, I conclude that solicitor-client privilege applies to the records in dispute under s. 14. The public bodies were authorized to refuse to disclose them to the applicant. Given this conclusion, I need not address the public

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[50] *Malimon v. Kwok*, 2019 BCSC 1972 at paras. 19-21.
[51] Affidavit of ADM at para. 29.
[52] *Kamengo Systems Inc. v. Seabulk Systems Inc.*, 1998 CanLII 4548 (BCSC) at para. 19.
[53] *Lee*, *supra* note 32 at para. 40.

bodies' alternative argument that s. 22 also applies to some of the information in dispute under s. 14.

SECTION 13 – ADVICE OR RECOMMENDATIONS

[37] Section 13 provides that the head of a public body "may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister." The purpose of s. 13 "is to allow for full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decisions and policy-making were subject to excessive scrutiny."[54]

[38] The analysis under s. 13 has two steps.[55] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for a public body. The second is to determine whether s. 13(2) applies. That subsection sets out various kinds of information that a public body "must not refuse to disclose" under s. 13(1).

[39] Order F19-28 helpfully summarizes the relevant legal principles established under s. 13, which I adopt here:

- A public body is authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.

- Recommendations include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.

- "Advice" usually involves a communication, by an individual whose advice has been sought, to the recipient of the advice, as to which courses of action are preferred or desirable.

- "Advice" has a broader meaning than the term "recommendations." The Supreme Court of Canada in *John Doe v. Ontario (Finance)* found that "advice" includes a public servant's view of policy options to be considered by a decision maker, including the considerations to take into account by the decision maker in making the decision.

- Advice also includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinion

[54] Order F15-61, 2015 OIPC 67 (CanLII) at para. 28.
[55] *Ibid* at para. 31.

on matters of fact on which a public body must make a decision for future action.

- Section 13(1) does not automatically apply to a document simply because it is a draft. The fact that a record is a draft does not necessarily make the entire record advice or recommendations under s. 13(1).
- Section 13(1) extends to factual or background information that is a necessary and integrated part of the advice. This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.[56]

Analysis

[40] The PSA submits that s. 13(1) applies to the information withheld under that section because it is "advice and recommendations provided for the Public Body by [AZ]", and that s. 13(2) does not apply.[57] The applicant does not address s. 13 in her submissions.

[41] The information in dispute under s. 13 is in one email and one email string.[58] The email is from AZ to the ADM.[59] The information withheld is how AZ proposes to respond, on the PSA's behalf, to an email from the applicant's lawyer. AZ invites the ADM's comments. The ADM responds with comments in an email that has been disclosed (except for one sentence withheld under s. 22).

[42] I find the draft correspondence is advice provided by AZ to the ADM on how the PSA should communicate with counsel for the applicant. The ADM responds with comments, which further satisfies me that the draft response is advice to the ADM who needs to decide whether AZ's proposed response is appropriate.

[43] The email string involves the ADM, AZ, and RW, a senior security specialist at the Office of the Chief Information Officer.[60] The email string relates to a request the ADM made to RW. The ADM requested RW review the applicant's email and Outlook calendar entries for specific information. RW reports back to the ADM, and then the ADM advises AZ of the information

[56] Order F19-28, 2019 OIPC 30 (CanLII) at para. 14 (footnotes omitted).
[57] PSA's written submissions dated June 24, 2019 at para. 57.
[58] OIPC File No. F18-73944 / PSA-2017-73424, pp. 12-14, 53-54. Part of p. 7 of the same file number was also initially withheld under s. 13, but later disclosed.
[59] OIPC File No. F18-73944 / PSA-2017-73424, p. 12.
[60] OIPC File No. F18-73944 / PSA-2017-73424, pp. 53-54.

provided by RW. The information withheld under s. 13 relates to the ADM's request and RW's findings.

[44] In my view, the withheld information is advice under s. 13(1) about how to investigate the applicant. One paragraph is advice because it suggests a course of action. The balance of the information is the ADM's request and RW's findings. The BC Court of Appeal has held that the deliberative process protected by s. 13 "includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action."[61] I am satisfied that the ADM's request and RW's findings constitute the facts and information necessary to the consideration of the alternative course of action. This information is integral to RW's advice because it is necessary for the ADM to understand that advice. I also find that disclosure of the information would allow accurate inferences about RW's advice.

[45] I turn now to s. 13(2), which sets out various kinds of information that a public body must not refuse to disclose under s. 13(1). The only exception that arguably applies is s. 13(2)(a). That subsection states that a public body must not refuse to disclose "any factual material". Factual "material" is distinct from factual "information".[62] The difference is whether the facts are a necessary and integrated part of the advice. If they are not, then the information is "factual material" and s. 13(2)(a) applies.

[46] I have reviewed AZ's draft response to the applicant's lawyer and do not find that it contains "factual material". Although some of the information is "factual" in nature, I find it is a necessary and integrated part of the advice. Therefore, s. 13(2)(a) does not apply. Nor, in my view, does s. 13(2)(a) apply to the facts withheld in the email string. As discussed above, those facts are a necessary and integrated part of the advice given by RW to the ADM and then to AZ.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[47] The public bodies submit that s. 22 of FIPPA applies to some of the information in dispute. Section 22(1) of FIPPA provides that the head of a public body "must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy."[63] The applicant did not address s. 22 in her submissions.

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[61] *College of Physicians*, *supra* note 25 at paras. 106-111. See also *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 52; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at paras. 79-96 [*PHSA*].

[62] *PHSA*, *ibid* at para. 91.

[63] Schedule 1 of FIPPA says: "third party", in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

[48] The proper approach to the analysis under s. 22 is well-established. It has four steps.[64] I will apply that approach here.

Analysis

[49] The information in dispute under s. 22 is in the HR Report[65] prepared by AZ and in emails[66] (some including attachments) between various persons involved in the HR and MH Investigations. The emails are generally about scheduling interviews with the applicant and others. The information withheld is:

- the total number, and the names, of the third parties who were the subjects of the HR and/or MH Investigations and who were interviewed or were intended to be interviewed;
- summaries of the evidence AZ collected from third parties;
- AZ's investigative observations, comments and findings related to the third parties; and
- details about the third parties' interviews, including interview dates, times and locations, and interview scheduling.

Personal Information

[50] The first question is whether the disputed information is personal information. That term is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information". Information is "about an identifiable individual" when it is "reasonably capable of identifying an individual, either alone or when combined with other available sources of information."[67] Contact information is defined in Schedule 1 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".

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[64] See e.g. Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.
[65] OIPC File No. F18-73944 / PSA-2017-73424, pp. 90-116; OIPC File No. F18-73941 / PSA-2017-73435, pp. 1841-1867 [HR Report]. I note that the HR Report was initially disclosed to the applicant with redactions under s. 22. The PSA made further and different disclosure to the applicant during the inquiry. Given the discrepancies between the initial severing and the later severing, the s. 22 analysis below pertains only to the information in the HR Report that has never been disclosed to the applicant.
[66] OIPC File No. F18-73944 / PSA-2017-73424, pp. 3-9, 12-14, 21-32, and 53-66.
[67] Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.

[51] I am satisfied that all of the information in dispute under s. 22 is personal information, and not contact information. Most of the information is clearly about named third parties. The rest of the information does not contain the third parties' names but it is reasonably capable of identifying them either alone or in combination with other information already disclosed to the applicant or already known to the applicant, given her involvement in the background circumstances. I also find that some of the disputed information in the HR Report is the personal information of both the applicant and certain third parties. This information relates to the applicant's interactions with those third parties.

[52] I note that part of the information in dispute under s. 22 is in a table related to scheduling interviews for the MH Investigation. The subject heading for one of the columns is "Contact Information", and the information under that heading is the email addresses and telephone numbers of interview subjects and other identifiable individuals involved in the investigation. This information would be contact information in a different context. Contact information is information used in the "ordinary course of conducting the third party's business affairs."[68] I do not find that the workplace investigation context of this case relates to the ordinary course of business. As such, I find that the information is not contact information.[69]

Section 22(4) – Presumptions of no unreasonable invasion

[53] The next step in the analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). I have reviewed the personal information in light of s. 22(4) and find that it does not apply.[70]

Sections 22(3) – Presumptions of unreasonable invasion

[54] The third step in the analysis is to determine whether any of the presumptions in s. 22(3) apply. The PSA argues that s. 22(3)(d) applies because all of the information in dispute under s. 22 was collected in the course of a workplace investigation into the third parties' conduct.[71] Section 22(3)(d) of FIPPA provides 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". The PSA argues that the information in dispute under s. 22 relates to employment history.[72]

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[68] Order F15-33, 2015 BCIPC 36 (CanLII) at para. 31; see also Order F15-32, 2015 BCIPC 35 (CanLII) at para. 15.
[69] Other orders have also found the same. See e.g. Order F19-15, 2019 BCIPC 17 (CanLII) at para. 43. See also Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 82.
[70] See e.g. Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 22-24.
[71] PSA's written submissions dated June 24, 2019 at paras. 64-78.
[72] *Ibid* at para. 76.

[55] The PSA relies on Orders 01-53, F10-11, and F18-03,[73] which say that information about an individual collected in the course of a workplace investigation into their conduct relates to their employment history.[74] In those circumstances, s. 22(3)(d) also applies to the investigator's evaluation of the individual's conduct.

[56] I find that s. 22(3)(d) applies to the information severed from the HR Report because it relates to the third parties' employment history. They were implicated in the unauthorized sharing of the OCG Report and were the subjects of the HR Investigation (and/or the MH Investigation), along with the applicant. The information is summaries of evidence provided to AZ by the subjects of the investigation and it includes AZ's findings on their conduct. In addition, there is information in emails that relates to scheduling the third parties for interviews for the MH and HR Investigations. In context, and particularly given the applicant's background knowledge, all of this information reveals, directly or through inference, that the third parties were the subjects of the investigations and, therefore, it relates to their employment history. I conclude s. 22(3)(d) applies.

[57] There is also a relatively small amount of scheduling-related personal information about the availability of AZ and a PSA employee. Section 22(3)(d) does not apply to this information. The information is about third parties who were not the subjects of the investigations. Although the information was collected in the course of workplace investigations, the investigations were not about these third parties. As such, I find the information does not relate to their employment history.

[58] Although the PSA did not raise this, I can also see that some of the information in the emails regarding interview scheduling relates to the medical circumstances of a third party.[75] Section 22(3)(a) provides that disclosure of information relating to a third party's medical condition is presumed to be an unreasonable invasion of privacy. I find s. 22(3)(a) applies to this information, in addition to s. 22(3)(d).

Section 22(2) – All relevant circumstances

[59] The fourth step in the analysis is to determine, having regard to all relevant circumstances including those set out in s. 22(2), whether disclosure of the information in dispute would be an unreasonable invasion of the third parties' personal privacy. The PSA submits that it would because the information "is sensitive in nature, and could have the effect of harming the third parties by

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[73] Order 01-53, 2001 CanLII 21607 (BC IPC); Order F10-11, 2010 BCIPC 18 (CanLII); Order F18-03, 2018 BCIPC 03 (CanLII); PSA's written submissions dated June 24, 2019 at paras. 73-74.
[74] Order 01-53, *ibid* at paras. 32-41.
[75] OIPC File No. F18-73944 / PSA-2017-73424, pp. 6-7. See e.g. Order F16-46, 2016 BCIPC 51 (CanLII) at para. 21.

causing unfair damage to reputations, and unfair exposure of personal information if the information is disclosed."[76]

[60] Although the PSA did not raise s. 22(2)(f), it is relevant in the circumstances. That subsection states that a relevant consideration is whether the personal information is supplied in confidence. AZ states in part of the HR Report, which has been disclosed, that she advised the witnesses "to keep the investigation process and anything said in it strictly confidential".[77] This satisfies me that the HR Investigation and interview process were conducted with an expectation of confidentiality, and therefore that the evidence the third-party subjects provided to AZ was supplied in confidence. Accordingly, I conclude that s. 22(2)(f) weighs against disclosure of the information withheld in the HR Report.

[61] The PSA's submissions refer to unfair harm to the reputations of the third-party subjects of the investigations. Sections 22(2)(e) and (h) provide that it is relevant whether:

> (e) the third party will be exposed unfairly to financial or other harm,
> …
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant[.]

[62] The PSA simply asserts that unfair harm would arise if the third-party personal information were disclosed. Without more, I do not find that these subsections apply.

[63] The sensitivity of the personal information is also relevant.[78] The PSA argues the third-party personal information is sensitive. I find the information in the HR Report is fairly sensitive for the subjects of the HR Investigation. This is because the information is evaluative of the subjects' workplace conduct, which has been called into question. I also find the medical information discussed above sensitive. As for the balance of the information relating to scheduling interviews for the third-party subjects, I find it is not sensitive.

[64] As noted above, some of the information withheld under s. 22 is information about the availability of AZ and a PSA employee. This information does not describe in detail where these third parties were at a particular time, what they were doing or who they were with.[79] I find this information so innocuous and lacking in detail that disclosure of it cannot be an unreasonable invasion of third-party personal privacy. I come to this conclusion also having considered the applicant's knowledge, which is another relevant circumstance

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[76] PSA's written submissions dated June 24, 2019 at para. 77.
[77] HR Report, *supra* note 65 at p. 4.
[78] Order F16-52, 2016 BCIPC 58 (CanLII) at para. 87.
[79] Compare Order F16-52, 2016 BCIPC 58 (CanLII) at paras. 87-91.

under s. 22(2).[80] I find it likely the applicant already knows most of this information because it figured in the process of scheduling the applicant's own interview with AZ.

Section 22(5)

[65] The final step in the analysis, in the particular circumstances of this case, is to determine whether s. 22(5) applies. That subsection provides, in relevant part:

> (5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless
>
> (a) the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information …[.]

[66] As noted above, some of the information in the HR Report is the personal information of both the applicant and certain third parties. The information is about the third parties' interactions with the applicant. Further, as I found above, the information was supplied in confidence. Therefore, the PSA must provide the applicant with a summary of the information, unless s. 22(5)(a) applies.

[67] I have reviewed the relevant portions of the HR Report, and am satisfied that s. 22(5)(a) applies. The applicant's personal information is so intermingled with third-party personal information that it cannot be disclosed without revealing the identities of the third parties. This is particularly so given the applicant's involvement and knowledge, which I find would allow for accurate inferences as to the identities of the third parties.

Conclusion

In summary, I conclude that disclosure of most of the personal information withheld under s. 22 would be an unreasonable invasion of the personal privacy of the third parties who were the subjects of the HR and/or MH Investigations. Where the presumptions under ss. 22(3)(a) and/or 22(3)(d) apply, they have not been rebutted. However, I conclude that it would not be an unreasonable invasion of the personal privacy of AZ and a PSA employee to disclose certain information relating to their availability for scheduling the applicant's interview with AZ.

SECTION 15 – HARM TO SECURITY OF PROPERTY OR SYSTEM

[68] The PSA submits that s. 15(1)(l) applies to some of the information in dispute. Section 15(1)(l) provides that the head of a public body may refuse to

[80] Order F19-41, 2019 BCIPC 46 (CanLII) at paras. 79-80.

disclose information if the disclosure could reasonably be expected to harm the security of any property or system, including a building, or a computer or communications system. The applicant does not address s. 15(1)(l) in her submissions.

[69] The information in dispute under s. 15(1)(l) is meeting locations and teleconference participant ID numbers in a copy of the applicant's Outlook calendar.[81] RW attached the calendar to the email in which he communicated his search findings to the ADM.

[70] The question under s. 15(1)(l) is whether disclosure of the information in dispute could reasonably be expected to harm the security of any property or system. The "reasonable expectation of harm" standard lies between "that which is probable and that which is merely possible."[82] The public body is required to provide evidence "well beyond" or "considerably above" a mere possibility of harm.[83] It is the disclosure of the information itself that must give rise to a reasonable expectation of harm.[84]

Analysis

[71] To support its argument under s. 15(1)(l), the PSA relies on past OIPC orders, specifically Orders F15-32 and F17-23.[85] In those orders, the adjudicators held that s. 15(1)(l) applied to teleconference participant ID numbers.

[72] I am satisfied there is a reasonable expectation of harm to a communications system in this case. The harm is unauthorized individuals accessing government meetings or compromising the security of teleconference systems. I find that the teleconference participant ID numbers at issue here are materially indistinguishable from the information at issue in Orders F15-32 and F17-23, and that the reasonable expectation of harm found in those cases also exists in this case.

[73] As for the meeting locations, the PSA does not explain in its submissions or evidence how disclosure of this information could reasonably be expected to

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[81] OIPC File No. F18-73944 / PSA-2017-73424, pp. 55-63. Initially, the PSA withheld both the teleconference call-in number and the participant ID numbers. However, the PSA has since disclosed the call-in number, which leaves only the participant ID numbers in dispute.
[82] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.
[83] *Ibid*.
[84] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.
[85] PSA's written submissions dated June 24, 2019 at paras. 59-63, citing Order F15-32, 2015 BCIPC 35 (CanLII) at paras. 6-12; Order F17-23, 2017 BCIPC 24 (CanLII) at paras. 60-75.

result in harm. The PSA's submissions are focused on the teleconference participant ID numbers and do not cite any legal authorities specifically relating to meeting locations. I am not persuaded that a reasonable expectation of harm to property arises from disclosure of the meeting locations.

[74] In summary, I conclude that s. 15(1)(l) applies to the teleconference participant ID numbers, but not to the meeting locations.

CONCLUSION

[75] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I confirm the decisions of the Public Service Agency and the Office of the Premier to refuse to disclose the information withheld under ss. 13 and 14 of FIPPA.

2. Subject to subparagraph 3 below, I confirm in part the Public Service Agency's decisions to refuse to disclose the information withheld under ss. 15(1)(l) and 22(1) of FIPPA.

3. The Public Service Agency is not authorized or required under ss. 15(1)(l) or 22(1) of FIPPA to refuse to disclose the information I have highlighted in a copy of the records that will be provided to it with this order.

4. The Public Service Agency is required to give the applicant access to the information identified above in subparagraph 3. The Public Service Agency must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59 of FIPPA, the Public Service Agency is required to comply with this order by April 7, 2020.

February 25, 2020

ORIGINAL SIGNED BY

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Ian C. Davis, Adjudicator

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