Order F21-50

MINISTRY OF HEALTH

Ian C. Davis
Adjudicator

October 21, 2021

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health (Ministry) for access to records relating to himself held by the Medical Services Plan and the Medical Services Commission. The Ministry released the responsive records to the applicant, but withheld some records and information under several exceptions to disclosure under FIPPA. The adjudicator decided that the Ministry is authorized to withhold the information in dispute under s. 14, some of the information in dispute under s. 13(1), and none of the information in dispute under ss. 15(1) and 17(1). The adjudicator also decided that the Ministry is required to withhold some of the information in dispute under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 14, 15(1)(c), 17(1), 22(4), 22(3)(b), 22(3)(d), 22(3)(f), 22(2)(f), 22(2)(h) and 22(1).

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Health (Ministry) for access to records relating to himself, in his role as a physician, held by the Medical Services Plan (MSP) and the Medical Services Commission (Commission). The access request relates to an audit the Ministry and the Commission conducted regarding the applicant's MSP billings.

[2] The Ministry released the responsive records to the applicant, but withheld some records and information under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), 15(1) (disclosure harmful to law enforcement), 17(1) (disclosure harmful to the financial or economic interests of a public body) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.

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

PRELIMINARY MATTERS

Issues and allegations outside the scope of this inquiry

[4] The applicant makes various allegations in his submissions, many of which relate to the audit. For example, the applicant accuses government employees of perjury, falsification of documents, conflict of interest, breach of contract and abuse of process.[1] The applicant also invokes s. 74 of FIPPA, which makes it an offence to, for example, wilfully mislead the Commissioner.[2] In addition, the applicant makes a complaint about an alleged breach of privacy.[3]

[5] In reply, the Ministry submits that the applicant's submissions "go well beyond the issues and the scope of this inquiry, insofar as they are primarily an expression of his grievances" relating to the audit.[4] The Ministry says the applicant's allegations are "unfounded, inflammatory, unwarranted, unsubstantiated, and, for the purposes of adjudicating the matters at issue in this inquiry, should be disregarded."[5]

[6] I can tell from the applicant's submissions that he strongly objects to various aspects of the audit process and the Ministry's conduct generally. These matters are part of the context for this inquiry and I have considered the applicant's submissions accordingly.

[7] However, my only task in this inquiry is to dispose of the issues stated in the Investigator's Fact Report and the Notice of Inquiry. Those issues are limited to whether certain FIPPA exceptions to disclosure apply to the information in dispute. In general, the OIPC will not consider new issues at the inquiry stage unless the OIPC grants permission.[6] In my view, the applicant raises new issues that go well beyond those stated in the Fact Report and the Notice of Inquiry. He did not seek, and the OIPC did not grant, permission to add those issues, so

[1] Applicant's submissions at pp. 9-10.
[2] Applicant's submissions at pp. 15-16.
[3] Applicant's submissions at p. 24.
[4] Ministry's reply submissions at p. 1.
[5] Ministry's reply submissions at p. 1.
[6] See, e.g., Order F16-30, 2016 BCIPC 33 (CanLII) at para. 13.

I decline to consider them.[7] At any rate, I clearly do not have jurisdiction over the applicant's various complaints regarding the audit process. [8]

Information no longer in dispute under s. 22(1)

[8] Some of the information the Ministry is withholding under s. 22(1) relates to third-party patients, specifically their names, personal health numbers (PHNs), dates of birth and dates of medical service.[9] The applicant states that he does "not seek the names, PHNs, birth dates, or dates of medical services" in the records.[10]

[9] Given the applicant's position, I conclude that the third-party patients' personal information is not in dispute in this inquiry and it is not necessary for me to decide whether the Ministry is required to withhold it under s. 22(1).[11] However, there is other information in dispute under s. 22(1) that I will analyze below.

Applicant's "Master Agreement" argument

[10] The applicant makes several references in his submissions to a "Master Agreement" between government, the Commission and the Doctors of BC.[12] The applicant argues that this agreement requires disclosure of the disputed information regardless of any exception to disclosure in FIPPA.

[11] I am not persuaded by this argument. I am not aware of any legal authority to establish that an agreement of this kind effectively overrides FIPPA. In general, a public body is not permitted to contract out of its rights and responsibilities in FIPPA.[13] The agreement may have applied to the underlying

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[7] The applicant raises many detailed points in his submissions. I have considered them all. However, I cannot, and am not required, to discuss them all: see, for example, *White v. The Roxy Cabaret Ltd.*, 2011 BCSC 374 at paras. 40-41. I have discussed what I consider to be the applicant's main arguments relevant to the FIPPA issues. I am satisfied that the points I have not explicitly addressed do not change my reasoning or the results.

[8] I also do not have jurisdiction to address s. 74 of FIPPA. The Attorney General prosecutes offences under that section and the courts decide those matters: Order F21-04, 2021 BCIPC 4 (CanLII) at para. 7. As for the applicant's privacy complaint, he can pursue it through the OIPC complaint process, which is a different procedure than this inquiry.

[9] Based on my review of the records and the Ministry's submissions, this information is the information the Ministry withheld under s. 22(1) in the Records at pp. 10-11, 44-49, 57-63, 72, 81, 96, 116-117, 138-156, 200-202, 206, 208, 210-212, 214, 263-265, 266-290, 292 and 301-304. Some of this information is patient initials, rather than full patient names. Given that the applicant is not seeking the full names, I am satisfied he is also not seeking the initials.

[10] Applicant's submissions at p. 19.

[11] Even if the patient information were in dispute, I would have found that the Ministry is required to withhold it under s. 22(1) for essentially the same reasons as provided in Order F20-12, 2020 BCIPC 14 (CanLII).

[12] Applicant's submissions at pp. 3, 6-9, 14-15, 18, 20, 28 and 34.

[13] Order 00-47, 2000 CanLII 14412 (BC IPC).

audit process, but this inquiry is a different process. I am not persuaded that the agreement overrides FIPPA and dictates a particular result in this inquiry.

ISSUES

[12] The issues I will decide in this inquiry are:

1. Is the Ministry authorized to refuse to disclose the information it withheld under ss. 13(1), 14, 15(1) and 17(1) of FIPPA?

2. Is the Ministry required to refuse to disclose the information it withheld under s. 22(1) of FIPPA?

[13] The burden of proof is on the Ministry in relation to ss. 13(1), 14, 15(1) and 17(1).[14] However, the applicant bears the burden to show that it would not be an unreasonable invasion of a third party's personal privacy to disclose the information the Ministry is withholding under s. 22(1).[15]

BACKGROUND

[14] The applicant is a physician.[16] He is enrolled with MSP, BC's public health insurance program, and can bill MSP for medical services provided to patients. As noted, the information in dispute in this case relates to an audit of the applicant's MSP billings.

[15] MSP is managed by the Commission in accordance with the *Medicare Protection Act* and related regulations. The Commission's function is to facilitate reasonable access to quality medical care, health care and prescribed diagnostic services for the residents of British Columbia. The Commission performs this function through MSP on behalf of the government of British Columbia.

[16] The Commission has the legal authority to audit practitioners who bill MSP for their services. The Commission delegates its auditing authority to the Audit and Inspection Committee (Committee). The Committee decides when a practitioner should be audited. It makes these decisions based on recommendations from the Billing Integrity Program, which is part of the Ministry. The Billing Integrity Program monitors and investigates billing patterns and

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[14] FIPPA, s. 57(1).

[15] FIPPA, s. 57(2). However, the Ministry has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

[16] The information in this background section is based on the evidence, which in general I accept, in Affidavit #1 of the Ministry's Senior Director, Audits (Senior Director) at paras. 1-36. I recognize that the applicant takes issue with some of the facts as stated in the Ministry's evidence. I have attempted to set out only the uncontested facts that do not affect my reasoning below.

practices of medical practitioners to detect and deter inappropriate and incorrect billing of MSP.

[17] The Billing Integrity Program also provides audit services to the Commission. Once the Committee decides a practitioner should be audited, it informs the practitioner and instructs the Billing Integrity Program to appoint a senior auditor and an independent medical inspector to conduct the audit. The Billing Integrity Program prepares a report of the audit's findings and submits it to the Committee. The Committee then reviews the report and makes a recommendation to the Commission about whether to seek recovery of funds from the practitioner or have the practitioner de-enrolled from MSP, or both.

[18] In 2014, the Billing Integrity Program recommended, and the Committee agreed, that the applicant's practice should be audited for a five-year period. The Billing Integrity Program conducted an on-site audit of the applicant's billing practices in 2017 and prepared an audit report (audit). In June 2018, the Committee approved the audit report and recommended to the Commission that action be taken to recover funds from the applicant and that he be considered for de-enrollment from MSP.

[19] On September 19, 2018, the applicant made the access request at issue in this inquiry.

[20] In November 2018, the Commission notified the applicant that, based on the audit, it was initiating proceedings under the *Medicare Protection Act* to recover funds from him and seek his de-enrollment from MSP. I will refer to this stage of the matter between the applicant and the Commission, together with the audit itself, as the "audit proceedings".

[21] In September 2020, after some rescheduling, an oral hearing regarding the applicant's MSP billing practices proceeded before a panel of the Commission. The panel has not yet issued its decision.

RECORDS IN DISPUTE

[22] There are 691 pages of records in the package before me. Many of the records have been disclosed to the applicant in their entirety. Based on my review of the records and the Ministry's evidence, I find that the records in dispute are emails, letters, spreadsheets, memoranda, reports, a general audit binder, an audit plan, contractor claim forms, draft Committee meeting minutes and various other kinds of records relating to the audit proceedings.

SOLICITOR-CLIENT PRIVILEGE

[23] The Ministry is withholding some of the disputed information under s. 14. That section says 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.[17] The Ministry only claims legal advice privilege. When I refer to "solicitor-client privilege" or "privilege" below, I mean legal advice privilege only.

[24] 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[18]);
2. that entails the seeking or giving of legal advice; and
3. that is intended by the solicitor and client to be confidential.[19]

[25] The Ministry submits that it has satisfied this test for the information it is withholding under s. 14 (s. 14 information).[20]

[26] The applicant submits that s. 14 does not apply for various reasons that I discuss below, including that the future crimes and fraud exception applies and that privilege has been waived. The concept of "waiver" is a consistent theme throughout the applicant's submissions and I consider it at various points below.

Is the Ministry's evidence sufficient to assess privilege?

[27] The Ministry did not provide the s. 14 information for my review. Instead, it provided an affidavit and two records tables as evidence to support its privilege claims. The affidavit is sworn by KD, the supervising solicitor of the Justice, Health and Revenue Group of the Legal Services Branch (LSB) of the Ministry of Attorney General.

[28] KD deposed that:

- the Justice, Health and Revenue Group includes lawyers who provide legal services to the Commission, the Committee, the Billing Integrity Program and employees of the Ministry;
- these lawyers report directly to KD (or indirectly through a deputy supervisor) and KD provides them with supervision, guidance and advice;
- KD reviewed the applicant's access request, examined all of the records and information in dispute under s. 14, and discussed the s. 14

[17] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[18] *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873 and 878-879 (cited to S.C.R.).
[19] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837.
[20] Ministry's initial submissions at paras. 43-72.

information "with LSB legal counsel responsible for providing legal advice to the Ministry and [Commission] clients";
- the s. 14 information relates to legal advice that LSB lawyers provided to Ministry and Commission clients regarding the audit, "as well as initial steps in relation to anticipation of a potential hearing in relation to the audit"; and
- in KD's opinion, all of the s. 14 information "is or reveals confidential communications in relation to legal advice between LSB, and the Ministry (and/or [the Commission]) and is the subject of solicitor client communication."[21]

[29] KD also provided further affidavit evidence describing the specific communications in dispute.[22]

[30] In addition, KD's affidavit includes two records tables as exhibits.[23] The entries in the tables provide the date associated with each record and a brief description, including the type of record (e.g., email or memorandum) and the names of the senders and recipients associated with the record. One table provides this information for all of the records in dispute under s. 14. The other table provides this information in chronological order for a specific series of emails sent on May 3-4, 2017.

[31] The applicant challenges the sufficiency of the Ministry's s. 14 evidence. He argues that KD's evidence is inadequate because KD is a supervising lawyer and not one of the lawyers actually involved in the disputed communications. The applicant says: "A proper method to affirm any client-solicitor relationship is to provide an affidavit from the specific relationship parties."[24]

[32] I agree with the applicant that, as a general rule, it is preferable for a public body to provide evidence from the lawyer directly involved in the disputed communications. However, claims of solicitor-client privilege turn on their particular facts and the specific communications in dispute.[25] In this case, it is clear to me from the Ministry's evidence that there was more than one LSB lawyer involved in the disputed communications. In these circumstances, I consider it acceptable for the Ministry to have submitted an affidavit by a supervising lawyer who reviewed all the communications.

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[21] Affidavit #1 of KD at paras. 1-12 and 30.
[22] Affidavit #1 of KD at paras. 13-29.
[23] There is a third table attached to Affidavit #1 of the Senior Director, which corresponds to all of the records in dispute in this inquiry.
[24] Applicant's submissions at p. 26.
[25] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para. 88 [*Minister of Finance*].

[33] Overall, I am satisfied that the Ministry's evidence is sufficient for me to determine whether privilege applies to the s. 14 information. KD's evidence is based on her review of the records and discussions with the specific LSB lawyers involved. I am satisfied that KD's evidence, including the tables, is sufficiently detailed and specific to determine whether solicitor-client privilege applies to the s. 14 information.

Does solicitor-client privilege apply?

[34] Solicitor-client privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.[26] In assessing privilege, my task "is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege."[27]

[35] Not all communications sent to or from a lawyer are privileged. That said, solicitor-client privilege applies 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".[28] The privilege applies to the "chain of exchanges" between lawyer and client and "not just the culmination of the lawyer's product or opinion".[29] Privilege generally applies to entire communications and not just the legal advice in the communications.[30]

[36] I accept KD's evidence that LSB lawyers in the Justice, Health and Revenue Group provided legal advice to the Ministry (including the Billing Integrity Program) and the Commission (including the Committee) regarding the audit proceedings.[31] In my view, this establishes a solicitor-client relationship between the LSB lawyers and their clients, the Ministry and the Commission.[32] Given the close operational connection between the Ministry and the Commission outlined above, it makes sense to me that they were both LSB's clients in relation to the audit proceedings.

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[26] *R. v. McClure*, 2001 SCC 14 at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [*Camp*].
[27] *Minister of Finance*, *supra* note 25 at para. 86.
[28] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.
[29] *Camp*, *supra* note 26 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.
[30] *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.), cited in Order PO-4106, 2021 CanLII (ON IPC) at para. 34.
[31] Affidavit #1 of KD at paras. 2 and 7-10.
[32] I recognize that the individuals involved in the audit proceedings include not only Ministry employees, but also independent physicians working as contractors (Affidavit #1 of TM at paras. 13, 15 and 18). In my view, this does not detract from the solicitor-client relationship because I am satisfied that, in relation to the disputed communications, these individuals were acting in their capacities as representatives or agents of the Ministry or the Commission.

[37] I accept the Ministry's descriptions of the records as set out in KD's evidence and the records tables. I see no reasonable basis to reject this sworn evidence. Based on the descriptions, I find the records in dispute under s. 14 are:

- emails and attachments between LSB legal counsel and representatives of the Ministry and/or the Commission (solicitor-client emails);[33]
- emails and attachments between representatives of the Ministry and/or the Commission (internal client emails);[34] and
- handwritten and transcribed notes of a Billing Integrity Program senior auditor (auditor notes).[35]

[38] I will address each of these categories of records separately.

Solicitor-client emails

[39] Most of the communications the Ministry is withholding under s. 14 are emails and attachments between LSB legal counsel and representatives of the Ministry and/or the Commission. As noted, I accept that the Ministry and the Commission were LSB's clients in relation to the audit proceedings. As a result, these communications are between solicitor and client, so they satisfy the first part of the privilege test.

[40] The next question is whether the solicitor-client emails were intended to be confidential. KD deposes that all of the s. 14 information was "communicated with the intention that the information was provided and received in confidence."[36] KD says the audit occurred in a confidential manner as required by the *Medicare Protection Act* and all of the communications were solely between LSB legal counsel and their client representatives.

[41] I am satisfied that the solicitor-client emails were intended to be confidential. I accept KD's sworn evidence that they were. Further, I can see from the descriptions in the records tables that the communications were only between LSB lawyers and their clients. This persuades me that the communications were intended to be confidential because they were not disclosed to anyone outside the solicitor-client relationship.

[42] The final question is whether the solicitor-client communications entail the seeking or giving of legal advice. KD says the communications relate to "legal advice and analysis of legal research" that LSB lawyers gave to the Ministry and

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[33] Records at pp. 4, 325-329, 330, 342, 347-348, 354-356, 357-359, 360-362, 363-366, 367-369, 374-377, 378-382, 383, 427-428, 429-434, 436-437, 440-444, 446-468, 483-488, 498-499, 500-501, 502-504, 505-507, 508-510, 511-516, 548-551, 556-559, 568, 613-614 and 673.
[34] Records at pp. 1-3, 370-373, 412, 489-493, 538-539, 543-547, 552-555 and 560-563.
[35] Records at pp. 123-124.
[36] Affidavit #1 of KD at para. 12.

the Commission regarding the audit and "steps in relation to anticipation of a potential hearing in relation to the audit."[37]

[43] I am satisfied that the solicitor-client emails entail the seeking and giving of legal advice. I find KD's evidence persuasive, given the context. The audit proceedings relate to the legal requirements of the *Medicare Protection Act*. It makes sense to me that legal issues would have arisen in this context. I accept that the Ministry and the Commission sought advice on such issues. In my view, the s. 14 information is the kind of typical back-and-forth exchange of legal instructions, advice and discussion that falls squarely within the protection of solicitor-client privilege.

[44] Some of the solicitor-client emails involve the Ministry or the Commission initiating contact with LSB and seeking advice. For example, one record is described as an email "with request for legal assistance."[38] The applicant argues that a "request for legal assistance does not attract solicitor-client privilege" because there is no solicitor-client relationship yet and no "advice per se."[39] I am not persuaded by this argument. It is well-established that an initial request to a lawyer for legal advice is protected by solicitor-client privilege even if the lawyer has not yet agreed to represent the potential client and there is no retainer yet in place.[40]

[45] Finally, the solicitor-client emails include some attachments.[41] Not all attachments to solicitor-client emails are necessarily privileged, but they are if they contain or would reveal legal advice.[42] Based on the table descriptions, I find that the attachments are documents providing instructions, relevant background information and legal research or opinions. In my view, the legal research and opinions are privileged because they constitute legal advice and the instructions and background information are privileged because they would reveal through inference the legal advice sought and provided.

Internal client emails

[46] Some of the s. 14 information is in emails exclusively between representatives of the Ministry, the Commission or both. For example, one such record is an email from a Ministry medical consultant to the then-Director of the Billing Integrity Program. The Ministry describes the email as "containing a reference to specific legal advice being sought from LSB legal counsel."[43] The Ministry is withholding the reference to the legal advice under s. 14.

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[37] Affidavit #1 of KD at paras. 9-10.
[38] Affidavit #1 of KD at Exhibit "B" [Section 14 Records Table], p. 1 (Item 6).
[39] Applicant's submissions at p. 26.
[40] *Descôteaux*, *supra* note 18 at pp. 876-877. See also *Lee*, *supra* note 29 at para. 35.
[41] For example, Records at pp. 4, 325-329, 330, 446-468 (11 of these pages) and 484-488.
[42] Order F18-19, 2018 BCIPC 22 (CanLII) at paras. 36-40 (and the cases cited therein).
[43] Section 14 Records Table, *supra* note 38 at p. 3 (Item 17).

[47] I find that the s. 14 information in the internal client emails is privileged. Privilege extends to "documents between employees which transmit or comment on privileged communications with lawyers."[44] I accept the Ministry's evidence that the communications in question here involve the clients discussing legal advice provided by LSB. In my view, this information cannot be disclosed without any risk of revealing privileged information directly or through inference.

[48] Although not explicit, the Ministry's records tables indicate that the internal client emails include some attachments. As I understand the evidence, these attachments include the legal advice attached to the solicitor-client emails. For the reasons already provided in relation to the solicitor-client emails, I am satisfied that the attachments to the internal client emails are also privileged.

Auditor notes

[49] Finally, the Ministry claims privilege over a "[r]eference to legal advice" in the transcribed and handwritten notes of a senior Billing Integrity Program auditor.[45] KD deposed that this information is privileged because it is confidential and refers to legal advice.[46]

[50] I accept KD's sworn evidence. I find that this portion of the auditor's notes would reveal, directly or through inference, legal advice provided by LSB. Solicitor-client privilege protects the content of communications between lawyers and their clients.[47] Accordingly, I am satisfied that this information is privileged even though it appears in client notes rather than solicitor-client correspondence.

Does the future crimes and fraud exception to privilege apply?

[51] The applicant submits:

> I must raise another issue however that would deny client-solicitor privilege in any regard and that is the likelihood and the need to explore the furtherance of the fact that each of these lawyers was involved in a fraud, a potential extortion, and several other criminal abuses (breach of privacy, perjury, malicious prosecution, among others). When there is a reasonable likelihood that a lawyer has participated in a criminal activity, that correspondence leading to the criminal activity must be released. There is no client-solicitor privilege that protects either the client or the solicitor….[48]

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[44] *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 12.
[45] Section 14 Records Table, *supra* note 38 at p. 1 (Item 3).
[46] Affidavit #1 of KD at paras. 12 and 15.
[47] *Maranda v. Richer*, 2003 SCC 67 at para. 22; *R. v. Amsel*, 2017 MBPC 52 at para. 23; Order F20-19, 2020 BCIPC 22 (CanLII) at para. 24.
[48] Applicant's submissions at p. 36.

[52] Although he does not expressly say so, I understand the applicant is invoking the "future crimes and fraud" exception to privilege. That exception states that privilege does not apply to solicitor-client communications which are in themselves unlawful or were made to obtain legal advice for the purpose of committing a crime.[49] The exception is "rare" and "extremely limited in nature".[50]

[53] The exception applies if the applicant demonstrates that:

- the challenged communications relate to proposed future conduct;
- the client is seeking to advance conduct which they know or should know is unlawful; and
- the wrongful act contemplated is clearly wrong.[51]

[54] If the applicant establishes a *prima facie* case that the above requirements are met, the procedure is for me to order the Ministry to produce the records so that I can review them and decide whether the exception applies.[52]

[55] The Ministry did not explicitly address the future crimes and fraud exception, but its position is clearly that the exception does not apply. The Ministry says the applicant's "accusations against ministry employees and legal counsel are unfounded, inflammatory, unwarranted, unsubstantiated, and, for the purposes of adjudicating the matters at issue in this inquiry, should be disregarded."[53]

[56] I am not persuaded that the applicant has established a *prima facie* case that the future crimes and fraud exception applies. In my view, the applicant's allegations are speculative and fall well below the threshold of a *prima facie* case. As I see it, the allegations essentially amount to the applicant objecting to the Ministry's and the Commission's conduct affecting him. I do not see how that establishes a *prima facie* case that the specific communications in dispute are unlawful or contemplate future unlawful conduct. For example, the applicant alleges malicious prosecution, but does not set out its elements or provide evidence that persuades me that the communications in dispute contemplate malicious prosecution. In my view, the applicant's allegations are not sufficient to establish a *prima facie* case for this extremely limited exception.

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[49] *Descoteaux*, *supra* note 18; *Camp*, *supra* note 26 at paras. 22-29.
[50] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.
[51] *Camp*, *supra* note 26 at para. 28; *Industrial Alliance Securities Inc. v. Kunicyn,* 2020 ONSC 3393 at para. 28.
[52] *Camp*, *ibid* at para. 24.
[53] Ministry's reply submissions at p. 1.

Conclusions regarding whether privilege applies

[57] I conclude for the reasons provided above that the s. 14 information is privileged and the applicant has not established a *prima facie* case that the future crimes and fraud exception applies.

Has privilege been waived?

[58] The applicant submits that if privilege applies, it has been waived.[54] He says the Ministry already disclosed the disputed information, or similar information, to him in the course of the audit proceedings. He says that release of "similar information creates waiver for the entirety of the same class."[55] The applicant also argues that the Ministry must disclose the names of the individuals involved in the disputed communications, as they appear in the records, because it disclosed those names in the records tables for this inquiry.[56]

[59] The Ministry acknowledges that "many" of the disputed records were provided to the applicant unredacted during the audit proceedings.[57] However, the Ministry submits that this does not create a waiver.[58] The Ministry argues that disclosure during the audit proceedings does not require disclosure under FIPPA because disclosure under FIPPA is disclosure to the world, whereas disclosure in the course of the audit proceedings is subject to an implied undertaking of confidentiality. In addition, KD deposed that she has "no intention to waive solicitor client privilege" by virtue of her attesting to anything in her affidavit, including the descriptions of the records in the records tables.[59]

[60] Solicitor-client privilege belongs to, and can only be waived by, the client.[60] 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.[61]

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[54] Applicant's submissions at pp. 3, 11, 14-20, 25-29 and 34-37.
[55] Applicant's submissions at p. 17.
[56] Applicant's submissions at p. 26.
[57] Affidavit #1 of the Senior Director at paras. 32, 38 and 40.
[58] Ministry's reply submissions at p. 2.
[59] Affidavit #1 of KD at para. 31.
[60] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39.
[61] *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.

[61] Generally, disclosure of privileged information to anyone other than the client and the client's lawyer (or their agents) constitutes waiver.[62] However, 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".[63] This is because an understanding that the document is to be treated in confidence negates an intention to waive the privilege.

[62] In my view, the clients did not waive privilege over the s. 14 information. The Ministry's evidence indicates that LSB reviewed and redacted information subject to solicitor-client privilege before disclosing records to the applicant for the purposes of the audit proceedings.[64] As a result, it seems the applicant never saw the s. 14 information, so I do not understand how there was waiver.

[63] At any rate, even if the Ministry or the Commission did disclose some privileged information to the applicant, the evidence does not support that they intended to waive privilege to the world, which I accept is how disclosure under FIPPA must be treated.[65] I find that the audit proceedings were confidential and that any information provided to the applicant was provided on the understanding or implied undertaking that it would not be disclosed publicly.[66] As a result, I am satisfied there was no waiver.

[64] I am also not persuaded that there has been waiver over information such as the names of the correspondents in the disputed communications. As noted above, privilege generally applies to entire communications, not just the legal advice within them. I accept KD's evidence that the information she provided in this inquiry was not intended by the Ministry or the Commission to waive privilege. Further, to find waiver here would be contrary to the courts' view that counsel does not waive privilege by submitting evidence in support of a privilege claim.[67]

[65] Finally, I am not persuaded that fairness and consistency require disclosure of the s. 14 information. Fairness and consistency may require disclosure where a party puts legal advice in issue in a proceeding or makes selective disclosure of evidence.[68] I do not know precisely what disclosure was made to the applicant during the audit proceedings, so I cannot determine whether the disclosure was inconsistent or unfair in a manner that prejudiced the applicant.

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[62] *Malimon v. Kwok*, 2019 BCSC 1972 at para. 20.
[63] *Malimon*, *ibid* at para. 21.
[64] Affidavit #1 of the Senior Director at para. 42.
[65] Order 03-35, 2003 CanLII 49214 (BC IPC) at para. 31.
[66] Affidavit #1 of KD at para. 12; Order F20-12, 2020 BCIPC 14 (CanLII) at paras. 50-51.
[67] *Minister of Finance*, *supra* note 25 at para. 84.
[68] *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at para. 50.

[66] The applicant attached some communications to his submissions that involve LSB lawyers.[69] He argues that the Ministry waived privilege over these records and that this requires waiver of similar records in this inquiry. However, I am not persuaded that these communications are privileged. Further, even if they are privileged and the Ministry waived privilege, I am not persuaded that waiver in the context of the audit proceedings requires waiver in the substantially different context of FIPPA.

[67] At any rate, even if the Ministry's disclosure during the audit proceedings was unfair, the applicant's recourse is to raise the matter in the context of those proceedings, rather than this inquiry, which deals with different issues in a different context.

Conclusions regarding s. 14

[68] For the reasons provided above, I conclude that the s. 14 information is privileged and the applicant has not met his burden to establish a *prima facie* case that the future crimes and fraud exception applies or that privilege has been waived.

ADVICE OR RECOMMENDATIONS

[69] The Ministry 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.

[70] 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.[70]

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

- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[71]
- 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.[72]

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[69] Applicant's submissions at pp. 16-17.
[70] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 43-44 [*John Doe*]; Order F15-61, 2015 BCIPC 67 (CanLII) at para. 28.
[71] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.
[72] *John Doe*, *supra* note 70 at paras. 23-24.

- "Advice" has a broader meaning than "recommendations".[73] 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.[74]
- 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.[75]

[72] 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).

[73] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. I am satisfied that the records are not that old, so s. 13(3) does not apply.

Is the disputed information advice or recommendations?

[74] The information the Ministry is withholding under s. 13(1) is:

- several iterations of draft Committee Minutes of Meeting for June 27, 2018, some of which include comments in the margins and tracked edits in the body of the document (draft minutes);[76] and
- an email chain between the director of the Billing Integrity Program and a government freedom of information analyst in which the director responds to questions about a complaint the applicant made to the OIPC.[77]

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[73] *John Doe*, *ibid* at para. 24.
[74] *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*].
[75] *College*, *ibid* at para. 111; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[76] Records at pp. 399-407, 616-629, 631-671 and 674-682; Ministry's initial submissions at para. 30.
[77] Records at pp. 421-423; Ministry's initial submissions at para. 32. I am satisfied there is no conflict of interest in me deciding whether s. 13(1) applies to these emails because they are not sent to or from any OIPC employees.

[75] The Ministry submits that the disputed information is advice or recommendations and that it is authorized to withhold this information under s. 13(1), "[b]ased on the purpose and function of s. 13".[78]

[76] The applicant submits that s. 13(1) does not apply to the disputed information.[79] He argues that the fact that the draft minutes are in draft form is irrelevant to the application of s. 13(1). With respect to the email chain, the applicant submits that the Ministry's application of s. 13(1) is "overly broad".[80] The applicant also argues that the Ministry disclosed some other draft information in the records or in the audit proceedings, so there has been "waiver" and it is inconsistent for it to also withhold the draft minutes.[81]

[77] The applicant's arguments regarding "waiver" and inconsistent disclosure invoke concepts that apply to the analysis of solicitor-client privilege under s. 14 (i.e., implied waiver). However, I am not persuaded that waiver applies to s. 13 in the same way that it does under s. 14. The applicant does not cite, and I am not aware of any, authority to establish that it does. That said, I accept that the applicant's arguments are still relevant to the s. 13 analysis. In my view, they relate to the Ministry's exercise of discretion under s. 13(1) and I will address them as such below.

Draft Committee meeting minutes

[78] In Order F21-15, the Director of Adjudication recently set out the proper approach to applying s. 13(1) to draft records as follows:

- s. 13(1) does not apply to draft versions of records simply because they are drafts or earlier versions;
- the public body may only withhold information in a draft record if that information is or would reveal advice or recommendations developed by or for a public body or a minister; and
- as a result, line-by-line analysis of the draft record is required and blanket severing is not appropriate.[82]

[79] The Ministry applied s. 13(1) to the various iterations of the draft minutes in blanket fashion, severing the entire pages. As the Director stated in Order F21-15, this is not the right approach and s. 13 does not apply to draft versions of records simply because they are drafts or earlier versions. The public body must determine, line-by-line, whether the specific information in the records is advice or recommendations.

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[78] Ministry's initial submissions at paras. 30-42.
[79] Applicant's submissions at pp. 15, 25 and 34.
[80] Applicant's submissions at p. 15.
[81] Applicant's submissions at p. 15.
[82] Order F21-15, 2021 BCIPC 19 (CanLII) at paras. 45-50.

[80] There is some information in the draft minutes that I find is not advice or recommendations. This information is page numbers, the document title, header and footer information, and most headings and sub-headings. Based on my review of the various iterations of the draft minutes, I find this information is not, and would not reveal, advice or recommendations. I am also not persuaded that disclosing this kind of generic, administrative and formatting information would in any way undermine the Committee's deliberative process. The Director made a similar finding in Order F21-15.[83]

[81] However, I accept, for the following reasons, that the balance of the information in the draft minutes would reveal advice or recommendations developed by or for a public body and falls squarely within the deliberative process protected by s. 13(1).[84]

[82] Based on my review of the records, I find that the draft minutes reflect members of the Committee and the Billing Integrity Program collaboratively deliberating on what recommendations to make to the Commission and how to present those recommendations. The recommendations are supported by the kind of expert factual information and explanation that the courts have accepted as advice under s. 13(1).

[83] I am also satisfied that disclosing the disputed information under FIPPA would "reveal" advice or recommendations because it has not already been disclosed publicly or to the applicant. I accept the Ministry's evidence that the minutes "were not finalized until November 2018", which is outside the date range for the applicant's access request.[85] Since the final version is not in dispute, I do not know whether it was disclosed publicly. As for the applicant, he received some disputed information during the audit proceedings. However, I am also not satisfied on the evidence before me that the Ministry already revealed the exact information in dispute under s. 13(1) to the applicant.

Email chain regarding OIPC complaint

[84] I turn now to the email chain. As noted, the information the Ministry is withholding here is questions and responses regarding a complaint that the applicant made to the OIPC.

[85] In my view, the questions and answers would not reveal advice or recommendations.[86] Past orders have found that fact-based questions and

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[83] Order F21-15, 2021 BCIPC 19 (CanLII) at para. 48.
[84] Some of the headings include names that I am satisfied would allow accurate inferences to be drawn about who the Committee recommends that the Commission pursue.
[85] Affidavit #1 of the Senior Director at para. 55. The date range for the access request is April 19, 2017 to September 19, 2018: Investigator's Fact Report at para. 1.
[86] Records at pp. 422-423.

answers generally do not constitute advice or recommendations.[87] In my view, the questions and answers are fact-based. The Billing Integrity Program Director is not responding to the questions with advice or expert analysis. He is simply providing factual responses. I do not see how this information is or would reveal advice or recommendations.

[86] However, there is one sentence in one email that I accept would reveal advice within the meaning of s. 13(1).[88] In this sentence, I find the Billing Integrity Program Director goes beyond simply providing factual information and provides advice about how the freedom of information analyst should respond to the OIPC.

Does s. 13(2) apply?

[87] The next step is to consider whether any of the information that I found above would reveal advice or recommendations falls within s. 13(2). Section 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).

[88] The Ministry argues that none of the exceptions in s. 13(2) apply.[89] The applicant did not specifically address s. 13(2).

[89] I have considered the disputed information in light of the various exceptions in s. 13(2). In my view, none apply here. As a result, the Ministry is authorized to withhold under s. 13(1) the information that I found above is advice or recommendations.

Exercise of discretion

[90] As noted above, the applicant argues that the Ministry disclosed other draft information in the records or in the course of the audit proceedings, so there has been "waiver" and it is inconsistent for the Ministry not to disclose the draft minutes.

[91] As I understand this argument, it pertains to the Ministry's exercise of discretion under s. 13(1). Section 13(1) is a discretionary exception to disclosure because it says that a public body *may* (not *must*) refuse to disclose information that would reveal advice or recommendations developed by or for a public body. This means that, even if the disputed information would reveal advice or recommendations and s. 13(2) does not apply, a public body may still decide to

[87] See, for example, Order F21-16, 2021 BCIPC 21 (CanLII) at para. 22; Order F20-44, 2020 BCIPC 53 (CanLII) at para. 30.
[88] Records at p. 421.
[89] Ministry's initial submissions at para. 33.

disclose the information (for the sake of transparency and public accountability, for example).

[92] Past orders and court decisions set out requirements governing a public body's exercise of discretion. A public body 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.[90] If the public body does not meet these requirements, the Commissioner can order it to exercise or re-exercise its discretion.

[93] In the context of s. 13(1), I understand the applicant to be arguing that the Ministry exercised its discretion improperly by withholding some draft information while disclosing others.

[94] The first question is whether the Ministry exercised its discretion at all. It is clear to me that it did. The Ministry decided, for example, to disclose minimal, non-substantive and innocuous edits in a draft letter, while withholding more substantive information in the draft minutes discussed above.[91] This demonstrates to me that the Ministry turned its mind to differences in the draft records and exercised its discretion to disclose information that it arguably could have withheld as advice under s. 13(1).

[95] I am also satisfied the Ministry exercised its discretion appropriately in disclosing some draft information, such as edits, while treating other draft information differently in the records or in the audit proceedings. This demonstrates to me that the Ministry considered the nature and sensitivity of the disputed information in assessing whether to withhold information under s. 13(1). In my view, those factors are clearly relevant under s. 13(1) and the Ministry considered them appropriately.

Conclusion regarding s. 13(1)

[96] For the reasons provided above, I conclude that the Ministry is authorized under s. 13(1) to withhold some, but not all, of the information withheld under s. 13(1). I am also satisfied that the Ministry properly exercised its discretion under s. 13(1).[92]

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[90] *John Doe*, *supra* note 70 at para. 52.
[91] Records at p. 495.
[92] The Ministry marked entire pages as having been withheld under ss. 13(1) and 22(1). The Ministry is clearly withholding the entire pages under s. 13(1), but I do not understand the Ministry to be withholding under s. 22(1) the specific information I found s. 13(1) does not apply to. At any rate, I am not persuaded that the information I found s. 13(1) does not apply to is personal information under s. 22(1), so s. 22(1) clearly does not apply.

HARM TO LAW ENFORCEMENT

[97] The Ministry is withholding some information under s. 15(1)(c),[93] which reads:

> The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to …
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement[.]

[98] The standard the Ministry must satisfy is a "reasonable expectation of harm"; this is a "middle ground between that which is probable and that which is merely possible."[94] The Ministry is not required to prove that the alleged harm will occur, or even that the harm is more likely than not to occur, if the disputed information is disclosed.[95] It need only prove that there is a "reasonable basis for believing that harm will result" from disclosure.[96] The release of the information itself must give rise to a reasonable expectation of harm.[97]

[99] The harms analysis is contextual and the evidence required depends on the nature of the issue and "inherent probabilities and improbabilities or the seriousness of the allegations or consequences".[98]

[100] Based on my review of the records table and the records themselves, I find the information the Ministry is withholding under s. 15(1)(c) is:

- a one-line "report filter", which reflects the search parameters used to generate an electronic report;[99]
- electronic file paths, which are one-line descriptions of a file's or folder's location on a computer system;[100]
- a cropped screenprint of files in a folder, which also shows the location of the folder on the Ministry's computer system;[101] and

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[93] Ministry's initial submissions at para. 74.
[94] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 201.
[95] *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at para. 93.
[96] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 at para. 42.
[97] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.
[98] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[99] Records at p. 205.
[100] Records at pp. 384, 390, 420, 475, 478, 688 and 690.
[101] Records at p. 391.

- the name of a hotel and contact information for it, as well as a "Tax ID" number, on an invoice for a medical inspector's stay at the hotel.[102]

[101] The Ministry only made submissions about the file paths, which it says it used to "share information internally."[103] The Ministry says it redacted this information "to protect the details of the query from the computer software" and "any potential security threat, trade secrets of software, or any potential impact it would have to audits while they are active."[104] The Ministry also says it provided this information to the applicant in the course of the audit proceedings.

[102] The applicant submits that the Ministry's reliance on s. 15 is "bizarre" and "entirely inappropriate" and the Ministry's evidence fails to establish that disclosure of the disputed information could reasonably be expected to result in harm under s. 15.[105] The applicant also says he has seen the information, so there has been "waiver".

[103] In my view, the Ministry has not met its burden to establish that s. 15(1)(c) applies to the disputed information.[106] The Ministry does not adequately explain how disclosing the disputed information could reasonably be expected to result in harm under s. 15(1)(c). It is not clear to me from the disputed information itself that s. 15(1)(c) applies. I do not see how disclosing the file paths, for example, could reasonably be expected to result in harm under s. 15 when that information is internal to the government computer system and protected from external access. In my view, the Ministry has not established the required "clear and direct connection" between the disclosure of the withheld information and the alleged harm.[107] Without more from the Ministry, I conclude that s. 15(1)(c) does not apply.

FINANCIAL OR ECONOMIC HARM TO PUBLIC BODY

[104] The Ministry is withholding information under s. 17(1), but did not specify which specific subsections it is relying on. As I understand the Ministry's position, the parts of s. 17(1) relevant to this inquiry provide as follows:

> The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following:

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[102] Records at p. 311.
[103] Ministry's initial submissions at para. 73.
[104] Ministry's initial submissions at para. 76.
[105] Applicant's submissions at pp. 18, 27 and 34.
[106] I also turned my mind to whether the other subsections in s. 15, in particular s. 15(1)(l), apply to the disputed information and I am not persuaded that any of them do.
[107] Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 27.

> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> ….

[105] I see no indication in the Ministry's submissions that it is relying on subsections (c)-(f). In any case, I do not consider these subsections relevant in the circumstances of this case.

[106] The standard the Ministry is required to meet under s. 17(1) is the same reasonable expectation of harm standard that applies under s. 15(1).

[107] It is not clear to me whether the Ministry is withholding under s. 17(1) all or only some of the information it is also withholding under s. 15(1).[108] To ensure completeness, I will consider under s. 17(1) all of the information the Ministry also withheld under s. 15(1).

[108] The parties' submissions on s. 17(1) are essentially the same submissions they made regarding s. 15(1), which I already set out above.

[109] As with s. 15(1), I am not persuaded that s. 17(1) applies to the information withheld under that section. Again, in my view, the Ministry's evidence and submissions fall short of establishing a reasonable expectation of harm under s. 17(1). The Ministry does not explain how the disputed information is "trade secrets" under s. 17(1)(a) or "financial, commercial, scientific or technical information" under s. 17(1)(b). The Ministry also does not specify the financial or economic interests at stake or adequately explain the connection between disclosure of the disputed information and financial or economic harm. None of this is evident to me from the disputed information itself. I conclude that s. 17(1) does not apply.

THIRD-PARTY PERSONAL PRIVACY

[110] The Ministry is withholding some information under s. 22(1). That section states that 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.

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[108] Based on my review of the records package the Ministry provided and the Ministry's records table, the Ministry only applied s. 17(1) to the report filter mentioned above in relation to s. 15. However, the Ministry says in its submissions that the information it is withholding "under both ss. 15 and 17" is the report filter *and* the file paths: Ministry's initial submissions at paras. 73 and 76.

[111] The Ministry submits that s. 22(1) applies[109] and the applicant submits that it does not. The applicant did not make submissions on all of the specific steps of the s. 22 analysis, so I will only refer to his submissions where applicable.

[112] The analytical approach to s. 22 is well established.[110] I apply it below.

Is the disputed information "personal information"?

[113] Since s. 22(1) only applies to personal information, the first step is to determine whether the disputed information is personal information. FIPPA defines personal information as "recorded information about an identifiable individual other than contact information".[111] 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."[112]

[114] FIPPA defines contact information 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".[113] Contact information is the kind of information commonly found in an employee directory or on a business card.[114]

[115] As noted above, the applicant is not seeking patient information such as the patients' names and personal health numbers, so this information is not in dispute. Based on my review of the records, I find the information in dispute under s. 22(1) is:

- mailing addresses associated with a medical inspector;[115]
- names of office managers at medical clinics or care centres;[116]
- phone numbers and email addresses;[117]
- a medical inspector's "Folio ID" and "Club Account" number on an invoice for a hotel stay;[118]
- information regarding third parties' work leaves;[119]

[109] Ministry's initial submissions at paras. 77-107.
[110] See, for example, Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.
[111] Schedule 1 of FIPPA.
[112] Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.
[113] Schedule 1 of FIPPA.
[114] Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 82.
[115] Records at pp. 41, 293 and 335.
[116] Records at pp. 70, 79 and 118-119.
[117] Records at pp. 119-121, 123-124, 126-127, 132, 136-137, 301, 305, 345, 350, 352, 387-389 and 520.
[118] Records at p. 311.
[119] Records at pp. 345, 386, 388, 424 and 572-610.

- the names of medical practitioners subject to the Commission's oversight or investigation and other information relating to them such as their medical specialty, billing number and billing statistics (practitioner information);[120] and
- an "Audit Schedule Calendar", including names of auditors and practitioners being audited, dates, locations and other details relating to scheduled audits (audit calendar).[121]

[116] The Ministry submits that all of this is personal information.[122] The Ministry submits that some of the addresses, phone numbers and email addresses relate to "contractors whose contact information is not used exclusively for business".[123] The Ministry also says the addresses and phone numbers of contractors is personal information "and not properly a reference to [a] place of business".[124]

[117] The applicant submits that some of the disputed information is contact information because the information is being used for work purposes.[125]

[118] In my view, some of the disputed information is clearly not personal information because it is not about an identifiable individual. This information is dates of Committee meetings, certain headings, as well as dates, times and page numbers in the audit calendar.[126] I also do not consider it personal information that the audit calendar indicates which dates were statutory holidays.

[119] I find the names of office managers are contact information, not personal information. The names appear in records where the Ministry is contacting or has contacted the office managers. The names appear in the records linked to the names and/or addresses of clinics. I am satisfied that the names are information to enable an individual at a place of business to be contacted.

[120] The disputed information also includes mailing addresses, an email address and a phone number associated with a medical inspector, who the Ministry describes as one of its contractors. In my view, this is contact information. The Ministry says this information is personal. However, the information appears in records clearly relating to the inspector's business of providing services to the Ministry. In my view, the information is to enable the medical inspector to be contacted at a place of business, even if, in these

[120] Records at pp. 315, 386, 411, 479 and 615.
[121] Records at pp. 572-610.
[122] Ministry's initial submissions at paras. 81-84.
[123] Ministry's initial submissions at para. 84.
[124] Affidavit #1 of Senior Director at para. 47.
[125] Applicant's submissions at p. 19.
[126] Records at pp. 411, 479 and 572-610.

particular circumstances, the place of business is not static or physical and may include a home address.[127]

[121] However, I find that the other phone numbers and one email address are personal information and not contact information. This information relates to third-party officer managers and a medical practitioner. I accept the Ministry's evidence that the information relates to personal cell phones and email accounts. Viewed in context, I find the individuals provided this information to be contacted beyond their place of business to deal with the special circumstances of the audit. Accordingly, in my view, this information does not fit within the definition of "contact information".

[122] As for the balance of the disputed information, I find it is personal information. It is all clearly about identifiable third parties,[128] specifically the medical inspector, medical practitioners, auditors and other third parties involved in the audit.

[123] I only analyze below the information that I found above is personal information.

No unreasonable invasion of privacy – s. 22(4)

[124] The next step is to analyze s. 22(4), which sets out various circumstances in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The Ministry submits that s. 22(4) does not apply and the applicant did not specifically address this subsection.

[125] Section 22(4)(e) states that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information "is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff". Past orders establish that s. 22(4)(e) applies to "objective, factual statements about what the third party did or said in the normal course of discharging her or his job duties, but not qualitative assessments or evaluations of such actions."[129]

[126] I find that s. 22(4)(e) applies to a small amount of information. Specifically, I find it applies to the names of the Ministry auditors that were assigned to write

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[127] For a similar finding, see, for example, Order F14-15, 2014 BCIPC 48 (CanLII) at para. 41. I would have in any case found that this information must be disclosed under s. 22(4)(e). In my view, the medical inspector is an employee of the Ministry based on the definitions of "employee" and "service provider" in Schedule 1 of FIPPA, and the information is about the medical inspector's position as such.

[128] The term "third party" is defined in Schedule 1 of FIPPA as including any person other than the person who made the access request and a public body.

[129] Order 01-53, 2001 CanLII 21607 (BC IPC) at para. 40. See also Order 02-57, 2002 CanLII 42494 (BC IPC) at para. 36; Order F10-21, 2010 BCIPC 32 (CanLII) at paras. 22-24.

certain audit reports and the date on which those reports were due to a manager for review.[130] In my view, this is objective, factual information about public body employees' position and functions and describes what these employees did in the normal course of their job duties.

[127] Apart from that, I have reviewed the disputed information in light of s. 22(4) and find that none of the other subsections apply.

Presumptions of unreasonable invasion of privacy – s. 22(3)

[128] The third step in the s. 22 analysis is to determine if any of the presumptions in s. 22(3) apply. Section 22(3) sets out various circumstances in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[129] The Ministry submits that ss. 22(3)(b), 22(3)(d) and 22(3)(f) apply to some or all of the disputed information. These subsections state that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness[.]

[130] The Ministry argues that: s. 22(3)(b) applies to any information compiled and identifiable as part of MSP billing audits; s. 22(3)(d) applies to the disputed information about the medical practitioners because it relates to their occupational history; and s. 22(3)(f) applies to certain medical practitioners' financial information.

[131] In my view, s. 22(3)(d) applies to the practitioner information. This information relates to the practitioners' occupational or employment history because it reveals details about their work, including what work they do, where they worked, how much they billed and whether their billings were subject to scrutiny or investigation by the Commission. I also find, consistent with past orders, that s. 22(3)(d) applies to the information about work leaves.[131]

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[130] Records at p. 411.
[131] See, for example, Order F15-17, 2015 BCIPC 18 (CanLII) at paras. 35-36.

[132] I also find that s. 22(3)(f) applies to certain practitioners' billing statistics because this information describes their income, at least in part.[132]

[133] As for s. 22(3)(b), I accept, as in Order F20-12, that MSP billing audits are investigations, with potential sanctions, into a possible violation of law, the "law" here being the legal duties set out in the *Medicare Protection Act*.[133]

[134] The next question under s. 22(3)(b) is whether the disputed information was "compiled" and is "identifiable" as part of MSP billing investigations. The presumption applies to evidence and information gathered or assembled during investigations, but not to collateral records such as internal emails about investigative steps.[134]

[135] I accept that s. 22(3)(b) applies to some of the practitioner information because it forms part of, and is identifiable as, the evidence and information gathered or assembled in the course of the investigation into the applicant's or other practitioners' billing practices.[135]

[136] However, I am not persuaded that s. 22(3)(b) applies to the other information in dispute. For example, I do not see how information relating to work leave or a medical inspector's hotel stay forms part of, or is identifiable as, the evidence gathered in the course of an investigation into whether a practitioner's MSP billings are appropriate. I also do not accept that internal Ministry or Commission records, including the audit calendar, constitute the kind of investigative evidence and information protected by s. 22(3)(b).

[137] I have considered the other presumptions in s. 22(3) and am satisfied that they do not apply to the disputed information.

[138] Given my findings above, disclosure of most of the disputed information is presumed to be an unreasonable invasion of a third party's personal privacy under one or more of ss. 22(3)(b), 22(3)(d) and 22(3)(f).

All relevant circumstances – s. 22(2)

[139] The final step in the analysis is to determine whether disclosure of the disputed information would be an unreasonable invasion of a third party's personal privacy, considering all relevant circumstances including those listed in

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[132] Records at p. 479.
[133] Order F20-12, 2020 BCIPC 14 (CanLII) at paras. 30-35.
[134] Order F18-38, 2018 BCIPC 41 (CanLII) at paras. 76-77. See also Order F19-02, 2019 BCIPC 2 (CanLII) at paras. 33-40.
[135] Records at pp. 315 and 479.

s. 22(2). It is at this stage that the presumptions under s. 22(3) may or may not be rebutted.

[140] The Ministry relies on s. 22(2)(f) and both parties discussed the applicant's knowledge of the disputed information as a relevant circumstance. I also find it relevant to consider s. 22(2)(h), as well as unlisted factors such as the sensitivity of the disputed information and whether any of the disputed information is the applicant's personal information. I discuss these factors below.

[141] The Ministry argues that another relevant circumstance to consider is that some of the disputed information is not within the scope of the applicant's access request because it is not about him.[136] In my view, this is not a relevant factor to consider here. I agree with the applicant that the Ministry is taking "quite a narrow view" of the access request.[137] All of the disputed information is in responsive records that relate to the audit, so I am satisfied the information is all, in a general way, about the applicant.

[142] I have considered the other factors listed in s. 22(2) and am satisfied they do not apply to the specific information in dispute.

Personal information supplied in confidence – s. 22(2)(f)

[143] Section 22(2)(f) says that a relevant circumstance to consider under s. 22(1) is whether the personal information "has been supplied in confidence". The Ministry submits that the disputed information was supplied in confidence because *Medicare Protection Act* audits are conducted confidentially and relate to highly sensitive information.[138]

[144] In my view, s. 22(2)(f) does not apply here. I find that s. 22(2)(f) does not apply to much of the disputed information because it was not "supplied" to the Ministry or the Commission, but rather gathered or created by them. I accept that the medical inspector supplied the personal information in the hotel invoice and that certain third parties supplied information about their work leaves. However, I am not persuaded on the evidence before me that this information was supplied "in confidence". These individuals were not supplying this information as allegations or evidence in the audit, so I do not see why they could reasonably have expected confidentiality in the circumstances.

[136] Ministry's initial submissions at para. 99.
[137] Applicant's submissions at p. 19.
[138] Ministry's initial submissions at para. 98.

Unfair damage to reputation – s. 22(2)(h)

[145] Section 22(2)(h) says that a relevant circumstance to consider under s. 22(1) is whether the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[146] In my view, s. 22(2)(h) applies to most of the practitioner information.[139] I find that this information reveals whether a practitioner was under suspicion, investigation or audit by the Ministry and the Commission. I accept that disclosing this information publicly may damage the reputation of these practitioners because it suggests wrongdoing on their part. I also find that the damage would be "unfair" within the meaning of s. 22(2)(h) because the information appears at stages of the proceedings where I am not satisfied the practitioners had an opportunity to fully defend themselves or challenge the case against them. I conclude that s. 22(2)(h) weighs in favour of withholding most of the practitioner information.

Applicant's knowledge

[147] Past orders have considered the applicant's knowledge of the disputed information as a relevant circumstance under s. 22(2).[140]

[148] As I understand the applicant, he submits that he already knows some or all of the disputed information through the audit proceedings or his medical practice, so there has been "waiver". I understand his position to be that it would not be an unreasonable invasion of a third party's personal privacy to disclose information to him that he already knows.

[149] The Ministry submits that the applicant's knowledge does not weigh in favour of disclosure.[141] It says that any prior disclosure of the disputed information to the applicant was subject to an implied undertaking of confidentiality and disclosure to the world under FIPPA would relieve the applicant of that undertaking.

[150] The Ministry says the applicant may have access to the disputed information, so I accept that he knows some or all of the information. Past orders consistently find that an applicant's knowledge of disputed information weighs in

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[139] Records at pp. 386, 411, 479, 572-610 (practitioner names) and 615. As I understand the record at p. 315, it simply lists the practitioners who provided services at a particular clinic. I do not understand this record as suggesting any wrongdoing, so I have not found that s. 22(2)(h) applies.

[140] See, for example, Order F21-08, 2021 BCIPC 12 (CanLII) at para. 192 (and the cases cited there).

[141] Ministry's initial submissions at paras. 100-107; Ministry's reply submissions at p. 2.

favour of disclosure of that information under s. 22(2).[142] In my view, the fact that the applicant already knows the disputed information weighs to some extent in favour of disclosure, although it obviously does not weigh as strongly in favour of disclosure as if the entire world knew the information. In my view, the fact that the disputed information is subject to an implied undertaking of confidentiality is a separate relevant consideration.

Implied undertaking of confidentiality

[151] As noted, the Ministry argues that an implied undertaking of confidentiality arising from the *Medicare Protection Act* proceedings applies to the disputed information and that this weighs against disclosure.

[152] In Order F20-12, the adjudicator found that information disclosed to a medical practitioner in the course of an audit under the *Medicare Protection Act* is subject to an implied undertaking of confidentiality.[143] The adjudicator reasoned that disclosing the information under FIPPA would effectively allow the applicant to avoid the undertaking because FIPPA places no restrictions on the use of information obtained in response to an access request. As noted above, disclosure under FIPPA is, in effect, disclosure to the world.[144] The adjudicator concluded that these considerations weighed heavily in favour of withholding the information in dispute in that case.

[153] I see no persuasive reason to depart from the reasoning in Order F20-12, so I make a similar finding here. I accept that the disputed information disclosed to the applicant in prior proceedings is subject to an implied undertaking of confidentiality. Disclosure under FIPPA would be inconsistent with and undermine the implied undertaking because it must be treated as disclosure to the world and FIPPA places no restrictions on use of information received in response to an access request. Even if the applicant knows the information, the world does not. I conclude this factor weighs against disclosure.

Applicant's personal information

[154] Previous orders have considered as a relevant circumstance weighing in favour of disclosure whether the disputed information is the applicant's personal information.[145] The Ministry withheld one line that I find is the applicant's personal information.[146] The information refers to the applicant by name and it is not also

[142] Order 01-30, 2001 CanLII 21584 (BC IPC) at para. 20; Order F05-34, 2005 CanLII 39588 (BC IPC) at para. 57; Order F17-01, 2017 BCIPC 1 (CanLII) at paras. 70-74.
[143] Order F20-12, 2020 BCIPC 14 (CanLII) at paras. 48-51.
[144] Order 03-35, 2003 CanLII 49214 (BC IPC) at para. 31.
[145] See, for example, Order F18-30, 2018 BCIPC 33 (CanLII) at para. 41; Order F20-13, 2020 BCIPC 15 (CanLII) at para. 73.
[146] Records at p. 315.

about a third party. The fact that this is exclusively the applicant's personal information weighs strongly in favour of disclosing this one line.

Sensitivity of the information

[155] Finally, another relevant factor that previous orders have considered under s. 22(2) is the sensitivity of the disputed information.[147]

[156] In my view, the practitioner information is sensitive where it reveals that the practitioner was under suspicion or investigation by the Commission. However, this is essentially the same factor as the one I already considered under s. 22(2)(h), so I do not give it any additional weight here.

[157] I find the work leave information, the personal cell phones and email address, and the information on the hotel invoice ("Folio ID" and "Club Account" number) is somewhat sensitive because it reveals information that I accept is generally private. The sensitivity of this information weighs in favour of withholding it.

Unreasonable invasion of privacy – s. 22(1)

[158] I found above that some of the information the Ministry is withholding under s. 22(1) is not personal information, so it must be disclosed. As for the balance of the disputed information, I conclude as follows, given my analysis above and having regard to all relevant circumstances.

[159] In accordance with s. 22(4)(e), it is not an unreasonable invasion of a third party's personal privacy for the Ministry to disclose the names of the Ministry auditors that were assigned to write certain audit reports and the date on which those reports were due to a manager for review.

[160] I am satisfied it would not be an unreasonable invasion of a third party's personal privacy to disclose the one line that I found is the applicant's personal information or the information I found is not sensitive. There are no s. 22(3) presumptions that apply to this information and I am not persuaded that the implied undertaking, if engaged at all, is intended to protect such innocuous, non-substantive information.

[161] However, I am satisfied that it would be an unreasonable invasion of a third party's personal privacy to disclose the balance of the information the Ministry is withholding under s. 22(1). Most of this information is presumed to be an unreasonable invasion of a third party's personal privacy under one or more of ss. 22(3)(b), 22(3)(d) and 22(3)(f). I am not persuaded that the presumptions

[147] See, for example, Order F18-30, 2018 BCIPC 33 (CanLII) at para. 43; Order F20-13, 2020 BCIPC 15 (CanLII) at para. 74.

have been rebutted in the circumstances. The only factor favouring disclosure is the applicant's knowledge, which in my view is outweighed by the implied undertaking of confidentiality, the sensitivity of the information and s. 22(2)(h).

CONCLUSION

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

1. I confirm the Ministry's decision to refuse the applicant access to the information withheld under s. 14.

2. I confirm, in part, the Ministry's decision to refuse the applicant access to the information withheld under ss. 13(1).

3. I require the Ministry to refuse access to the information it withheld under s. 22(1) that I have not highlighted in a copy of the records that will be provided to the Ministry with this order.

4. I require the Ministry to give the applicant access to:

   - the information in dispute under ss. 15(1) and 17(1), and
   - the information in dispute under ss. 13(1) and 22(1) that I have highlighted in a copy of the records that will be provided to the Ministry with this order.

   The Ministry 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(1) of FIPPA, the Ministry is required to comply with this order by December 6, 2021.

October 21, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F19-78142