Order F21-23

VICTORIA AND ESQUIMALT POLICE BOARD

Ian C. Davis
Adjudicator

June 10, 2021

CanLII Cite: 2021 BCIPC 28
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 28

Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Victoria and Esquimalt Police Board (Board) for records relating to an investigation into the conduct of a former chief of the Victoria Police Department. The Board provided the applicant with responsive records severed under ss. 3(1)(c) (outside scope of FIPPA), 12(3)(b) (local public body confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege), 15(1)(l) (harm to security of property or system) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA, as well as common law settlement privilege. The applicant withdrew his request for review of the records and information withheld under ss. 12(3)(b), 15(1)(l) and 22(1). The adjudicator confirmed the Board's decision under s. 3(1)(c), determined that the Board was authorized to refuse to disclose some but not all of the information withheld under ss. 13(1) and 14, and found it unnecessary to consider settlement privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), 13(1), 13(2) and 14.

INTRODUCTION

[1] The applicant, a magazine, made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the City of Victoria for access to records. Specifically, the applicant requested records relating to an investigation into the conduct of a former Victoria Police Department (VicPD) chief constable (former police chief). The City of Victoria transferred the request to the Victoria and Esquimalt Police Board (Board), pursuant to s. 11 of FIPPA.[1]

[1] Section 11 allows a public body to transfer an access request to another public body if certain conditions are met, such as where the requested records are in the custody or under the control of the other public body. The Board is a public body under FIPPA because it is a municipal police board established under section 23 of the *Police Act*: see FIPPA, Schedule 1, definitions of "public body" and "local government body".

[2] The Board provided the responsive records to the applicant with some records and information severed under ss. 3(1)(c) (outside scope of FIPPA), 12(3)(b) (local public body confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of third-party personal privacy) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Board's decision. Mediation did not resolve the matter and it proceeded to inquiry. Upon request, the OIPC granted the Board permission to add s. 15(1)(l) (harm to security of property or system) and common law settlement privilege as inquiry issues. The OIPC invited the former police chief to participate in this inquiry, but he did not make submissions. The applicant and the Board made written inquiry submissions.

PRELIMINARY MATTERS

Applicant's complaints

[4] Prior to this inquiry, the applicant complained to the OIPC about the City's and the Board's records retention policies and whether the public bodies had conducted an adequate search for the requested records, as required by s. 6(1) of FIPPA.[2] The applicant notes in its submissions that an OIPC investigator mediated these issues, resulting in the Board providing it with additional responsive records.[3]

[5] The applicant makes another point about the completeness of the responsive records in its submissions. The applicant says it is concerned that responsive records are missing and that they have been "lost or deleted from the City of Victoria's email server."[4]

[6] In reply, the Board submits that the applicant's complaints are beyond the scope of this inquiry and have already been adjudicated by an OIPC investigator.[5]

[7] In general, a new issue will not be considered at the inquiry stage unless exceptional circumstances warrant it and the OIPC grants permission.[6] I decline to consider the issues the applicant raises because they are not listed in the Notice of Inquiry or the Investigator's Fact Report and the applicant did not seek permission to add them as inquiry issues. I accept that the applicant's complaints

[2] Applicant's submissions at paras. 1-17; Board's reply submissions at paras. 5-7.
[3] Applicant's submissions at para. 17; Investigator's Fact Report at paras. 3-4.
[4] Applicant's submissions at para. 40.
[5] Board's reply submissions at paras. 4-13.
[6] Order F19-01, 2019 BCIPC 1 (CanLII) at para. 5.

were already addressed by the OIPC and that the applicant had a fair opportunity to raise its concerns prior to this inquiry.[7]

Issues no longer in dispute

[8] In the applicant's inquiry submissions, it states that it "has no issue with any severing made" under ss. 12, 15 and 22.[8] In reply, the Board submits that, "given the applicant's concession", its severing under ss. 12, 15 and 22 "need no longer be adjudicated in this Inquiry."[9]

[9] By taking "no issue" with the Board's severing under ss. 12, 15 and 22, I understand the applicant to have withdrawn its request that the OIPC review the Board's severing under those sections. I conclude that ss. 12, 15, and 22 are no longer in dispute in this inquiry and it is not necessary to make any order about them. Given the applicant's position, I have reviewed the Board's severing only where it is based on a single exception that the applicant disputes (s. 3(1)(c), s. 14, s. 13, or settlement privilege), or any of the disputed exceptions combined. I have taken this approach because if the Board is withholding the same information on the basis of both s. 13 and s. 22, for example, and I were to find that s. 13 does not apply, then the Board could still withhold the information based on s. 22, since the applicant does not dispute any severing under that section.[10]

Information no longer in dispute

[10] The Board provided sworn evidence that, in preparation for this inquiry, it decided it was appropriate to disclose further information to the applicant.[11] The Board said it would provide this information to the applicant with its inquiry submissions. I accept that the Board provided this information to the applicant and that it is no longer in dispute.[12]

ISSUES AND BURDEN OF PROOF

[11] The issues to be decided in this inquiry are the following:

1. Are any of the records outside the scope of FIPPA pursuant to s. 3(1)(c)?

---

[7] Board's reply submissions at paras. 6-7.
[8] Applicant's submissions at paras. 36 and 38-39.
[9] Board's reply submissions at para. 15.
[10] However, since s. 22 only applies to "personal information" as defined by Schedule 1 of FIPPA, I have satisfied myself generally that the Board only applied s. 22 to personal information.
[11] Affidavit #1 of DT at para. 17 regarding Records at pp. 65, 94-95, 105, 278-281 and 333.
[12] Board's reply submissions at para. 3; Board's Schedule A at pp. 10, 12-13 and 37.

2. Is the Board authorized under ss. 13 and 14 to refuse to disclose the records and information severed under those sections?

3. Is the Board authorized by common law settlement privilege to refuse to disclose the records and information severed on that basis?

[12] The burden is on the Board to show that these exceptions to disclosure apply.[13]

BACKGROUND

[13] The Board is a "municipal police board" created under the authority of Part 5 of the *Police Act*.[14] A municipal police board consists of the mayor of the municipality's council, one person appointed by the council, and up to seven persons the Lieutenant Governor in Council appoints, after consultation with the director of police services. The councils of two or more municipalities may enter into an agreement to establish a joint police board.

[14] VicPD provides police and law enforcement services to the City of Victoria and the Township of Esquimalt. In general, the Board's role is to provide civilian oversight to the activities of VicPD, on behalf of the residents of Esquimalt and Victoria.

[15] One of the Board's main governance functions is to act as the authority for policy and service complaints, including internal discipline matters. Under the *Police Act*, in the case of conduct complaints made against a chief constable or deputy chief constable, the decision-maker or "discipline authority"[15] (a defined term in the *Police Act*) is the chair of the police board. Accordingly, in the case of the Board, the discipline authority is the mayor of Esquimalt and the mayor of Victoria (Co-Chairs).

[16] In the summer of 2015, the Co-Chairs acquired communications between the former police chief and a member of another local police department. That member was the spouse of a VicPD member under the former police chief's command. The communications raised concerns about the former police chief's conduct. After consulting with the Office of the Police Complaint Commissioner of

---

[13] FIPPA, s. 57(1) (re ss. 13 and 14); Order F16-28, 2016 BCIPC 30 (CanLII) at para. 8 (re s. 3(1)(c)); *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 at para. 9, leave to appeal ref'd 2009 BCCA 452 (re settlement privilege).

[14] The information in this background section is based on the relevant provisions of the *Police Act*, R.S.B.C. 1996, c. 367; the evidence, which I accept, in Affidavit #1 of DT and Exhibit "A"; and the Office of the Police Complaint Commissioner's "Summary Informational Report" relating to the former police chief, which is Exhibit "B" to Affidavit #1 of DT and attached to the applicant's submissions.

[15] This term is defined in the *Police Act*, *ibid* at ss. 76 and 174.

British Columbia (OPCC), the Co-Chairs initiated an internal investigation and disciplinary process. In early December 2015, the Co-Chairs completed the investigation, resulting in a report and a decision letter.

[17] The OPCC is generally responsible for overseeing and monitoring complaints, investigations and the administration of discipline and proceedings respecting municipal police forces. For internal discipline matters, the OPCC's jurisdiction is limited to reviewing the investigation and disciplinary process after they have concluded. In certain circumstances, the OPCC may designate a new discipline authority and order an external investigation.

[18] The OPCC reviewed the Co-Chairs' internal investigation report and the outcome. On December 18, 2015, the OPCC ordered an external investigation and designated two independent retired judges to act as discipline authorities. The process ultimately concluded in or around September 2018, resulting in multiple findings of misconduct against the former police chief.

[19] On October 25, 2018, the applicant made a FIPPA request to the City of Victoria for the following records:

> 1. All communications between Mayor Lisa Helps and Esquimalt Mayor Barb Desjardins [the Co-Chairs] related to the [former police chief] internal investigation. The timeframe for this request is from August 1, 2015 to December 31, 2015.
>
> 2. All communications between Mayor Lisa Helps and any other member of the Victoria Police Board regarding [the former police chief] and the matters that were subject to the internal investigation noted in Police Complaint Commissioner Stan Lowe's September 26 Final Report. The timeframe for this request is from August 1, 2015 to December 31, 2015.[16]

[20] As noted above, the City of Victoria transferred the applicant's request to the Board. In response to the request, the Board provided the applicant with the severed records in dispute in this inquiry.

RECORDS AND INFORMATION IN DISPUTE

[21] Most of the records in dispute are single emails or email chains. Some of the emails have attachments. The records in dispute include letters and a memorandum. The Board is refusing access to some records under s. 3(1)(c). The Board severed information from the other records under ss. 13, 14 and settlement privilege.

[16] Email from the applicant to the City of Victoria dated October 25, 2018.

SECTION 3(1)(C) – OUTSIDE SCOPE OF FIPPA

[22] The Board refused access to some of the records under s. 3(1)(c). That section states that FIPPA does not apply to "a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act".

[23] Section 3(1)(c) sets out three requirements:

1. an "officer of the Legislature" must be involved;
2. the record must have been created by or for, or be in the custody or control of, the officer of the Legislature; and
3. the record must relate to the exercise of the officer's functions under an Act.[17]

[24] The records in dispute here are communications sent to or from the Deputy Police Complaint Commissioner (DPCC), the Police Complaint Commissioner (PCC) or the PCC's lawyer.[18] The other individuals involved are the Co-Chairs, the Co-Chairs' lawyer (Lawyer A), Board members and the Board's lawyer (Lawyer B). The Board is also withholding a letter, which the PCC sent to a VicPD deputy chief constable.

[25] The Board submits that all of these records are outside the scope of FIPPA pursuant to s. 3(1)(c) because they were created by or for the OPCC in relation to the exercise of the OPCC's functions under the *Police Act* concerning the investigation into the former police chief's conduct.[19]

[26] The applicant says that one of the records withheld under s. 3(1)(c) has already been made public on the VicPD website, so it should be disclosed.[20] The applicant also "respectfully submits that there is no necessity or good purpose served for withholding any records" under s. 3(1)(c).[21]

[27] The first two requirements of s. 3(1)(c) are clearly met. Schedule 1 of FIPPA defines "officer of the Legislature" as including the OPCC.[22] All the records involve the PCC acting on his own behalf, or through his counsel or

---

[17] Order 01-43, 2001 CanLII 21597 (BC IPC), paras. 13-14.
[18] Records at pp. 103, 121, 256-257, 272, 274-275, 300-301, 329, 334-335, 373, 412-413 and 425.
[19] Board's Schedule A at pp. 4, 13, 15-16, 34, 36-37, 40, 44-45, 52-53, 64 and 67.
[20] Applicant's submissions at para. 34.
[21] Applicant's submissions at para. 35.
[22] See also the *Police Act*, *supra* note 14 at s. 47(2).

delegate.[23] The emails and the letter were created by or for the OPCC in the sense that the OPCC either sent or received them.

[28] The third requirement is that the records must relate to the exercise of the OPCC's functions under an Act.

[29] Past orders distinguish between administrative and operational records. Only operational records relate to the exercise of an officer's functions under an Act and are outside the scope of FIPPA under s. 3(1)(c).[24] Operational records include case-specific records received or created during the course of opening, processing, investigating, mediating, settling, inquiring into, considering acting on or deciding a case. Administrative records do not relate to specific case files, but instead include records such as personnel and office management files.

[30] In my view, all the records in dispute under s. 3(1)(c) are operational records relating to the exercise of the OPCC's functions under the *Police Act*. As noted above, the OPCC's functions under that Act include overseeing complaints, investigations and proceedings concerning police conduct. Based on my review of the records, I am satisfied that the records withheld under s. 3(1)(c) relate to the exercise of the OPCC's oversight functions in connection with various aspects of the investigation into the conduct of the former police chief. These records are case-specific and not merely administrative.

[31] The applicant attached an email to his submissions that he says is publicly available on the VicPD website, but that the Board severed under s. 3(1)(c).[25] In my view, even if the email is the same record as one of the records in dispute, which I cannot confirm, the Board is not required to disclose it if s. 3(1)(c) applies. If the record is outside the scope of FIPPA, then the applicant has no right of access to it under FIPPA, the Board has no obligation to disclose it, and I have no jurisdiction to order the Board to disclose it, regardless of its status outside the FIPPA context. For these reasons, I do not see how this argument assists the applicant under s. 3(1)(c).

[32] I am also not persuaded by the applicant's argument that there is "no necessity or good purpose served for withholding any records" under s. 3(1)(c). In my view, the language of s. 3(1)(c) and past orders do not require considering whether applying s. 3(1)(c) is necessary or serves a good purpose. If s. 3(1)(c) excludes records from FIPPA, the purpose served is to facilitate the exercise of an officer of the Legislature's functions under an enactment.[26]

---

[23] The fact that the officer of the Legislature acted through a delegate or agent does not preclude the operation of s. 3(1)(c): see, e.g., Adjudication No. 1 (September 6, 1996) at para. 20 (available on OIPC website under "Adjudications").
[24] See e.g. Order F20-11, 2020 BCIPC 13 (CanLII) at paras. 14-16. All of the principles in this paragraph are drawn from Order F20-11 and the authorities cited therein.
[25] Applicant's submissions at para. 34.
[26] Order 01-43, *supra* note 17 at para. 25.

[33] I conclude that the records the Board is withholding under s. 3(1)(c) are outside the scope of FIPPA, so the applicant has no right of access to them under FIPPA.

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[34] The Board is also withholding information under s. 14. That section states 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.[27] The Board submits that legal advice privilege applies to the records in dispute. When I say "solicitor-client privilege" below, I mean legal advice privilege only.

[35] 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[28]);
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.[29]

[36] A communication does not satisfy this test merely because it was sent to or from a lawyer; the lawyer must be acting in a legal capacity.[30] That said, solicitor-client privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.[31] The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[32]

[37] Solicitor-client privilege obviously applies to communications in which the lawyer actually provides legal advice to a client. However, the privilege also applies more broadly to "all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal

---

[27] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[28] *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873 and 878-879.
[29] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.
[30] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81 ; *R. v. McClure*, 2001 SCC 14 at para. 36; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.
[31] *McClure*, *ibid* at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [*Camp*].
[32] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.

capacity."[33] Solicitor-client privilege applies to the "chain of exchanges" between lawyer and client and "not just the culmination of the lawyer's product or opinion".[34]

[38] The Board submits that solicitor-client privilege applies to all of the communications severed under s. 14. The Board provided the unsevered records for my review.

[39] The applicant does not specifically address whether solicitor-client privilege applies to the disputed communications. Instead, it argues that the Co-Chairs waived solicitor-client privilege. I discuss the applicant's arguments regarding waiver below. The first question is whether solicitor-client privilege applies at all.

Does solicitor-client privilege apply?

[40] Based on my review of the records, I find that the communications the Board is withholding under s. 14 are:

- emails and some attachments between one or both of the Co-Chairs and Lawyer A;[35]
- emails between one or more Board members and Lawyer B;[36]
- emails between the Co-Chairs only, one email between one of the Co-Chairs and an executive assistant, and emails between Board members only (internal client emails);[37]
- an email from Lawyer A to the DPCC, copying the Co-Chairs;[38] and
- a letter prepared by Lawyer A, provided to the Co-Chairs and then distributed to the Board members, and subsequent related emails.[39]

[33] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.
[34] *Camp*, *supra* note 31 at para. 40. See also paras. 43-45. This is commonly referred to as the "continuum of communications" in which the solicitor provides advice: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 33.
[35] Records at pp. 4, 6-7, 10, 47-50, 65-66, 69, 73, 112, 118-120, 151, 211, 219-220, 224-225, 234, 236-241, 246-247, 250, 255, 285, 287-291, 297-299, 337, 352-354, 359, 371, 405-406, and 438.
[36] Records at pp. 469 and 480-481.
[37] Records at pp. 228, 421, 429-431, 439, 482-483 and 513.
[38] Records at p. 254.
[39] Records at pp. 131-132, 136, 143-144 and 146-148.

Emails between Co-Chairs and Lawyer A

[41] I will first consider the emails between one or both of the Co-Chairs and Lawyer A.[40]

[42] I am satisfied based on the communications themselves and the Board's affidavit evidence that the Co-Chairs retained Lawyer A to advise them in their capacity as discipline authority under the *Police Act*. I find that Lawyer A was in a solicitor-client relationship with the Co-Chairs when the disputed communications were made. Since the emails are between one or both of the Co-Chairs and their lawyer, the first part of the test for privilege is met.

[43] I am also satisfied that the emails were intended to be confidential. The emails are exclusively between the Co-Chairs and their lawyer. No third parties were privy to the communications. This satisfies me that the Co-Chairs and their lawyer intended their communications to be confidential.[41]

[44] The final part of the test is whether the communications entail the seeking or providing of legal advice. Providing legal advice includes advising the client about the law, as well as about "what should be done in the relevant legal context".[42] Privilege attaches to legal advice, as well as to the factual information exchanged between lawyer and client for the purpose of obtaining legal advice.[43]

[45] Based on my review of the records, I am satisfied that all of the communications between the Co-Chairs and their lawyer meet the third part of the test and are privileged.[44] The communications involve the Co-Chairs and their lawyer seeking or providing legal advice, discussing legal options and strategy, or relaying and discussing facts relevant to determining what the Co-Chairs should do in the legal context of the internal investigation.

[46] Intermixed within some of the emails between the Co-Chairs and their lawyer is information relating to scheduling and meeting arrangements.[45] Solicitor-client privilege applies to all information, including "matters of an administrative nature", that a person must provide in order to obtain legal

---

[40] See *supra* note 35.
[41] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis, 2014) at para. 14-49.
[42] *Gower v. Tolko Manitoba Inc.,* 2001 MBCA 11 at para. 19.
[43] *Camp*, *supra* note 31 at para. 43.
[44] As noted, I have not considered the information withheld under s. 14 and another exception that the applicant does not dispute, such as s. 22. However, I note that even if I were to consider that information, I would have found it privileged under s. 14 for the reasons provided in relation to the information reviewed. For example, the Board applied ss. 14 and 22 to the information severed on pp. 244, 371-372, 408 and 476-477. It is apparent to me from those records that the severed information is privileged.
[45] For example, Records at pp. 6-7, 65-66, 112, and 224-245.

advice.[46] In my view, the information at issue here was necessary to the seeking and providing of legal advice and is privileged. Also, I am not satisfied that this information can be severed from the emails without any risk of revealing privileged information.[47]

[47] Finally, some of the emails between the Co-Chairs and their lawyer have attachments.[48] Not all attachments to solicitor-client emails are necessarily privileged.[49] However, I find that the attachments at issue here are privileged. One of them is a memorandum from Lawyer A to the Co-Chairs providing legal analysis, advice and recommendations. The other attachment is a draft letter that Lawyer A prepared and sent to the Co-Chairs. In these documents, Lawyer A is clearly providing legal advice to the Co-Chairs, so privilege applies.

Emails between Board members and Lawyer B

[48] The Board also claims privilege over emails between Board members and Lawyer B.[50]

[49] I am satisfied based on the communications themselves and the Board's affidavit evidence that the Board retained Lawyer B to advise them on the *Police Act* matter concerning the former police chief.

[50] I am also satisfied that the emails were intended to be confidential. With one exception, the emails are only between Board members and their lawyer. The exception is one email where a Board member also copied a third party, the mayor of Delta.[51] Subsequent emails satisfy me that this was entirely inadvertent. In my view, the subsequent emails establish, rather than negate, an intention of confidentiality.

[51] Finally, the disputed emails clearly relate to the seeking and providing of legal advice. In the emails, a Board member explicitly asks Lawyer B for legal advice on specific matters. I find that the emails are privileged.

Internal client emails

[52] In addition to the communications discussed above, the Board is also withholding information from emails that were not sent to or from a lawyer.[52] These emails are between the Co-Chairs only and between Board members

---

[46] *Camp*, *supra* note 31 at para. 44 citing *Descoteaux*, *supra* note 28 at 892-893.
[47] See *Lee*, *supra* note 34 at para. 40.
[48] Records at pp. 237-241 and 245 (I assume, based on the Board's Schedule A at p. 30, that the Board's marking on p. 245 is an error and that it is claiming privilege over this attachment).
[49] Order F18-19, 2018 BCIPC 22 (CanLII) at paras. 36-40 (and the cases cited therein).
[50] See *supra* note 36.
[51] Records at pp. 480-481.
[52] See *supra* note 37.

only. The Board submits that these emails are privileged because they would reveal legal advice.

[53] I find the emails between the Co-Chairs privileged.[53] Since the emails are only between the Co-Chairs, I am satisfied they were intended to be confidential. Privilege extends to "documents between employees which transmit or comment on privileged communications with lawyers."[54] The emails in question involve the Co-Chairs discussing legal advice from Lawyer A, legally relevant information provided to the Co-Chairs from Lawyer A, and what to do in the legal context of the internal investigation. In my view, the emails cannot be disclosed without any risk of revealing privileged information directly or through inference.

[54] The Board also claims privilege over part of an email from one of the Co-Chairs to the Board's executive assistant.[55] The Co-Chair tells the Board's executive assistant about an action the Co-Chair took. The Board submits that the withheld information is privileged because it is a confidential communication between Board members regarding legal advice "from the lawyer for the Discipline Authority of the Police Board".[56]

[55] In my view, the information in question here is privileged. I accept that, although the Co-Chairs and the Board had separate lawyers, the Board's executive assistant played a dual administrative role. In addition to assisting the Board as a whole, she acted as agent for the Co-Chairs in their capacity as discipline authority. Given the assistant's dual role, I accept that the information at issue here was shared in confidence. Further, I accept that the information would reveal the Co-Chairs' instructions to Lawyer A, so it is privileged.

[56] As for the emails between the Board members only, I am satisfied that they are also privileged. They involve Board members (including the Co-Chairs) discussing legal advice provided by Lawyer B. The Board members also discuss when to seek further legal advice on certain matters. These emails would reveal legal advice and are privileged.

Email from Lawyer A to the DPCC

[57] I turn now to the Board's claim of privilege over an email from Lawyer A (the Co-Chairs' lawyer) to the DPCC.[57] The Co-Chairs are copied on the email.

[58] The Board submits that the email is a "confidential communication between the members of the Police Board Discipline Authority and the Discipline

[53] Records at pp. 228 and 421.
[54] *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 12.
[55] Records at p. 439.
[56] Board's Schedule A at p. 69.
[57] Records at p. 254.

Authority's legal counsel".[58] The Board says that Lawyer A is providing legal advice to the Co-Chairs in this email.

[59] In my view, this email is not privileged. The contents of the email clearly show that Lawyer A is addressing, and providing explanation to, the DPCC, not the Co-Chairs. The mere fact that the Co-Chairs were copied on this email does not make it privileged. The DPCC is a third party (i.e., not the lawyer or the client) to the solicitor-client relationship between the Co-Chairs and their lawyer. In my view, the fact that the email was voluntarily sent to the DPCC, a third party, negates any solicitor-client confidentiality. I accept that the email is marked "Confidential". However, I find that this was because the email deals with a sensitive report relating to the internal investigation concerning the former police chief, not because it was intended to be confidential as between the Co-Chairs and their lawyer.

Lawyer A's letter and subsequent communications

[60] Finally, the Board is also claiming privilege over a letter and subsequent related emails.[59] Lawyer A prepared the letter and provided it to the Co-Chairs, who then distributed it to the other Board members, copying Lawyer A. One of the Board members responded, asking questions about the substance of the letter. Lawyer A provided answers via email to the Co-Chairs only. The Co-Chairs then forwarded Lawyer A's email to the other Board members.

[61] The Board submits that the letter and subsequent communications about it are privileged because, at the time the communications were made, Lawyer A was acting for the Board as a whole, and not just for the Co-Chairs as discipline authority.[60]

[62] In my view, the evidence does not support the Board's assertion that Lawyer A was acting for the Board as a whole when the letter and related communications were made. The records indicate to me that Lawyer A was acting for the Co-Chairs as discipline authority. The Board did not provide any persuasive evidence or explanation to establish otherwise. Accordingly, I do not accept that the letter and subsequent communications are privileged as between Lawyer A and the entire Board.

[63] I am, however, satisfied that the letter and Lawyer A's emails to the Co-Chairs are privileged as between Lawyer A and the Co-Chairs. The letter and Lawyer A's email responses were sent directly to the Co-Chairs, so they are solicitor-client communications. I also find, based on the contents of the letter,

[58] Board's Schedule A at p. 33.
[59] See *supra* note 39.
[60] Board's Schedule A at pp. 17-18.

that it contains a legal opinion and was intended to be confidential. The document is marked "Private & Confidential".

[64] As for the email containing the Board member's questions, I also find that it is privileged on the basis that it responds directly to the legal advice Lawyer A provided the Co-Chairs in the letter and would reveal that advice.

Conclusion

[65] To conclude, I find that solicitor-client privilege applies to all of the communications that the Board is withholding under s. 14, except for the email from Lawyer A to the DPCC.

Did the clients waive privilege?

[66] The next question is whether there was waiver of privilege. Solicitor-client privilege belongs to, and can only be waived by, the client.[61] To establish waiver, the party asserting it must show:

1. the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or
2. in the absence of an intention to waive, fairness and consistency require disclosure.[62]

[67] Generally, disclosure of privileged information to anyone other than the client and the client's lawyer (or their agents) constitutes waiver of the privilege.[63]

[68] The applicant submits that the Co-Chairs waived privilege over communications they sent to the OPCC in response to the OPCC's request for documents under the *Police Act*.[64] Also, as discussed above, the Co-Chairs disclosed Lawyer A's letter to the entire Board and Lawyer A's email responses to a Board member's questions. Since I found above that the entire Board was not Lawyer A's client at the time, the question of waiver arises in relation to these communications as well.

Lawyer A's letter and email responses

[69] The question here is whether the Co-Chairs evinced a voluntary intention to waive privilege over the letter and Lawyer A's responses by distributing those communications to the other Board members.

---

[61] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39.
[62] *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.
[63] *Malimon v. Kwok*, 2019 BCSC 1972 at para. 20.
[64] Applicant's submissions at paras. 19-33.

[70] In my view, there are two reasons why the Co-Chairs did not waive privilege in the circumstances.

[71] First, there is no waiver when a privileged document is provided to a party outside the solicitor-client relationship "on the understanding that it will be held in confidence and not disclosed to others".[65] This is because an understanding that the document is to be treated in confidence negates an intention to waive the privilege. The letter was distributed to the other Board members clearly marked "Private & Confidential". Further, the content of the Board member's email in response to the letter satisfies me that the other Board members understood the letter to be confidential and treated it as such.

[72] Second, I find that common-interest privilege applies.

[73] Common-interest privilege preserves solicitor-client privilege where a client discloses privileged information to a third party intending confidentiality and the third party has a common interest with the client.[66] Courts have applied common-interest privilege to legal opinions shared between parties to litigation with a common adversary, to commercial parties jointly interested in completing a transaction, and to parties in certain fiduciary, contractual or agency relations.[67] The privilege has also been applied in situations where a council or association shares a legal opinion with its members, or one member of an association shares a legal opinion with other members, and the parties share a common interest in the advice.[68]

[74] In my view, at the time the Co-Chairs disclosed the letter and Lawyer A's responses to the Board members, there was a common interest between the Co-Chairs and the Board members sufficient to support extending solicitor-client privilege to the Board members. I cannot disclose the nature of the legal advice provided by Lawyer A. However, it is apparent to me from the subject matter of that advice that it was clearly of common interest and mutual benefit to the Co-Chairs and the Board members.

[75] I conclude that the Co-Chairs did not waive privilege over the letter and Lawyer A's responses to the Board member's questions by sharing those communications with the entire Board.[69]

---

[65] *Malimon*, *supra* note 63 at para. 21.
[66] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510.
[67] *Maximum Ventures Inc.*, *ibid* at para. 10; *Pitney Bowes of Canada Ltd. v. Canada*, 2003 FCT 214**;** *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 24.
[68] Interim Order MO-3253-I, 2015 CanLII 68019 (ON IPC); Order PO-4065, 2020 CanLII 69344 (ON IPC); Order F15-61, 2015 BCIPC 67 (CanLII).
[69] Given this conclusion, the Board member's questions about Lawyer A's letter remain privileged for the reasons provided above.

Communications disclosed to the PCC

[76] As noted above, the applicant submits that the Co-Chairs waived privilege over communications they disclosed to the OPCC in response to the OPCC's request for documents under the *Police Act*.[70] The applicant says these communications were subsequently made public through a report prepared and published by the OPCC. The applicant argues that the OPCC's disclosure of information provided by the Co-Chairs shows that the communications are not privileged. The applicant points to examples in the OPCC report where the applicant says the OPCC disclosed communications between the Co-Chairs or their lawyer and the internal investigator retained by the Co-Chairs (Investigator). The applicant says the disclosure of these communications indicates an intention to waive privilege.

[77] The applicant also says that the Co-Chairs "both said publicly that their decisions and actions regarding the internal investigation were based on advice from their legal counsel."[71]

[78] In reply, the Board submits that "its sharing of documents to the OPCC did not constitute a voluntary waiver of its solicitor-client privilege because the disclosure was made on a confidential and common interest basis."[72]

[79] It is not clear to me from the evidence whether the Co-Chairs actually disclosed privileged information to the OPCC. The contents of certain disputed records indicate to me that the Co-Chairs asserted, rather than waived, solicitor-client privilege over records provided to the OPCC.[73]

[80] At any rate, when a statute compels disclosure of privileged information, no waiver occurs.[74] The OPCC requested documents from the Co-Chairs pursuant to s. 175(5) of the *Police Act*, which *requires* internal discipline authorities to provide the OPCC with documents upon request. If the Co-Chairs disclosed privileged information to the OPCC in response to the OPCC's request, the disclosure was not a voluntary waiver, given the mandatory nature of s. 175(5).

[81] The applicant mentions emails between the Co-Chairs or their lawyer and the Investigator, the contents of which were disclosed in an OPCC report. Those emails are not in dispute in this inquiry and they are clearly not privileged

---

[70] Applicant's submissions at paras. 19-33.
[71] Applicant's submissions at para. 22.
[72] Board's reply submissions at para. 21.
[73] Records at pp. 334, 353-354, 412 and 438-439.
[74] *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 at paras. 41-42, reversed in part 2007 FCA 87 (but not on this point); *Stevens v. Canada (Prime Minister)*, 1997 CanLII 4805 (FC), affirmed 1998 CanLII 9075 (FCA).

because the Investigator was not the Co-Chairs' lawyer, so I do not see how they assist the applicant in establishing waiver.[75]

[82] The applicant also says an OPCC report quotes the contents of an email between the Co-Chairs, but the Board severed that information under s. 14.[76] I cannot confirm whether the information in the OPCC report is in a responsive record because that would reveal information in dispute. In any case, only the client can waive privilege. In the circumstances, I am not satisfied that what the OPCC did with information the Co-Chairs were required to provide to it establishes that the Co-Chairs voluntarily waived privilege over the information provided.

[83] Further, the applicant notes that the Co-Chairs mentioned publicly that their decisions were based on legal advice. This does not establish waiver. It is well-established that a client does not waive privilege by disclosing only the mere fact of receiving legal advice and their reliance on it.[77] This is not a case of disclosing the actual advice or relying on the advice to advance a claim or defence in the context of litigation.

[84] In my view, it is not necessary to consider common-interest privilege in relation to records provided to the OPCC. I am satisfied, based on the reasons given above, that the Co-Chairs did not waive solicitor-client privilege.

Implied waiver based on fairness and consistency

[85] As noted above, waiver may also occur, in the absence of an intention to waive, where fairness and consistency require disclosure. Implied waiver occurs where "a party does not explicitly waive the privilege but takes some action that is inconsistent with maintaining the privilege."[78] For example, a party may impliedly waive privilege by putting legal advice in issue in a proceeding or by making selective disclosure of evidence.[79]

[86] I do not find any implied waiver based on fairness and consistency in this case. Based on my review of the evidence, I am satisfied that the Co-Chairs' and the Board's actions were consistent with maintaining confidentiality over the information in dispute under s. 14. The applicant does not point to any actions the Co-Chairs or the Board took that are inconsistent with maintaining privilege, other than those I already discussed and dealt with above.

---

[75] The same reasoning applies to the example in the applicant's submissions at para. 31.
[76] Applicant's submissions at para. 28.
[77] *Merritt v. Canada (Attorney General)*, 2020 BCSC 1887 at paras. 39 and 44; Order F13-10, 2013 BCIPC 11 at para. 54 (and the authorities cited therein).
[78] Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at s. 7.104, cited in *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38 at para. 50, leave to appeal refused 2020 CanLII 13153 (SCC).
[79] *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at para. 50.

[87] In the result, I find that the Board is authorized to withhold the information it severed under s. 14, except for the email from Lawyer A to the DPCC.[80]

SECTION 13 – ADVICE OR RECOMMENDATIONS

[88] The Board is also withholding information under s. 13(1). That section states that the head of a public body must 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.[81]

[89] The principles that apply to the s. 13 analysis are well-established and include the following:

1. Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[82]

2. Recommendations involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised" and can be express or inferred.[83]

3. "Advice" has a broader meaning than "recommendations".[84] Advice includes providing an evaluative analysis of options or an opinion that involves exercising judgment and skill, even if the opinion does not include a communication about future action.[85]

4. The compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process. Thus, s. 13(1) applies to factual information compiled and selected by the expert using his or her expertise, judgment and skill to provide explanations necessary to the public body's deliberative process.[86]

---

[80] Common-interest privilege is not relevant to the email from Lawyer A to the DPCC because I found above that privilege does not apply to it at all.
[81] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 43-44 [*John Doe*]; Order F15-61, 2015 BCIPC 67 (CanLII) at para. 28.
[82] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.
[83] *John Doe*, *supra* note 81 at paras. 23-24.
[84] *John Doe*, *ibid* at para. 24.
[85] *John Doe*, *ibid* at para. 26; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras. 103 and 113 [*College*].
[86] *College*, *ibid* at para. 111; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

[90] The first step in the s. 13 analysis is to consider whether the disputed information is advice or recommendations under s. 13(1). The second step is to consider whether the disputed information falls within s. 13(2), which sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1).[87]

[91] The applicant made a one-paragraph submission on s. 13. As I understand it, the submission advances an argument relating to the Board's exercise of discretion. I discuss that argument below, after the analysis under ss. 13(1) and 13(2).

Section 13(1)

[92] The Board submits that the information withheld under s. 13(1) is, or would reveal, advice or recommendations. I have considered the Board's explanations of the nature of the various disputed records and its characterization of the information in dispute.

[93] Where the Board is withholding information under ss. 13 and 14, and I have already found that s. 14 applies, I have not considered whether s. 13 also applies.

[94] I find that some of the withheld information is not, and would not reveal, advice or recommendations under s. 13(1).[88] This information includes meeting topics and general topics of advice,[89] factual updates or statements,[90] and administrative details and directions.[91] Past orders establish that this kind of information is not advice or recommendations under s. 13(1).[92] Further, some of the withheld information includes language preceding advice or recommendations, such as "I recommend that …".[93] This information is not itself advice or recommendations and would not reveal advice or recommendations. I am not persuaded that disclosing this information would undermine any of the Co-Chairs' or the Board's deliberations.

[95] As for the balance of the information withheld under s. 13(1), I am satisfied that it is advice or recommendations. It involves Board members setting out and assessing options, providing opinions, and deliberating about the various

[87] Section 13(3) does not apply in this case because the disputed information has not been in existence for 10 or more years.
[88] Parts of the information withheld under s. 13(1) in Records at pp. 43, 117, 128, 295, 308, 320, 325, 377, 379, 391, and 400.
[89] Records at pp. 43 and 128.
[90] Records at pp. 43, 117, 128, 295, and 308.
[91] Records at pp. 117, 128 and 295.
[92] Order F19-27, 2019 BCIPC 29 (CanLII) at para. 29; Order F20-44, 2020 BCIPC 53 (CanLII) at para. 29.
[93] Records at pp. 308, 320, 325, 377, 379, 391 and 400.

decisions they had to make throughout the *Police Act* matter concerning the former police chief.[94] Some of the information consists of the Board members' revisions and edits on draft statements.[95] In my view, all of this information is protected by s. 13(1) because it is part of the Board's and the Co-Chairs' deliberative processes.

[96] There is also some disputed information created by public affairs and media relations experts, including draft statements, that I find the Board considered in making media-related decisions.[96] I find that this information is advice under s. 13(1). It involves the public affairs and media specialists exercising their professional skill and judgment to advise the Board and the Co-Chairs on the public affairs and media-related aspects of the *Police Act* matter.

Section 13(2)

[97] As noted above, s. 13(2) sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1). The Board submits that s. 13(2) does not apply to any of the withheld information. The applicant did not make submissions on s. 13(2).

[98] I have considered the disputed information in light of s. 13(2). I do not see how any of the subsections in s. 13(2) apply to the disputed information, particularly without more from the parties.

Exercise of discretion

[99] The applicant's entire submission regarding s. 13 is as follows:

> The Public Body has severed documents from the records that it has published elsewhere and are available to the public through a Google search. Public Body document 117 is a letter from Mayors Desjardins and Helps to Police Board member Peter Ryan. This document has been published on the Victoria Police Department website (See Exhibit 5: Response to Peter Ryan's letter page 1 on VicPD website June 19, 2019.) The Applicant respectfully submits to the Adjudicator that records that have already been made public (that is, they can be found through a Google search or in a court record) be identified by the Public Body and then released.[97]

[100] In reply, the Board submits that if third parties have disclosed disputed records and information, this should not impact its ability to refuse disclosure.

---

[94] Records at pp. 22, 43, 50, 115, 117, 294-296, 308, 320, 325, 333, 365, 377, 379, 381-388, 391, 395-396, 400, 404, 411, 417, 428, 482, 485, 489-490, 492, 504, 508, and 525.
[95] For example, Records at pp. 115, 308, 383-387, 395-396, 411 and 428.
[96] For example, Records at pp. 222, 230, 232, 436-437, 473, 494, 500-501, 505-506, 531-532, 535-537 and 541-543.
[97] Applicant's submissions at para. 37.

The Board says it is unreasonable for it to have to "search the internet and identify records which have been disclosed by a party other than the Police Board."[98] The Board submits that if the applicant already has access to certain records, then there is no need to request them under FIPPA and pursue an inquiry.

[101] As I understand it, the applicant's argument pertains to the Board's exercise of discretion under s. 13. Section 13(1) is a discretionary exception to disclosure. This means that even if the disputed information would reveal advice or recommendations and s. 13(2) does not apply, the Board may still decide to disclose the information (for the sake of transparency, for example). The Board must show that it actually exercised its discretion. It must also show that it exercised its discretion appropriately, which means not in bad faith, for no improper purpose, and by considering all relevant factors and no irrelevant factors.[99] If the Board does not meet these requirements, the Commissioner can order it to exercise or re-exercise its discretion.

[102] I understand the applicant to be arguing that the Board improperly exercised its discretion to withhold at least one record under s. 13 because that record is publicly available. The applicant seeks an order requiring the Board to re-exercise its discretion to withhold the information it withheld under s. 13 taking into consideration the public availability of the disputed information.
[103] I decline to make the order the applicant seeks. It is not clear to me on the evidence whether the document the applicant provided was publicly available at the time the Board made its access decision. Accordingly, I am not satisfied that it improperly exercised its discretion in relation to that record. At any rate, even if the Board failed to identify a publicly available record, I am not satisfied that this alone establishes improper exercise of discretion. The Board provided sworn evidence, which I accept, that satisfies me that it exercised its discretion and, in doing so, was alive to the issue of publicly available records.[100] I am not persuaded that the Board failed to consider a relevant factor or otherwise exercised its discretion improperly.

Conclusion re s. 13

[104] I found above that a relatively small amount of the information the Board is withholding under s. 13(1) is not advice or recommendations. The Board is not authorized to withhold that information. However, I accept that disclosing the balance of the disputed information would reveal advice or recommendations and none of the subsections in s. 13(2) apply. I conclude that the Board is authorized to withhold that information under s. 13(1). Finally, I am satisfied that the Board

[98] Board's reply submissions at para. 17.
[99] *John Doe*, *supra* note 81 at para. 52.
[100] Affidavit #1 of DT at paras. 11 and 17.

exercised its discretion to disclose the information withheld under s. 13(1) and that it did so appropriately.

SETTLEMENT PRIVILEGE

[105] The Board is only withholding information from two pages of the records on the basis of settlement privilege.[101] The Board is also withholding this information under s. 14 and I found above that solicitor-client privilege applies. Given this finding, I do not consider it necessary to also consider settlement privilege.[102]

CONCLUSION

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

1. I confirm the Board's decision that the records withheld under s. 3(1)(c) are outside the scope of FIPPA.
2. I confirm in part the Board's decisions to refuse to disclose the information withheld under ss. 13 and 14.
3. The Board is not authorized to refuse to disclose:
    a) the information severed under s. 14 on page 254 of the Records; and
    b) the information severed under s. 13 that I have highlighted on pages 43, 117, 128, 295, 308, 320, 325, 377, 379, 391, and 400 of a copy of the Records that will be provided to the Board with this order.[103]
4. I require the Board to give the applicant access to the information specified in subparagraph 3 above. The Board must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

---

[101] Records at pp. 371-372.
[102] If it had been necessary to do so, I would have found that the Board properly withheld the disputed information based on settlement privilege. It is clear to me from the contents of the records that the information meets the test set out in Order F20-21, 2020 BCIPC 25 (CanLII) at para. 58.
[103] To the extent there are any duplicates that I have not highlighted, I intend my highlighting on one record to apply to any duplicate of that record.

Pursuant to s. 59(1) of FIPPA, the Board is required to comply with this order by July 23, 2021.

June 10, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F19-77773