Order F22-34

MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT

Erika Syrotuck
Adjudicator

July 14, 2022

CanLII Cite: 2022 BCIPC 38
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 38

Summary: The applicant requested records relating to the McAbee Fossil beds from the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry). In response, the Ministry provided 8,936 pages of responsive records, withholding some information under a number of different exceptions to disclosure. The adjudicator found that the Ministry was authorized to refuse to disclose the information in dispute under ss. 13(1), and 14 and some of the information under ss. 16(1)(a)(iii) and 18(a). The Ministry was required to withhold some information in dispute under ss. 12(1) and 22(1). However, the Ministry was required to disclose some of the information it withheld under ss. 12(1), 16(1)(a)(iii), 18(a) and 22(1). The adjudicator found that s. 16(1)(c) did not apply to the information considered under that section. The Ministry also withheld some information under common law settlement privilege, but did not provide the records in dispute. The adjudicator ordered the Ministry to produce the records for the purpose of adjudicating settlement privilege. The applicant also complained that the Ministry did not adequately search for records. The adjudicator ordered the Ministry to conduct a further search for text messages and deleted emails.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 12(1), 13(1), 14, 16(1)(a)(iii), 16(1)(c), 18(a), 22(1), 22(2), 22(2)(f), 22(2)(g), 22(2)(i), 22(3)(a), 22(3)(d), 22(3)(g), 22(3)(i), 22(4)(e), 44(1)(b), 44(2.1), 44(3), Schedule 1; *Indian Act* RSC 1985 c. 1-5.

INTRODUCTION

[1] This inquiry is about an applicant's request, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (Ministry) for records relating to the McAbee Fossil beds.[1]

[1] The applicant initially made two requests and the Ministry joined them into one request before responding. This is a summary of the joined request.

[2] In response to the applicant's access request, the Ministry provided 8,936 pages of records. It withheld some information under a number of different exceptions to disclosure in part 2 of FIPPA.

[3] The applicant complained to the Office of the Information and Privacy Commissioner (OIPC) that the Ministry did not conduct an adequate search for records as required by s. 6(1) of FIPPA. The applicant subsequently asked the OIPC to review the Ministry's decision to withhold information under the exceptions in part 2 of FIPPA.

[4] Mediation did not resolve the issues and the matter proceeded to inquiry.

[5] At the inquiry, the applicant agreed to the Ministry's request to remove some information in dispute from the inquiry.[2] Accordingly, I will not consider the Ministry's decision with respect to this information.[3]

[6] In addition, the Ministry reconsidered its decision to withhold some information in dispute. As a result, it disclosed additional information to the applicant. It also clarified that it was no longer relying on two exceptions[4] but requested to add settlement privilege to the inquiry. Although the applicant objected, the OIPC gave permission to the Ministry to add settlement privilege as an issue in the inquiry.

[7] Also, during the inquiry, I wrote to the parties to seek further submissions on s. 18(b) (disclosure harmful to an endangered, threatened or vulnerable species) and how it applied to one set of maps concerning rattlesnakes. The Ministry suggested this information be removed from the information in dispute and the applicant consented. As a result, I will not decide s. 18(b) and the applicant will not get access to the maps about the location of rattlesnakes.[5]

ISSUES

[8] At this inquiry, I must decide the following issues:

1. Did the Ministry conduct an adequate search for responsive records as required under s. 6(1) of FIPPA?

2. Is the Ministry required to withhold the information in dispute under ss. 12(1) and 22(1) of FIPPA?

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[2] The applicant agreed to remove all the information in dispute under s. 15 and a government IDIR that the Ministry withheld under ss. 22 and 15 on page 924 of part 4 of the records.
[3] In other words, the applicant will not get access to this information through this inquiry process.
[4] Sections 3 and 17.
[5] Pages 983-985 in part 2 of the records.

3. Is the Ministry authorized to withhold the information in dispute under ss. 13(1), 14, 16(1)(a)(iii), 16(1)(c), and 18(a) of FIPPA?

4. Is the Ministry authorized to withhold information in dispute under settlement privilege?

[9] Under s. 57(1) of FIPPA, the burden of proof is on the Ministry to show that the applicant has no right of access under ss. 12(1), 13(1), 14, 16(1)(a)(iii), 16(1)(c) and 18(a). Section 57(2) of FIPPA states that the applicant must prove that disclosure of a third party's personal information would not be an unreasonable invasion of that third party's personal privacy.

[10] FIPPA does not set out the burden with regards to s. 6(1). Past orders have found that the burden is on the Ministry to show that it has performed its duties under s. 6(1).[6]

[11] In addition, the Ministry bears the burden of proving its claim of settlement privilege.[7]

DISCUSSION

Background

[12] The applicant's request is for records relating to the McAbee Fossil Beds Heritage Site (McAbee), located near the village of Cache Creek, British Columbia.

[13] The applicant is a paleontologist who was involved in McAbee.

Information at issue

[14] In response to the applicant's access request, the Ministry provided 8,936 pages of records relating to McAbee. Many of those records have been disclosed, fully or partially. The majority of the records containing the information in dispute are emails and attachments. In addition, some information in dispute is in various other kinds of documents such as handwritten notes, agreements, information notes, cabinet submissions, plans, meeting agendas, letters and documents relating to consultations with First Nations. I will discuss the specific information and/or records in dispute as they relate to each exception.

Section 6(1) – adequate search

[15] Section 6 (1) of FIPPA says:

[6] Order F20-13, 2020 BCIPC 15 at para 13, for example.
[7] Order F21-11, 2021 BCIPC 15 at para 5.

> The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[16] Section 6(1) imposes a number of obligations on a public body. As mentioned above, the applicant's complaint in this case is that the Ministry did not adequately search for records responsive to the access request. It is well established that s. 6(1) requires a public body to conduct an adequate search for records.[8]

[17] A public body's search efforts should be those that a fair and rational person would find acceptable.[9] Section 6(1) does not impose a standard of perfection.[10]

[18] With regards to the type of evidence required to show that a public body conducted an adequate search, former Commissioner Loukidelis said that a public body should

> …candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records.[11]

[19] The Ministry says that it has fulfilled its duty under s. 6(1) to respond openly, accurately and completely.

[20] To illustrate its search efforts, the Ministry has provided evidence from its Freedom of Information Coordinator (Coordinator), who attests to the following:

- After receiving the applicant's request, Information Access Operations (IAO)[12] emailed the Ministry to make it aware of the access request with a "call for records". This is consistent with the standard practice between the Ministry and IAO when IAO receives a new access request.
- Because the request was about McAbee, the Ministry determined that responsive records would be with the BC Heritage Branch. No other program area within the Ministry is responsible for McAbee.
- The Ministry canvassed all relevant employees within the Heritage Branch who potentially had relevant records. These employees were

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[8] Order 02-18, 2002 CanLII 42443 (BCIPC) at para 7.
[9] *Ibid.*
[10] *Ibid.*
[11] Order 00-32, 2000 BCIPCD No. 35, accessible at http://www.oipcbc.org/orders/Order00-32.html at page 5.
[12] IAO is part of the Ministry of Citizens' Services. IAO processes access requests on behalf of ministries of the provincial government. See Affidavit of the Team Lead, Information Access Operations at paras 3-4.

instructed to perform searches using the search feature in the Ministry's file explorer LAN drive. The Ministry also searched the Heritage Branch's shared electronic folders, individual electronic folders, emails and calendars of relevant employees,[13] Heritage Branch notebooks, calendars and paper files.
- During mediation, it became apparent that a small number of responsive records existed within the Minister's office. These records were located and released in full in October 2020.
- The Ministry performed additional searches when the applicant initiated his adequate search complaint.
- The Ministry estimates that it took Heritage Branch staff close to 100 hours to search, review and upload documents.
- The Coordinator has no reason to believe that any other areas of the Ministry would have additional responsive records.
- The Coordinator has no reason to believe that there are additional records in the custody or under the control of the Ministry that are responsive to the applicant's access request other than the records that have already been located, retrieved and provided to the applicant.

[21] The Ministry says that the above evidence demonstrates that the Ministry has made a significant effort to find all possible responsive records.[14] It says that it has described all potential sources of records. With regard to sources that it has not searched, the Ministry says it has explained its reasons for not doing so. It says that the Ministry and IAO have no reason to believe that there are any further responsive records. Overall, the Ministry submits that a fair and rational person would find the Ministry's search efforts reasonable.

[22] The Applicant submits that there are communications missing from the records provided by the Ministry in response to his access request. First, he says that he examined a subset of the emails between himself and the Senior Stewardship Officer, Paleontology of the Heritage Branch at the Ministry (Stewardship Officer) with the Heritage Branch, who is in charge of the McAbee fossil beds project. The applicant says that he compared those emails with the first four disclosure packages and found 252 emails missing from the documents provided by the Ministry. The applicant says that the emails provided between him and the Stewardship Officer end June 2017, but the applicant's records show emails exchanges as late as May 2018. The applicant also points to two specific interactions he had with the Ministry and says that emails related to those interactions are missing. The applicant provided a list of the date and times of the missing emails but says that since he only searched for a subset of missing emails, the list represents a minimum of emails absent from the records provided.

[13] Including the Heritage Branch director.
[14] Information in this paragraph is from the Ministry's initial submissions, paras 50-51.

[23] The applicant also says that the Ministry did not provide records of phone conversations between him and the Stewardship Officer and the Manager, Stewardship and Historic Place Operations at the Ministry (Manager). Further, the applicant says that he recalls hearing a McAbee contractor refer to texting with the Stewardship Officer concerning McAbee business, yet there are no text messages in the responsive records.[15]

[24] In reply to the applicant's submissions, the Ministry says that the Stewardship Officer and the Manager conducted further searches of their email and as a result it located, processed and released 324 additional pages of records.[16] However, the Ministry says that not all of these pages were actually missing from the records package.[17] The Ministry provided evidence from a paralegal with the Ministry of Attorney General, who conducted a search of the records already provided for a subset of the emails identified by the applicant as missing and was able to find some but not all of those emails.[18] Regarding the records that were missing from the Ministry's initial response, the Ministry says that this was an understandable oversight given the high volume of records in this inquiry.[19]

[25] Additionally, the Ministry says that any text messages, notes about phone conversations and emails not already provided were likely deleted[20] or not in its possession because the Stewardship Officer and the Manager deemed them to be transitory records.[21] The Ministry says that it is the expected practice of government employees to manage their emails and other records in a way that preserves non-transitory information and properly disposes of transitory information.[22] Both the Stewardship Officer and Manager say that they regularly delete transitory emails and believe they would have deleted the emails that the applicant believes are missing shortly after receipt.[23]

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[15] The applicant also says that he subsequently made an access request to the Royal BC Museum (Museum) and that some records appear to be missing from the Museum's disclosure. The Ministry says, and I agree, that the adequacy of a different public body's response to an access request is outside of the scope of this inquiry.
[16] Ministry's reply submissions, para 5.
[17] Ministry's reply submissions, para 8.
[18] Affidavit of the Paralegal, para 4-8.
[19] Ministry's reply submissions, para 25.
[20] Before the access request was received. At para 17 of its reply submissions, the Ministry acknowledges that once a public body receives an access request it must keep all responsive records, including transitory records.
[21] Ministry's reply submissions, paras 19 and 20, affidavit #2 of the Stewardship Officer at paras 7-8 and affidavit of the Manager at paras 10-11.
[22] Ministry's reply submissions, para 14.
[23] Affidavit #2 of the Stewardship Officer at para 7; affidavit of the Manager at para 10.

[26] Despite the fact that some records were not initially provided to the applicant in response to the access request, the Ministry maintains that it has met its duty under s. 6(1) to conduct an adequate search for records.[24] The Ministry reiterates that it should not be held to a standard of perfection and says that it is not motivated to intentionally exclude records from issue in this inquiry, let alone records that the applicant already has.[25] It says that it has demonstrated good faith by locating and producing 8,936 pages of responsive records.[26] It says there is no evidence of anything other than an understandable oversight in locating certain additional records.[27]

[27] After reviewing the above evidence, I find that, for the most part, the Ministry's search efforts were fair and reasonable. For example, I find the process described by the Coordinator to be logical. I also accept that the Ministry acted in good faith and did not intentionally exclude records.

[28] However, in response to the applicant's complaint that text messages, emails and notes about phone conversations are missing from the responsive records, the Ministry says it legitimately deleted these kinds of records because they were transitory. These records bear further comment.

[29] First, I am satisfied that the Ministry adequately searched for handwritten or electronic notes documenting phone conversations. The Ministry provided several sets of handwritten notes as responsive records in this inquiry. Based on this and the evidence of the Coordinator, who says that Heritage Branch employees were instructed to search notebooks, I am satisfied that the Ministry both searched for handwritten notes and that no further notes exist. Further, the Coordinator's evidence is that Ministry employees were instructed to search the LAN drive and their electronic folders. Based on this, I am satisfied that any electronic notes would have been captured by the Ministry employees' searches.

[30] However, I am not satisfied that the Ministry adequately searched for text messages. Nothing in the Coordinator's evidence specifically addresses whether or not the Ministry instructed Heritage Branch employees to search for text messages. The Stewardship Officer and the Manager say that they would have treated text messages they sent or received not already captured in the responsive records as transitory and would have no longer had them at the time of the access request. In my opinion, this evidence does not adequately address whether these employees actually searched for text messages. I also note that none of the records that the Ministry provided are discrete text messages. For these reasons, I am not satisfied that the Ministry adequately searched for text messages.

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[24] Ministry's reply submissions, para 10.
[25] Ministry's reply submissions, paras 6 and 10.
[26] Ministry's reply submissions, para 4.
[27] Ministry's reply submissions, para 7.

[31] In addition, I find that conducting an adequate search in this case required the Ministry to search for emails in its "deleted items" folder, but the Ministry's evidence does not establish that it did so.

[32] It is well established that public bodies need to search for deleted emails. In her report on this very topic, former Commissioner Denham said that public bodies must search for deleted emails that are retrievable without excessive efforts.[28] More specifically, the Commissioner said that emails in an employee's "deleted items" folder must be searched in response to any access request because emails in this folder are readily retrievable by performing an automated search. Emails in the "deleted items" folder can be expunged from that folder and moved into a "recover deleted" folder, but it will only be necessary to search there in instances where there is a reasonable belief that this folder contains responsive records.[29]

[33] As noted above, the Ministry says that some of the emails were deleted. I note that neither the Stewardship Officer nor the Manager explained what they meant when they said emails were deleted, so it is not clear if they mean emails were moved into the "deleted items" folder or into the "recover deleted" folder. Based on the evidence provided by the Ministry, and former Commissioner Denham's comments, I find that the Ministry had a duty to at least search the "deleted items" folder.

[34] However, I am not satisfied that the Ministry, including the Stewardship Officer and Manager, actually searched its deleted emails. This is because nothing in the Ministry's evidence indicates that it turned its mind to whether it should or did search for deleted emails.

[35] Having found that the Ministry did not adequately perform its duty, I must decide what remedy is appropriate.[30]

[36] Given the passage of time, I recognize that it may be less likely that searching for deleted emails will result in the Ministry locating additional responsive records. However, because the Stewardship Officer and Manager did not explain what they meant by "delete" it is possible that some items remain. Therefore, I am ordering the Ministry to search for deleted emails that are retrievable without excessive efforts. To be clear, I am not ordering the Ministry to search "recover deleted" or restore backups.[31]

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[28] Investigation Report 15-03, 2015 BCIPC 63 at page 17.
[29] *Ibid.*
[30] The commissioner's discretion comes from s. 58(3)(a), which says that the commissioner *may* require that a duty imposed under the Act be performed.
[31] FIPPA was amended after the public body made its initial submission but before it made its reply submissions. The issue of which version of the legislation should apply was not raised by

[37] Similarly, I have decided to order the Ministry to search for text messages responsive to the applicant's request.

[38] I turn now to whether the Ministry properly applied the exceptions to disclosure. The applicant did not make submissions about any of the exceptions to disclosure.

Section 14

[39] Section 14 allows a public body to refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege. Only legal advice privilege is at issue in this inquiry.

[40] Legal advice privilege applies to communications that:

i) are between solicitor and client;
ii) entail the seeking or giving of legal advice; and
iii) are intended to be confidential by the parties.[32]

[41] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For example, legal advice privilege extends to internal client communications that transmit or comment on privileged communications with lawyers.[33]

[42] The Ministry says that the information it has withheld under s. 14 is not direct communications with a lawyer. Rather, the Ministry says that the withheld information refers to legal advice from the Legal Services Branch (LSB) of the Ministry of Attorney General to the Ministry or reveals an intention by the Ministry to seek legal advice from LSB.[34] It says that disclosure of the withheld information would reveal the Ministry's internal discussions about legal advice, and therefore relates to seeking, formulating or giving legal advice.[35]

[43] The Ministry applied s. 14 to five different records but did not provide them for my review. Rather, the Ministry provided affidavit evidence from various LSB lawyers and from the Stewardship Officer. This approach is consistent with the BC Supreme Court's stated preference for the OIPC to resolve disputes about solicitor-client privilege on the basis of affidavit evidence from lawyers; however,

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the parties. Since my order does not conflict with the updated version, there is no need for me to decide which version of the legislation applies.
[32] *Solosky v The Queen* 1979 CanLII 9 (SCC) at page 837.
[33] *Ibid* at para 12 citing *Mutual Life Assurance Co. of Canada v Canada (Deputy Attorney General)* [1988] OJ No. 1090 (Ont. SCJ).
[34] Ministry's initial submissions, paras 125 and 129.
[35] Ministry's initial submissions, para 130.

the court also noted that an affidavit from the instructing client may be a suitable alternative.[36] I will address the suitability of the evidence from the Stewardship Officer below.

[44] Since each record involves different circumstances and different lawyers, I will go through the Ministry's evidence record by record.

Record 1 – advice relating to Order in Council

[45] The Ministry has applied s. 14 to a small portion of a five-page document relating to an Order in Council.[37]

[46] The Ministry provided evidence from the Ministry of Attorney General's Registrar of Regulations (Registrar), who is a lawyer with the Office of Legislative Counsel.[38] The Registrar says that Legislative Counsel review Orders in Council and provide written legal advice to the Government, acting through Cabinet. The Registrar deposes that they have reviewed the information at issue and says that the Ministry has applied s. 14 to the portion that reflects Legislative Counsel's advice. The Registrar says that legal advice provided to Cabinet is advice that is supplied with an expectation that it will not be disclosed more broadly than is necessary based on employees' duties.

[47] The Ministry also provided evidence from the Stewardship Officer who says that they helped prepare the document at issue and that it includes Legislative Counsel's advice to Cabinet regarding the Order in Council.[39]

[48] I am satisfied that the information at issue would reveal confidential legal advice given from Legislative Counsel to the government of British Columbia regarding the Order in Council. In addition to the affidavit evidence, which I accept, I can see that the information in the document surrounding the s. 14 information supports the Ministry's evidence.[40] I find that solicitor-client privilege applies to this information.

Record 2 – record of consultation

[49] The next document containing information withheld under s. 14 is an 11-page record of consultation with First Nations about McAbee.[41] The Ministry

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[36] *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner* 2021 BCSC 266 at para 85.
[37] Page 179 at part 1 of the records. I note that the Ministry applied s. 12(1) to the entire document.
[38] All of the information in this paragraph is from the Registrar of Regulations' affidavit.
[39] Affidavit #1 of the Stewardship Officer at para 26.
[40] This information is not disclosed to the applicant because the Ministry has applied s. 12(1) to the entire document, and so I cannot be more specific.
[41] Ministry's initial submissions, para 193. Record at pages 558-568 of part 1 of the records.

has withheld several portions of this document under s. 14, including one entire page.[42] The Ministry also withheld some information in the document under s. 16, some of which overlaps with the information withheld under s. 14. It disclosed the remainder of the document.

[50] The Stewardship Officer says that they created the document and that it references legal advice from a named LSB lawyer.[43] The Stewardship Officer says that the title of the document expressly mentions "legal opinions" relating to McAbee. The Stewardship Officer also says that "many of the instances" of the information withheld under s. 14 refer to legal advice or in one instance, steps the lawyer was going to take in order to provide the Ministry with legal advice. The Stewardship Officer says that at all times communications with legal counsel were intended to be confidential.

[51] The Ministry also provided evidence from the lawyer with LSB who confirms that they provided the legal advice referenced at certain pages of the document and that it is broadly about the duty to consult with First Nations about the future management of the McAbee Fossil Site.[44] The lawyer says they provided the advice via email and provided the date range and names of the recipients of the emails.[45]

[52] After carefully reviewing the Ministry's evidence, I decided it did not clearly address all of the portions at issue under s. 14. I wrote back to the Ministry to offer it an opportunity to clarify and/or supplement its evidence.[46]

[53] In response, the Ministry provided further submissions and an additional affidavit from the Stewardship Officer. The Ministry clarified that the lawyer's evidence was meant to address all of the portions of the record of consultation. It also provided an additional affidavit from the Stewardship Officer clarifying that the pages in question refer to legal advice received by the Ministry.[47]

[54] Based on all of the above evidence, I am satisfied that all of the information that the Ministry withheld under s. 14 in the record of consultation would directly or indirectly reveal confidential legal advice provided by the LSB lawyer to the Ministry.

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[42] Pages 558, 559, 560, 561, 562, 564 and 567 of part 1 of the records.
[43] The information in this paragraph is from the affidavit #1 of the Stewardship Officer at paras 27 and 31.
[44] Affidavit of SB at paras 6 and 7.
[45] Affidavit of SB at para 7.
[46] By letter dated April 4, 2022.
[47] Ministry's April 12, 2022 letter and Affidavit #3 of the Stewardship Officer at para 6.

Record 3 – Cabinet Submission

[55] The third document is a "Cabinet submission – Request for Decision."[48] The Ministry withheld only a small portion of the information in this document under s. 14 but applied s. 12(1) to the whole document.

[56] The Stewardship Officer says that the information withheld under s. 14 explicitly refers to legal advice that the Stewardship Officer had previously received from the Aboriginal Law Group of the Legal Services Branch.[49] More specifically, the Stewardship Officer says that they received the legal advice via email on a specific date from a named lawyer who has since retired.[50] The Stewardship Officer says that at all times communications with legal counsel were intended to be confidential.[51]

[57] Although it is preferable to have evidence regarding solicitor-client privilege from the lawyer who provided the advice, in this case the advising lawyer is retired. Given the Stewardship Officer's direct knowledge, I find that evidence from the Stewardship Officer is a suitable alternative.

[58] I accept the Stewardship Officer's evidence that the information at issue explicitly refers to confidential legal advice received from an LSB lawyer. I find that legal advice privilege applies to the information in dispute.

Record 4 – email about settlement negotiations

[59] The fourth record is the body of one email between Ministry employees, including the Stewardship Officer.[52] Disclosed information in the email chain indicates that the withheld portion of the email is an update given to the Assistant Deputy Minister on the status of settlement negotiations.[53]

[60] The Stewardship Officer says that the withheld information contains a combination of explicit legal advice and information that would allow an accurate inference as to other legal advice.[54] More specifically, the Stewardship Officer says that the email explicitly refers to receiving advice from LSB in the context of settlement negotiations and the steps that the Ministry took upon receipt of that advice. The Stewardship Officer says that the advice referred to in

[48] Page 1635, part 1 of the records in dispute.
[49] Affidavit #1 of the Stewardship Officer at para 28.
[50] Affidavit #1 of the Stewardship Officer at para 28.
[51] Affidavit #1 of the Stewardship Officer at para 31.
[52] Page 643, part 3 of the records in dispute. The Ministry also applied s. 13(1) and settlement privilege to this record but given my finding, it is not necessary to consider whether these exceptions apply.
[53] The information disclosed at pages 643-644 of part 3 of the records in dispute. See also affidavit #1 of the Stewardship Officer at para. 46.
[54] Information in this paragraph is from affidavit #1 of the Stewardship Officer at paras 29 and 31.

the email was provided by a named lawyer at LSB who has since retired. Records disclosed by the Ministry indicate that the named lawyer was involved in giving advice about settlement compensation. The Stewardship Officer says that communications with legal counsel were intended to be confidential at all times.

[61] As with the record above, the Ministry has not provided evidence directly from the advising lawyer, who is now retired. Rather, the Ministry has provided evidence from the Stewardship Officer, who was on the email chain at issue was involved in the settlement negotiation process. For these reasons, I find that the Stewardship Officer's evidence is appropriate to rely on in this case.

[62] Based on the above evidence, I am satisfied that, if disclosed, the portion of the email at issue would directly disclose or allow an accurate inference to be made about confidential legal advice given from LSB to the Ministry.

Record 5 – intention to seek legal advice

[63] The Ministry applied s. 14 to information in an email between Ministry employees that the Ministry says communicates an intention to seek legal advice.[55]

[64] On its own, an intention to seek legal advice is usually not privileged.[56] However, where there is evidence that the public body sought and received legal advice about the matter they intended to seek legal advice about, past orders have found that disclosure of the intention to seek that legal advice is privileged because it would reveal confidential communications between a lawyer and client.[57]

[65] The Ministry has provided affidavit evidence from a Senior Legislation and Policy Analyst (Policy Analyst) at the Ministry, who sent the email at issue.[58] The Policy Analyst says that the email at issue expresses their intent to seek a legal opinion relating to delegation under the *Heritage Conservation Act*. The Policy Analyst says that they subsequently received a legal opinion from a named lawyer with LSB about delegation under the *Heritage Conservation Act*.[59] Further, the Policy Analyst states that, at all times, communications with legal counsel and the intention to seek legal advice were intended to be confidential.

[66] The Ministry also provided affidavit evidence from the lawyer named in the Policy Analyst's affidavit, who confirms that they provided a legal opinion by email to the Policy Analyst on the relevant date.[60]

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[55] Page 1096 of part 3 of the records in dispute; duplicated at page 358 of part 4.
[56] Order F21-63, 2021 BCIPC 72 at para 40.
[57] *Ibid*; Order F19-07, 2019 BCIPC 9 at paras 18-21.
[58] The information in this paragraph is from the Affidavit of the Policy Analyst, paras 4 - 8.
[59] Via email on a specific date.
[60] Affidavit of AW at para 5.

[67] I am satisfied that, if disclosed, the information in this email would reveal confidential communications between a lawyer and client. More specifically, I am satisfied that the information at issue expresses an intention to seek legal advice from LSB on matters relating to delegation under the *Heritage Conservation Act* and that LSB did actually provide that advice in confidence.

[68] In summary, I find that all of the information the Ministry withheld under s. 14 is subject to solicitor-client privilege.

Settlement Privilege

[69] The Ministry is withholding some information on the basis of settlement privilege. Settlement privilege is a common law privilege that protects communications made for the purpose of settling a dispute.

[70] Part 2 of FIPPA makes no mention of settlement privilege. However, the BC Supreme Court found that since FIPPA contains no clear legislative intent to abrogate it, parties are entitled to rely on settlement privilege to refuse to disclose information responsive to an access request under FIPPA.[61]

[71] Settlement privilege is a class privilege and applies to communications that meet the following three criteria:

1. A litigious dispute must be in existence or within contemplation;

2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

3. The purpose of the communication must be to attempt to effect a settlement.[62]

[72] The Ministry did not provide the records or portions of records in dispute under settlement privilege for my review. The Ministry asserted during the inquiry process that I would decide settlement privilege without reviewing the records.[63] However, there is not a settled practice as there is when the Commissioner decides whether records are subject to solicitor-client privilege under s. 14, as I described above. I was unable to find a previous order of the Commissioner where the Commissioner or their delegate addressed whether it is appropriate to decide if settlement privilege applies in the absence of the records. Similarly,

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[61] *Richmond (City) v Campbell* 2017 BCSC 331 at paras 71-73.
[62] *Nguyen v Dang* 2017 BCSC 1409 at para 22; Order F21-11, 2021 BCIPC 15 at para 11; Order F18-06, 2018 BCIPC 8 at para 60.
[63] Via email dated October 21, 2021.

I was unable to find a case from a Canadian court where this issue has been discussed.

[73] The Commissioner has the power under s. 44(1) to order a person to produce records under their custody or control for the purposes of conducting an investigation, audit or inquiry. Section 44(3) states that, if the Commissioner makes an order under s. 44(1), a public body must produce the record within 10 days despite "a privilege of the law of evidence". Since settlement privilege is "a privilege of the law of evidence",[64] read together, ss. 44(1) and (3) clearly allow me to order production of a record to which settlement privilege may apply. The issue is whether it is appropriate that I do so.

[74] In its initial submissions, the Ministry relied on the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v University of Calgary* for the proposition that records do not need to be provided to the Commissioner for the purpose of adjudicating a public body's claim of settlement privilege.[65] However, that case was about whether an adjudicator should order production of the records to decide claims of solicitor-client privilege. The Ministry did not adequately explain how it would apply to decisions about settlement privilege. For this reason, and given that whether records should be produced for the purpose of deciding settlement privilege is a novel issue, I wrote back to the parties for further submissions.

[75] The Ministry and the applicant both provided further submissions.

[76] The Ministry said that it is legally required to withhold the records from the Commissioner because providing the records would waive the privilege.[66] The Ministry further submits that settlement privilege is held by both parties and cannot be unilaterally waived by one party. In support of this argument, the Ministry references *Blood Tribe Department of Health v Canada (Privacy Commissioner)* [*Blood Tribe*] where the Supreme Court of Canada said that the Privacy Commissioner of Canada was a "stranger" to solicitor-client privilege, and that "compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality."[67] The Ministry submits that even though the *Blood Tribe* was about solicitor-client privilege, rather than settlement privilege, the principles enunciated by the Court apply, and argue that compelled disclosure to the Commissioner would violate the parties' interest in a confidential settlement process.

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[64] *Alberta (Information and Privacy Commissioner) v University of Calgary* 2016 SCC 53 at para 44 [*University of Calgary*].
[65] *Ibid.*
[66] The Ministry's arguments on this issue are from the Ministry's March 10, 2022 letter.
[67] Ministry's March 20, 2022 letter citing *Blood Tribe Department of Health v Canada (Privacy Commissioner)* 2008 SCC 44 at para 21 [*Blood Tribe*].

[77] The Ministry then says:

> "Without the protection of settlement privilege, a party communicating a proposal related to settlement, or responding to one, would have no control over what the other side may do with such documents. An absence of control creates a risk that settlement discussions would be disclosed publicly. The risk of public disclosure discourages parties from entering into good faith settlement discussions. Therefore, without the protection of settlement privilege, the public interest in encouraging settlements will not be served.
>
> In effect, therefore, disclosure to the Commissioner would discourage parties from entering into settlement negotiations with the Province. The courts have widely accepted that settlement negotiations are in the public interest and should be fostered rather than discouraged."[68]

[78] Finally, the Ministry submits that it has provided sufficient evidence for me to decide whether the records in dispute are subject to settlement privilege. It says that it has provided detailed affidavit evidence sufficient to establish that settlement privilege applies to the records in dispute and notes that the applicant has not challenged the credibility of the affiant or the Ministry's submissions about the application of settlement privilege.

[79] The applicant asks that the records not be excluded from my review.[69] The applicant says that he is not a lawyer and is not in a position to have an opinion on the various legal precedents cited. However, the applicant says that, as a matter of general principle, it seems the credibility of the entire Act (i.e. FIPPA) hinges on confidence that the requested information be vetted by an impartial adjudicator.

[80] For the reasons that follow, I have decided to order the Ministry to produce the records for which it is claiming settlement privilege.

[81] First, I am not persuaded by the Ministry's argument that disclosing the records at issue would constitute a waiver of settlement privilege. As the Ministry states, settlement privilege is held by both parties and cannot be unilaterally waived by one party. Therefore, since there is no express or implied intention from the other parties to waive the privilege, disclosure by the Ministry to the Commissioner would not be considered a waiver of settlement privilege.[70] Further, where a party is compelled to disclose a record, that disclosure is not voluntary and no waiver occurs.[71]

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[68] Citations omitted.
[69] The applicant's arguments are from the applicant's March 17, 2022 reply.
[70] See Order F21-11, 2021 BCIPC 15 at para 41 for a similar finding.
[71] *Blank v Canada (Minister of Justice)* 2005 FC 1551 at paras 41-42, rev'd in part on other grounds 2007 FCA 87.

[82] I am also not persuaded by the Ministry's argument that the principles expressed by the courts in regards to solicitor-client privilege extend to settlement privilege. The privileges serve important, but fundamentally different purposes.

[83] Solicitor-client privilege is of central importance to the legal system as a whole. The privilege protects a broad range of communications between a lawyer and their client.[72] The Supreme Court of Canada in *R v McClure* said "[a]t the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented."[73] Solicitor-client privilege is not "merely a rule of evidence", it is also "an important civil and legal right and a principle of fundamental justice in Canadian law."[74] In other words, clients have a substantive right not to have confidential communications with their lawyers disclosed.

[84] To ensure public confidence, the privilege must be "as close to absolute as possible."[75] Solicitor-client privilege is "jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction".[76] The privilege "will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis."[77] In addition, any legislative incursions on solicitor-client privilege must be strictly construed.[78]

[85] Due to the importance of solicitor-client privilege as a fundamental right, the OIPC makes an exception to its usual practice of reviewing the records in dispute. While s. 44(2.1) makes it clear that the solicitor-client privilege of a record disclosed to the Commissioner is not affected by the disclosure, the OIPC's practice is to decide whether solicitor-client privilege applies without reviewing the records unless it is necessary to do so in order to fairly decide.[79] This aligns with the practice of courts; the Supreme Court of Canada said that "[e]ven courts will decline to review solicitor-client documents to adjudicate the

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[72] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 at para 21 [*Pritchard*].
[73] *R v McClure,* 2014 SCC 14 at para. 2 [*McClure*].
[74] *University of Calgary supra* note *64* at para 41 citing *Lavallee, Rackel & Heintz v. Canada (Attorney General)* 2002 SCC 61 at para 49.
[75] *McClure supra* note *73* at para. 35.
[76] *Pritchard supra* note *72* at para 17.
[77] *McClure supra* note *73* at para 35.
[78] *Blood Tribe*, *supra* note 67 at para 11.
[79] See Order F19-21, 2019 BCIPC 23 for an example of where the adjudicator decided whether it was necessary to order production of records to decide whether those records were subject to solicitor-client privilege. The BC Supreme Court stated a preference for resolving claims of privilege via affidavit evidence in *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 at para 85.

existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue".[80]

[86] In contrast, settlement privilege is a rule of evidence rooted in the public interest in promoting settlements. It recognizes that settlement discussions will be more fruitful if parties have space to settle a dispute without worrying that what they say will be later disclosed.[81] In this way, settlement privilege plays a vital role in improving access to justice.[82]

[87] Unlike solicitor-client privilege, settlement privilege is not as close to absolute as possible. It can be set aside where "a competing public interest outweighs the public interest in encouraging settlement."[83] For example, courts set aside settlement privilege if it is necessary to prove the existence or scope of the settlement.[84] Also, unlike solicitor-client privilege, settlement privilege does not confer a substantive right.

[88] Given the fundamentally different principles behind the two privileges and their overall status in the legal system, I am not satisfied that the rationale for excluding records from the Commissioner's review where solicitor-client privilege has been claimed extends to settlement privilege, as the Ministry argues.

[89] I also do not accept the Ministry's assertion that review by the Commissioner creates a risk of public disclosure that will make parties less willing to settle.

[90] I am not sure what kind of public disclosure the Ministry sees as a risk, as it does not explain. If the OIPC finds that an exception to disclosure does not apply and orders a public body to disclose records, it is the public body who must either comply with the order by providing access to the applicant or bring an application for judicial review of the order.[85] The OIPC does not itself disclose records to an applicant as a result of an inquiry. Therefore, in the event that a public body disagrees with the Commissioner's decision regarding settlement privilege, it can bring an application for judicial review before any record is ever disclosed publicly. I am not satisfied that providing records to the Commissioner for the purpose of adjudicating settlement privilege creates a risk of public disclosure which will in turn make public bodies less willing to settle.

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[80] *Blood Tribe supra* note *67* at para 17, also quoted by Justice Cromwell in *University of Calgary supra* note 64 (in dissent) at para 121.
[81] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para 13 [*Sable*].
[82] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 at para 1 [*Union Carbide*].
[83] *Sable supra* note 81 at para 19 quoting *Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para 20.
[84] *Union Carbide supra* note 82 *at* para 35.
[85] See s. 59 of FIPPA.

[91] The Ministry has also argued that I do not need the records in order to decide whether settlement privilege applies.

[92] I do not think it is appropriate that I decide settlement privilege in the absence of the records. I cannot conduct a detailed analysis without reviewing the information in dispute. Deciding settlement privilege is not like solicitor-client privilege, where courts have cautioned against severing due to the risk of revealing privileged information.[86] In this particular case, the Ministry has applied settlement privilege to several different kinds of information, including the "interests, expectations and concerns" of third parties.[87] In my opinion, it would be difficult to conduct a detailed analysis of whether settlement privilege applied to all of this information without being able to review it.

[93] In addition, I am persuaded by the applicant's comments regarding the value of having the adjudicator review the information in dispute. Due to the very nature of an inquiry, an applicant is constrained in making their case because they cannot see the information at issue.[88] It also underscores how vital it is for the public to have confidence in the adjudicator's ability to neutrally and impartially decide any questions of fact and law. The applicant expressly says that he feels that the credibility of the inquiry process depends on the ability of the adjudicator to review the records in dispute. I agree and find that an independent review of the records is important to building and keeping public confidence in the inquiry process and that deciding an inquiry in the absence of the records should be the exception not the rule.

[94] Based on the differences I have outlined above, I do not think that decisions regarding settlement privilege warrant the kind of exception that is made for solicitor-client privilege. Therefore, I have decided to order the Ministry to produce to me, as the commissioner's delegate, the records containing the information it asserts is excepted from disclosure under settlement privilege.

[95] The Ministry applied s. 12(1) and s. 22(1) to some information to which it also applied settlement privilege. Since I cannot review this information, I cannot decide whether these sections apply to that specific information. I have decided s. 12(1) and s. 22(1) only in relation to the information in the records provided to me.

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[86] *British Columbia (Attorney General) v Lee* 2017 BCCA 219 at para 39 citing *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 and para 40.
[87] Ministry's initial submissions at para 155.
[88] Regarding part 2 of FIPPA, this statement does not apply to decisions regarding s. 43, or issues under part 1.

Section 12(1) – cabinet confidences

[96] Section 12(1) of FIPPA requires a public body to refuse to disclose information that would reveal the substance of deliberations of the Executive Council (also known as Cabinet) or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees. However, s. 12(1) does not apply in the circumstances set out in s. 12(2).

[97] The purpose of s. 12(1) is to widely protect the confidence of Cabinet communications.[89] Explaining the rationale for protecting cabinet confidences, the Supreme Court of Canada has said that "[t]hose charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny".[90]

[98] The Ministry has applied s. 12(1) to information in the following documents:

- copies of documents titled "Cabinet Submission – Request for Decision"' and related drafts, emails, attachments and speaking notes;[91]
- Various decision, information and transition notes, and related speaking notes;[92]
- Versions of a McAbee heritage site implementation plan;[93]
- A document called "Fossil Management – Information for ELUC";[94] and one called "Fossil Management Framework – NR sector".[95]
- Iterations of a timeline attached to an independent contractor agreement (timeline);[96]
- Versions of a policy review document about devolution of provincially owned heritage properties;[97]

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[89] *Aquasource Ltd. v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para 41.
[90] *Babcock v Canada (Attorney General),* 2002 SCC 57 at para 18.
[91] Pages 1630-1635 of part 1; pages 337, 342 -347, 350-356, 358-363, 407, 410-415 of part 2; pages 435-447, 561-575, 580-595, 599-615, 618-633 of part 4 of the records in dispute.
[92] Pages 169, 173-183, 1765 part 1; pages 180-181, 965, 975 part 2; pages 1183-1184 part 3; pages 419, 424 part 4 of the records in dispute.
[93] Pages 160, 164, 168, part 1, 633, 636, 637, 640, 641, part 6 of the records in dispute.
[94] Page 740, part 1; pages 176, part 2. The title is revealed in affidavit #1 of the Stewardship Officer at para 18(c).
[95] Pages 490-493, part 2 of the records in dispute.
[96] Page 1756, 1761 part 1 of the records in dispute.
[97] Page 1904, part 1 of the records; duplicated at 1243, part 2 of the records; draft at page 1286 and pages 1315-1322 (withheld entirely) of part 2.

- A document about First Nations Consultation in relation to McAbee (record of consultation);[98] and
- Parts of several emails.[99]

[99] I will first decide if the requirements of s. 12(1) are met before turning to whether any circumstances in s. 12(2) apply.

Section 12(1) – Committee of the Executive Council

[100] The Ministry submits that the information it withheld under s. 12(1) would reveal the substance of deliberations of Cabinet and two of its committees: Treasury Board and the Environment and Land Use Committee (together, the Committees).[100]

[101] As s. 12(1) only applies to the Executive Council or any of its committees, I must first determine whether the Treasury Board and the Environment and Land Use Committee are committees of the Executive Council for the purposes of s. 12(1).

[102] Under s. 12(5), the Lieutenant Governor in Council may designate a committee for the purposes of s. 12. The Ministry says that the Committees are both designated under the *Committees of the Executive Council Regulation* (Regulation).[101]

[103] I conclude that Treasury Board and the Environment and Land Use Committee are both designated as committees for the purpose of s. 12 under the Regulation.[102] I also note that many responsive records pre-date the version of the Regulation in force at the time of the applicant's access requests. Since the relevant date is the date the records were created,[103] I confirm that the past version of the Regulation also designated both Committees for the purpose of s. 12.[104]

Section 12(1) – substance of deliberations

[104] The next step in the s. 12(1) analysis is to decide whether the information in dispute would reveal the substance of deliberations of Cabinet or the Committees.

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[98] Page 565 part 1 of the records in dispute.
[99] Page 487 part 2; pages 422, 559, 578, 597, 616 part 4 of the records in dispute.
[100] Ministry's initial submissions, para 72.
[101] BC Reg. 156/2017.
[102] The Committees of the Executive Council Regulation 156/2017 has been repealed and replaced with Reg. 150/2021.
[103] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2011 BCIPC 112 (CanLII) at paras 90- 92.
[104] BC Reg. 229/2005.

[105] In the context of s. 12(1), the phrase "substance of deliberations" refers to the body of information that the Cabinet or any of its committees considered (or would consider in the case of submissions not yet presented) in making a decision.[105] The BC Court of Appeal articulated this test as asking the question: "Does the information sought to be disclosed form the basis for Cabinet deliberations?"[106] In addition, s. 12(1) applies to information which would permit an accurate inference to be drawn about the "substance of deliberations."

[106] The Ministry submits that the information in dispute under s. 12(1) was part of the body of information considered by the Committees and that its disclosure would reveal the substance of deliberations of the Committees either directly or by inference.[107]

[107] More specifically, the Ministry says that it appeared before the Environment and Land Use Committee several different times relating to McAbee. It says that, in 2011, it presented to this committee and, as a result, was given Cabinet direction to protect McAbee through a *Heritage Conservation Act* designation, to prepare a management plan for the site, and to prepare a submission for Treasury Board.[108] Further, the Ministry says it appeared before the Environment and Land Use Committee in 2012 asking Cabinet to designate McAbee as an official heritage site and again in 2017 on matters relating to fossil management.[109] The Ministry provided evidence from the Records Management Officer for Cabinet Operations in the Office of the Premier (Records Management Officer) who confirms that Cabinet and the Environment and Land Use Committee met on these two dates, respectively.[110]

[108] I have reviewed the information in dispute under s. 12(1) and find that most of it would reveal the "substance of deliberations" of Cabinet, the Environment and Land Use Committee or Treasury Board.

[109] First, I am satisfied that some of the withheld information would reveal information that formed the basis for the Environment and Land Use Committee's deliberations about fossil management. The Records Management Officer says that they believe a final copy of the "Request for Decision"[111] was distributed to the Environment and Land Use Committee and that Cabinet approved the related request.[112] In addition, the Stewardship Officer says that the document titled

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[105] *Aquasource, supra* note 89 at para 39.
[106] *Ibid* at para 49.
[107] Ministry's initial submissions, para 77.
[108] Ministry's initial submissions, para 73. The Ministry provided additional details, but these were accepted *in camera* and so I cannot discuss them.
[109] Ministry's initial submissions, paras 74-75.
[110] Based on the Records Management Officer's review of Cabinet Operations' records.
[111] Located at pages 1630-1635 of part 1 of the records in dispute.
[112] Affidavit of the Records Management Officer at para 15.

"Fossil Management – Information for ELUC" was prepared for the Ministry's meeting with the Environment and Land Use Committee.[113] Based on this evidence and the contents of the records, I am satisfied that the "Requests for Decision" and the related materials, as well as the document called "Fossil Management – Information for ELUC", were prepared for Cabinet and/or the Environment and Land Use Committee about matters relating to fossil management. In addition, I can see that other information, such as emails[114], decision notes,[115] transition notes,[116] and information notes[117], refers directly to information considered by the Environment and Land Use Committee. Therefore, I am satisfied that this information would reveal the substance of deliberations.

[110] In addition, I am satisfied that other information in dispute would reveal the substance of deliberations of Cabinet or its committees relating to other matters such as the designation of McAbee as a heritage site. For example, the withheld information in the site implementation plan, the record of consultation, the timeline, some decision notes,[118] information notes[119] and some emails refer directly to information considered by Cabinet or its committees, including Treasury Board. Therefore, I find that disclosure of this information would reveal the substance of deliberations of Cabinet or its committees.

[111] However, I find that s. 12(1) does not apply to parts of a version of a policy review document about devolution of provincially owned heritage properties.[120] The Ministry withheld the entire version of this document, but I find that only two paragraphs would reveal the substance of deliberations of Cabinet or its committees.[121] The Ministry did not explain, and it is not evident to me that the remainder of the document would reveal the substance of deliberations of Cabinet or its committees.

Section 12(2)

[112] Having found that some information would reveal the substance of deliberations of Cabinet or its committees, I must consider whether any of the circumstances in s. 12(2) apply. If information is of the type described in s. 12(2), it cannot be withheld under s. 12(1).

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[113] Affidavit #1 of the Stewardship Officer, para 18(c).
[114] Page 487 of part 2 of the records in dispute, for example.
[115] Pages 419 and 424 of part 4 of the records in dispute.
[116] Page 965 and 975 part 2 of the records in dispute.
[117] Page 180-181, part 2 of the records in dispute, for example.
[118] Page 169, part 1; 1183-1184, part 3 of the records in dispute, for example.
[119] Pages 173-183 and 1765 of part 1 of the records in dispute.
[120] Pages 1315-1322 of part 2 of the records in dispute.
[121] The Ministry withheld the same two paragraphs in other versions of this document and I confirm that this information would reveal the substance of deliberations of Cabinet or its committees in all versions.

[113] Section 12(2) states that subsection (1) does not apply to:

> (a) information in a record that has been in existence for 15 or more years,
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> > (i) the decision has been made public,
> >
> > (ii) the decision has been implemented, or
> >
> > (iii) 5 or more years have passed since the decision was made or considered

[114] I find that s. 12(2)(a) does not apply. None of the records at issue under s. 12(1) are more than 15 years old.

[115] The Ministry asserts that s. 12(2)(b) does not apply and nothing before me indicates that it would.

[116] Under s. 12(2)(c) background explanations or analysis cannot be withheld under s. 12(1). "Background explanations" include everything factual that Cabinet used to make a decision, and "analysis" includes discussion about the background explanations but not analysis of policy options presented to Cabinet.[122] Section 12(2)(c) does not apply to background explanations or analysis interwoven with the substance of deliberations.[123]

[117] With regards to s. 12(2)(c), the Ministry says that it has applied s. 12(1) as narrowly as it can and, in many instances, has released considerable information about the s. 12(1) information in the records.[124]

[118] In my opinion, none of the information in dispute is background explanations or analysis.

[119] In conclusion, s. 12(1) applies to all of the information to which the Ministry applied that section with the exception of the information discussed in paragraph 111 above.

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[122] Order No. 48-1995, BCIPD No. 21 at para 13. This approach was confirmed by the BC Court of Appeal in *Aquasource supra* note 89.
[123] *Aquasource supra* note 89 at para 50.
[124] Ministry's initial submissions, para 81.

Section 13

[120] Section 13 (1) allows a public body to refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[121] The purpose of s. 13(1) is to prevent the harm that would occur if a public body's deliberative process was exposed to public scrutiny.[125]

[122] The term "advice" is broader than "recommendations"[126] and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.[127] "Recommendations" include material relating to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[128] Section 13(1) also encompasses information that would allow an individual to make accurate inferences about any advice or recommendations.[129]

[123] The first step is to determine whether the information is advice or recommendations under s. 13(1). If it is, I must decide whether the information falls into any of the categories in s. 13(2) or whether it has been in existence for more than 10 years under s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, that information cannot be withheld under s. 13(1).

[124] The Ministry has applied s. 13(1) to a small amount of information in the records. It says that the information constitutes Ministry employees using their professional expertise to determine the significance of matters.[130] The Ministry also says that it is clear from the records that any proposed course of action can be accepted or rejected.[131] Further, the Ministry submits that some of the information would indirectly disclose advice or recommendations because an accurate inference could be drawn.[132]

[125] First, it has applied s. 13(1) to some information in two versions of an Information Note.[133] The withheld information is about a policy option developed for the Minister, some of which is about a recommended course of action. This information is clearly advice or recommendations within the meaning of s.13(1).

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[125] *Insurance Corporation of British Columbia v. Automotive Retailers Association* 2013 BCSC 2025 [*ICBC*] at para 52.
[126] *John Doe v Ontario (Finance)* 2014 SCC 36 [*John Doe*] at para 24.
[127] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113.
[128] *John Doe supra* note 126 at para 23.
[129] Order F19-28, 2019 BCIPC 30 at para 14.
[130] Ministry's initial submissions, para 95.
[131] Ministry's initial submissions, para 96.
[132] Ministry's initial submissions, para 97.
[133] Pages 1824-1825, part 1; 2180 part 2.

[126] The Ministry has also applied s. 13(1) to comments in several documents, including a draft Issues Note.[134] The comments are editorial in nature and give suggestions on the content of the documents. I find that these comments were made using the opinion-giver's expertise. For these reasons, I conclude that they are advice within the meaning of s. 13(1).[135] My finding is consistent with past orders which have concluded that editorial commentary constitutes advice or recommendations within the meaning of s. 13(1).[136]

[127] Lastly, the Ministry has applied s. 13(1) to two partial sentences in the body of the Issues Note.[137] It is evident from the disclosed information that these partial sentences are the subject of the advice given in the comments discussed in the preceding paragraph. I gather that this is the information that the Ministry says would allow an accurate inference to be made about the advice or recommendations.

[128] While the Ministry has not explained, I am satisfied that disclosure of the partial sentences would allow an accurate inference to be made about the advice given. In making this finding, I have considered that the applicant has extensive knowledge about matters relating to McAbee. Therefore, I am satisfied that this information is subject to s. 13(1).

[129] In summary, I find that all of the information that the Ministry withheld under s. 13(1) would reveal advice or recommendations.

Sections 13(2) and (3)

[130] Having found that the information in dispute is advice or recommendations within the meaning of s. 13(1), I must also consider whether any of the provisions in ss. 13(2) or (3) apply. If any of these circumstances apply, the information cannot be withheld.

[131] Section 13(2) sets out types of records and information that cannot be withheld under s. 13(1). The information at issue does not fall into any of these categories.

[132] None of the records are more than 10 years old, and therefore s. 13(3) does not apply.

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[134] Pages 358-360, 1286, 1291 of part 2; Issues Note at pages 601-602 in part 3 of the records in dispute.
[135] Some of the information to which I found s. 12(1) did not apply on pages 1315-1322 of part 2 of the records is identical to some of the comments that I have found are advice or recommendations under s. 13(1). Therefore, in order to give effect to my finding that s. 13(1) applies, I also authorize the Ministry to withhold these identical comments where they appear on pages 1315-1322 in part 2.
[136] Order F19-27, 1029 BCIPC 29 at para 37, for example.
[137] Pages 601-602, part 3 of the records in dispute.

[133] In summary, I find that s. 13(1) applies to all of the information to which the Ministry applied this exception.

Section 16

[134] Section 16 allows a public body to withhold information where disclosure could reasonably be expected to harm intergovernmental relations or negotiations. The Ministry made submissions on s. 16(1)(a)(iii) and s. 16(1)(c) but did not specify which of these exceptions applies to which information in dispute. The Ministry applied "s. 16" to the following information:

- several parts of a record of consultation;[138]
- a small portion of a set of handwritten notes;[139] and
- part of an email.[140]

Recent amendments

[135] Sections 16(1)(a)(iii) and 16(1)(c) and the related definitions in Schedule 1 of FIPPA were amended November 25, 2021.[141] Before the amendment, and at the time the Ministry made its decision on the applicant's access request, those sections read:

> **16** (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
>
> …
>
> (iii) an aboriginal government;
>
> …
>
> (c) harm the conduct of negotiations relating to aboriginal self government or treaties.

[136] The amendments replace the term "aboriginal government" with "Indigenous governing entity" in s. 16(1)(a)(iii) and the word "aboriginal" with "Indigenous" in s. 16(1)(c).

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[138] Pages 558-568, part 1 of the records in dispute.
[139] Page 24, part 3 of the records in dispute.
[140] Page 1258, part 2 of the records in dispute.
[141] By the *Freedom of Information and Protection of Privacy Amendment Act*, SBC 2021 c 39 s 8(a) and 8(b).

[137] Before the amendments, Schedule 1 of FIPPA said that "aboriginal government" "means an aboriginal organization exercising governmental functions". The recent amendments removed that definition and substituted the following definition:

> "Indigenous governing entity" means an Indigenous entity that exercises governmental functions, and includes but is not limited to an Indigenous governing body as defined in the *Declaration on the Rights of Indigenous Peoples Act*;[142]

[138] As detailed below, I have decided s. 16(1)(a)(iii) and s. 16(1)(c) in relation to the language before it was amended as that was what was in effect at the time the Ministry made its decision. However, my analysis applies equally to the amended provisions.

[139] I will first decide whether s. 16(1)(a)(iii) applies, and if necessary, go on to decide s. 16(1)(c).

Section 16(1)(a)(iii)

[140] Section 16(1)(a)(iii) has two parts and the Ministry must prove both. The first issue is whether the information at issue relates to an "aboriginal government". Second, I must decide whether disclosure of the information in dispute could reasonably be expected to harm the conduct of relations between the government and the "aboriginal governments."

"Aboriginal government"

[141] As I mentioned above, before it was amended, Schedule 1 of FIPPA defined "aboriginal government" in the following way:

> **"aboriginal government"** means an aboriginal organization exercising governmental functions;

[142] Previous orders have found that an "aboriginal government" includes, at the very least, a "band" under the federal *Indian Act*[143] but is not limited to bands or groups that have concluded self-government agreements or treaties.[144]

[143] The Ministry submits that the various groups referred to in the records are "aboriginal governments" for the purpose of s. 16(1)(a)(iii).

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[142] *Ibid,* s. 47(a).
[143] *Indian Act* RSC 1985 c. 1-5.
[144] Order 01-14, 2001 CanLII 21567 (BCIPC) at para 14; Order F20-48, 2020 BCIPC 57 at para 190; Order F21-45, 2021 BCIPC 53 at para 74.

[144] The Ministry explains that, in keeping with the commitment to Indigenous peoples' right to self-determination, the Province has recognized a number of different Indigenous groups as exercising governmental functions.[145] The Ministry says that, where an Indigenous group has recognized an entity as having the authority to represent them and negotiate on their behalf, the Province has followed suit and recognized that entity as an "aboriginal government" for the purpose of FIPPA.[146] The Ministry says that when deciding whether or not an entity is an "aboriginal government", the focus should be on whether the organization has the ability to negotiate on behalf of the rights holders.[147]

[145] Therefore, the Ministry says that, at minimum, where there is evidence that an Indigenous group has provided the Province with notice that a particular representative body has the authority to negotiate on their behalf, that entity should be considered an "aboriginal government" under FIPPA.[148] The Ministry says that the OIPC accepted this approach in Order F20-48.[149]

[146] The portions of the record of consultation and the email that the Ministry withheld under s. 16 clearly relate to specific Indigenous groups. Moreover, the records indicate that those Indigenous groups are clearly exercising a representative function. I accept that these groups are "aboriginal governments" for the purpose of s. 16(1)(a)(iii).

[147] However, the Ministry did not adequately explain and is not clear to me how the withheld information in the handwritten notes relates at all to an "aboriginal government" within the meaning of s. 16(1)(a)(iii).[150] The notes do not appear to be related to any Indigenous group. As a result, I find that the Ministry has not met its burden of proving that this information relates to an "aboriginal government" as defined in FIPPA and therefore that s. 16(1)(a)(iii) does not apply.

Harm

[148] Section 16(1)(a)(iii) applies if disclosure could reasonably be expected to harm the conduct of relations between the province and an "aboriginal government".

[149] It is well established that the phrase "could reasonably be expected to" means that the standard of proof is a "reasonable expectation of probable harm." This means that a public body must show that the likelihood of the harm

[145] Ministry's initial submissions, paras 167 and 169.
[146] Ministry's initial submissions, para 169.
[147] Ministry's initial submissions, para 166.
[148] Ministry's initial submissions, para 170.
[149] Ministry's initial submissions, para 171 citing Order F20-48, 2020 BCIPC 57.
[150] I note that the Stewardship Officer's evidence does not address this record.

occurring is "well beyond" or "considerably above" a mere possibility.[151] The amount and quality of the evidence required to meet this standard depends on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[152]

[150] The Ministry explains that in this case, the information at issue in the record of consultation relates to constitutionally required consultation with First Nations about decisions it made about the future of McAbee.[153] The Ministry's submissions indicate that it believes disclosure of the information in this record could reasonably be expected to harm the conduct of its relations with the Indigenous groups referred to in the records.

[151] By way of background, the Ministry provided extensive submissions about the history and the importance of the relationship between the Crown and Indigenous peoples.[154] The Ministry explains that "these sometimes fragile relationships are the result of a history of mistrust, but are essential for the Province to fulfil its obligations to Indigenous peoples."[155] The Ministry says that in order to build trusting relationships, Indigenous groups must have confidence in their communications with the Province and must not see any indicia of bad faith.[156] Further, the Ministry says that it needs to be able to develop and assess its negotiating position without concerns that it will later be subject to public scrutiny or that the information could be released and compromise its relationship with an Indigenous group because there is a misinterpretation or misunderstanding.[157]

[152] Regarding the specific information in dispute, the Stewardship Officer says that some of the information at issue in the record of consultation reflects the Province's opinion on "certain historical events" which do not include any background details that explain how the Province reached those conclusions. The Stewardship Officer says that this information, if disclosed, may be incorrectly interpreted.[158]

[153] The Stewardship Officer says that other information in the record of consultation reflects confidential without prejudice discussions and negotiations respecting, among other things, possible accommodation measures entered into in good faith by the Province and First Nations. The Stewardship Officer explains

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[151] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para 54 citing *Merck Frosst v Canada (Health)* 2012 SCC 3 at paras 197 and 199.
[152] *Ibid* citing *FH v McDougall,* 2008 SCC 53 at para 40.
[153] Ministry's initial submissions, para 193.
[154] Ministry's initial submissions, paras 179-192.
[155] Ministry's initial submissions, para 190.
[156] Ministry's initial submissions, para 188.
[157] Ministry's initial submissions, para 189.
[158] Affidavit #1 of the Stewardship Officer at para 59.

that disclosure of this information could harm the provincial government's relationship with the Indigenous group with whom it was negotiating by breaching the trust and confidence necessary to engage in meaningful and successful negotiations.[159]

[154] I find that most of the information withheld under s. 16 directly relates to the consultation and negotiation between the Province and the Indigenous groups. For example, some of the information withheld under s. 16 reflects the specific negotiating positions of the Province and the Indigenous groups. The information describes the parties' positions over time, and would reveal the "give and take" between the parties during the negotiations. In Order F20-48, the adjudicator found that disclosure of this kind of information would breach the trust and confidence necessary to engage in meaningful and successful negotiations.[160] I make the same finding here.

[155] In addition, there is some information describing past events and I can appreciate that these statements lack context. I accept that disclosing this information could reasonably be expected to harm the conduct of relations with the Indigenous groups referred to in the records.

[156] The remaining information in dispute under s. 16(1)(a)(iii) is a portion of an email. The Ministry did not specifically address the harm that it asserts will result from disclosure of this information. I can see that this contains an Indigenous group's opinion and is the type of information that the Indigenous group could expect to be treated confidentially and/or disclosed in a more intentional way. I find that s. 16(1)(a)(iii) applies to this information.

Section 16(1)(c)

[157] As I found above that s. 16(1)(a)(iii) did not apply to small portion of some handwritten notes, I will consider whether s. 16(1)(c) applies.

[158] Section 16(1)(c) applies to information that, if disclosed, could reasonably be expected to harm the conduct of negotiations relating to aboriginal self government or treaties.

[159] The Ministry did not explain how the notes relate to aboriginal self government or treaties and it is not apparent to me how they do. Therefore, I find that s. 16(1)(c) does not apply. Consequently, the Ministry must disclose this information to the applicant.

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[159] Affidavit #1 of the Stewardship Officer at para 60.
[160] Order F20-48, 2020 BCIPC 57 at paras 208-212.

Section 18(a)

[160] Section 18(a) allows a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of fossil sites, natural sites or sites that have an anthropological or heritage value.

[161] Section 18(a) has two parts and the public body must prove both. First the sites at issues must be fossil sites, natural sites or sites that have an anthropological or heritage value. Second, disclosure of the information in dispute must be reasonably expected to result in damage to, or interfere with the conservation of that site.

[162] The Ministry has applied s. 18(a) to various pieces of information relating to McAbee such as maps[161], photographs, location coordinates and descriptions,[162] and "Site Inventory Forms".[163]

> Fossil sites, natural sites or sites that have an anthropological or heritage value

[163] The first part of s. 18(a) identifies several kinds of sites, but proving that the records relate to one kind of site is sufficient to satisfy the first part of s. 18(a).

[164] For the reasons that follow, I find that the sites at issue are either fossil sites or sites that have anthropological value.

[165] The Ministry explains that the information at issue mainly relates to the location of archeological sites that overlap with McAbee.[164] The Ministry submits that these sites have both anthropological value and heritage value as set out in s. 6 of the *Freedom of Information and Protection of Privacy Regulation* (FIPPA Regulation).[165] Section 6 of the FIPPA Regulation was also amended on November 25, 2021. Before it was amended, s. 6 said:

> For the purposes of section 18 of the Act,
>
> (a) a site has anthropological value if it contains an artifact or other physical evidence of past habitation or use that has research value, and

[161] Pages 783, 824, 825, 876 part 2; 992-995, 1014-1017 part 3; 991, 992, 1070, 1071 part 5; 581-582 part 6 of the records in dispute.
[162] Pages 783-787, 791, 792, 794-799, 810, 826, 845, part 2; 992-995, 1014-1017 part 3; 159 Part 4; 964, 991, 992, 1015, 1042-1043, 1070, 1071 part 5; 581-582 part 6 of the records in dispute.
[163] Pages 965-989, 1045-1069, part 5 of the records in dispute.
[164] Ministry's initial submissions, para 202.
[165] Ministry's initial submissions, para 204.

> (b) a site has heritage value if it is the location of a traditional societal practice for a living community or it has historical, cultural, aesthetic, educational, scientific or spiritual meaning or value for the Province or for a community including an aboriginal people.[166]

[166] The Stewardship Officer says that the sites identified in the records have anthropological value and contain artefacts and other physical evidence of past habitation by First Nations and that this is evident from the records.[167] The Stewardship Officer says that these sites and artefacts have important research value because the sites reflect one of the best opportunities to learn about the traditional ways of life for the Indigenous peoples who used to live in what is now known as the McAbee area.[168]

[167] The Stewardship Officer says that the sites also have heritage value because they are the location of traditional societal practices for living First Nations communities.[169]

[168] Based on the Ministry's evidence, submissions and information in the responsive records, I am satisfied that the archeological sites overlapping with McAbee have anthropological value within the meaning of s. 18(a).

[169] In addition to what the Stewardship Officer says, which I accept, I find that the records themselves clearly indicate that the archeological sites contain physical evidence, including artefacts, of past habitation.[170] For example, disclosed information in the records describes various kinds of artefacts and "cultural depressions believed to be housepits" located at one of the sites.[171]

[170] Anthropological value as defined in s. 6 of the FIPPA Regulation also requires that the physical evidence of past habitation have research value. "Research value" is not defined in FIPPA or the FIPPA Regulation. However, I do not think it is necessary to delve into the precise meaning of "research value" in the present circumstances. In my view, it is clear that the evidence of past habitation has "research value" because the records themselves are about what has been learned from the evidence of past habitation and what could be learned from future study of it.[172]

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[166] Section 6 of the Regulation was amended during the Inquiry by B.C. Reg. 297/2021, Sch. 3, s. 2 by replacing the words "aboriginal people" with "Indigenous people." As I ultimately do not consider whether the sites at issue have heritage value, I do not need to decide which version of the Regulation applies.
[167] Affidavit #1 of the Stewardship Officer, para 64.
[168] Affidavit #1 of the Stewardship Officer, para 64.
[169] Affidavit #1 of the Stewardship Officer, para 65.
[170] Pages 782-799, part 2 of the records in dispute, for example.
[171] Pages 784-786, part 2, of the records in dispute, for example.
[172] As demonstrated by the disclosed information on page 784, part 2 of the records in dispute, for example.

[171] As a result, I am satisfied that the archeological sites have anthropological value. Given this finding, I do not need to consider whether these sites also have heritage value.

[172] However, it is unclear whether some of the information at issue actually relates to these anthropological sites. While the Ministry did not argue it, I have no trouble concluding that the remaining information is about fossil sites. For example, some of the information is about the location of fossils.[173]

[173] In conclusion, all the information at issue under s. 18(a) is either about fossil sites or sites that have an anthropological value.

Harm

[174] The standard of proof is a reasonable expectation of probable harm, which is the same standard I have described above in relation to s. 16(1)(a)(iii).

[175] Section 18(a) identifies two kinds of harm and either is sufficient for s. 18(a) to apply. The question is whether disclosure of the information in dispute could be reasonably expected to either:

- result in damage to a site; or
- interfere with the conservation of a site.

[176] In considering the type of evidence required to prove harm for the purposes of s. 18(a), former Commissioner Loukidelis in Order 01-11 said that it is not necessary to prove that any individual has a motive to "despoil" the site, although evidence of such a motive may be useful.[174] He further said that evidence of an opportunity to harm or interfere with the site is relevant, but not necessarily dispositive of the issue.[175] In concluding that s. 18(a) applied, he also acknowledged that, until the sites at issue were professionally excavated, their "only effective protection lies in their locations not being publicly known."[176]

[177] The Stewardship Officer says that the information at issue is not publicly available and that it is restricted and provided only to archaeologists, First Nations, and governments only after they sign a data sharing agreement that imposes conditions on further disclosure.[177] The Stewardship Officer further says that if this type of information were released publicly, there is a real and

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[173] Page 159, part 4, of the records in dispute, for example.
[174] Order 01-11, 2001 CanLII 21565 (BCIPC) at para 31.
[175] *Ibid.*
[176] *Ibid* at para 44.
[177] Affidavit #1 of the Stewardship Officer at para 66.

substantial risk that individuals would seek out and disturb these archaeological sites.[178]

[178] I find support for the Stewardship Officer's evidence in the records themselves. For example, the disclosed information in the records indicates that a burial site was damaged by "amateur" archeologists.[179]

[179] Regarding the fossil sites, disclosed information in the records indicates that McAbee is vulnerable to illegal fossil collection and damage due to its international reputation and ease of access from Highway 1/97.[180] In addition, the records contain correspondence from the public expressing an interest in collecting fossils.[181]

[180] Considering all of the above, I am satisfied that disclosure of maps, coordinates and site descriptions could reasonably be expected to result in damage to the fossil sites and sites that have anthropological value because they show where the sites are. However, the Ministry has withheld information on the Site Inventory Forms, such as the template language and headings, and general descriptions that would not reveal the location of the sites at issue. I find that the Ministry can only withhold information on the forms that would reveal the location of the sites, such as specific descriptions and coordinates.[182]

Section 22 – unreasonable invasion of a third party's privacy

[181] The Ministry has withheld a significant amount of information under s. 22. Section 22 requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Personal Information

[182] Since s. 22(1) only applies to personal information, the first step in the s. 22 analysis is to determine whether the information in dispute is personal information.

[183] Schedule 1 of FIPPA provides the following definitions of "personal information" and "contact information":

> **"personal information"** means recorded information about an identifiable individual other than contact information;

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[178] Affidavit #1 of the Stewardship Officer at para 67.
[179] Page 787, part 2 of the records in dispute.
[180] Disclosed at pages 1183-1184, part 3 in the records in dispute.
[181] Page 731, part 4, of the records in dispute for example.
[182] There are two sets of Site Inventory Forms. I have highlighted one set of the Site Inventory forms and the Ministry must sever both sets in accordance with my highlighting.

> **"contact information"** means 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;

[184] Under the above definitions, information that is "contact information" is not "personal information" for the purpose of FIPPA. Whether information is "contact information" depends on the context in which it appears.[183]

[185] The Ministry submits that the information in dispute under s. 22 is personal information of various third parties.[184] It says that the information in dispute relates to third parties' medical and employment histories. The Ministry says that some of the information is personal phone numbers and email addresses but is not contact information.

[186] In my opinion, the vast majority of the information in dispute under s. 22(1) is personal information because it is information about an identifiable individual.

[187] However, I find that some information in dispute under s. 22(1) is not personal information. For example, an email address of an individual in a commercial contract[185] is clearly for the purpose of contacting the individual at a place of business and so it is "contact information." In addition, some of the information is not personal information because it is not about an identifiable individual. This includes the street address of a corporation.[186] In addition, information about groups of people is not about an identifiable individual.[187]

[188] Since s. 22(1) only applies to personal information, the Ministry cannot withhold the information that I have concluded is not personal information.

Section 22(4) – not an unreasonable invasion

[189] The next step in the analysis is to determine if any of the circumstances in s. 22(4) apply to any of the personal information in dispute. If s. 22(4) applies, disclosure of personal information is not an unreasonable invasion of a third party's personal privacy and the information must be disclosed.

[190] The Ministry submits that none of the circumstances in s. 22(4) apply.

[191] In my view, s. 22(4)(e) applies to one piece of personal information in the records. Section 22(4)(e) says that information about a third party's position,

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[183] Order F20-13, 2020 BCIPC 15 at para 42.
[184] Ministry's initial submissions, para 223.
[185] Page 721, part 1 of the records in dispute.
[186] Page 163, part 2 of the records in dispute.
[187] Page 1822, part 2; and page 833, part 4 of the records in dispute.

functions or remuneration as an employee of a public body is not an unreasonable invasion of that third party's personal privacy.

[192] I find that information in the records about the Stewardship Officer's job classification is about the Stewardship Officer's position as an employee of the Ministry.[188] Therefore, s. 22(4)(e) applies and the Ministry cannot withhold it.

[193] I find that none of the other information in dispute falls under any of the circumstances in s. 22(4).

Section 22(3) – presumptions

[194] Section 22(3) lists circumstances where disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. The next step in the analysis is to consider whether any of the circumstances apply.

[195] The Ministry submits that disclosure of some of the information at issue is presumed to be an unreasonable invasion of a third party's personal privacy under some of the circumstances set out in s. 22(3). In addition, I find that there are other presumptions that are relevant based on my own review of the information in dispute.

[196] I will consider each of these presumptions in turn.

Medical history – s. 22(3)(a)

[197] Under s. 22(3)(a) disclosure of personal information that relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation is presumed to be an unreasonable invasion of that third party's personal privacy.

[198] The Ministry submits that s. 22(3)(a) applies to information about individuals' medical history, medical appointments and other information related to medical matters. The Stewardship Officer has identified this information in their affidavit.[189]

[199] I find that some of the personal information identified by the Stewardship Officer falls into s. 22(3)(a) because it is about third parties' medical conditions or medical treatments.[190] This includes specific details about ailments, medical appointments, and specific treatments.

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[188] At page 412, part 4 of the records in dispute.
[189] See Affidavit #1 of the Stewardship Officer at para 70(a).
[190] For example, pages 349, 1374, 1531, 1597, 1598, part 2; 606, 774, 775, 780, part 3; page 378, part 4; page 525, part 5 of the records in dispute.

[200] I find that s. 22(3)(a) does not apply to the remaining information that the Stewardship Officer identified under this presumption because it is not clear how some information is even remotely related to anything medical, psychiatric or psychological and the Ministry did not explain.[191] In addition, some of the information that the Ministry says falls under s. 22(3)(a) is too general to fall under s. 22(3)(a).[192] For example, some of the information indicates that a third party is generally not well. In my opinion, this kind of vague information does not qualify as a third party's medical, psychiatric or psychological history. I find that s. 22(3)(a) does not apply to this type of information.

Employment history – s. 22(3)(d)

[201] Under s. 22(3)(d) disclosure of personal information that relates to employment, occupational or educational history is presumed to be an unreasonable invasion of that third party's personal privacy.

[202] The Ministry submits that s. 22(3)(d) applies to numerous instances of personal information in the records because it is the educational or employment history of third parties.

[203] Some of the personal information is clearly educational and/or employment history as past orders have defined those terms. For example, the Ministry has withheld resumes,[193] information describing a third party's employment or educational endeavours[194], information describing a third party's work performance,[195] and employee identification numbers.[196] I find that this information all falls under s. 22(3)(d).

[204] The Ministry also submits that some information related to employees' vacations is their employment history under s. 22(3)(d). I do not see how details of where a person went or activities they engaged in on a trip has anything to do with a third party's employment history. As I have said in past orders, details of a vacation, even from work, are not sufficiently connected to a third party's employment so as to constitute their employment history.[197] In some instances, it is not even clear that the personal details in the records at issue are about trips taken using annual leave.[198]

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[191] Page 779, part 3 of the records in dispute.
[192] For example, on pages 1116 and 1983, part 2 of the records in dispute.
[193] Pages 366-367, part 2 of the records in dispute.
[194] Page 709, part 2 of the records in dispute.
[195] Page 426, part 3 of the records in dispute, for example.
[196] Page 325, part 4 of the records in dispute, for example.
[197] Order F20-20, 2020 BCIPC 23 at paras 129-131, for example.
[198] Page 1170, part 2 of the records in dispute, for example.

[205] However, where the information would disclose that a third party was away from work at a specific time using a leave that they are entitled to (i.e. sick leave, annual vacation), I find this is sufficiently connected to a third party's work so as to constitute their employment history and disclosure of this information is presumed to be an unreasonable invasion of those employees' privacy under s. 22(3)(d).[199]

Personal recommendations – s. 22(3)(g)

[206] Under s. 22(3)(g) disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations about the third party is presumed to be an unreasonable invasion of that third party's personal privacy.

[207] The Ministry says that s. 22(3)(g) applies to the name and personal contact information of references for named third parties.[200] In support of its argument, the Ministry relies on several orders from the OIPC that found that reference check information is covered by s. 22(3)(g).[201]

[208] I find that s. 22(3)(g) does not apply to the name, phone number, and email addresses of the references. It does not include any qualitative information about what the references thought about the third parties named in the records. The orders the Ministry points to clearly included the references' comments and opinions[202] and therefore are distinguishable from the present case. As a result, I find the information at issue does not constitute a personal recommendation, evaluation, character reference or personnel evaluation within the meaning of s. 22(3)(g).[203]

Ethnicity or religious beliefs – s. 22(3)(i)

[209] Under s. 22(3)(i) disclosure of personal information that indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations is presumed to be an unreasonable invasion of that third party's personal privacy.

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[199] Pages 1067, part 3 of the records in dispute, for example.
[200] Ministry's initial submissions, para 238 and para 70(c) of affidavit #1 of the Stewardship Officer. The information is on page 49, part 2 of the records in dispute.
[201] Order F19-42, 2019 BCIPC 47 at para 26 citing Order 00-48.
[202] Order F19-42, 2019 BCIPC 47 at para 11.
[203] I made the same finding in Order F21-66, 2021 BCIPC 77 at paras 51-54.

[210] The Ministry says that some of the information in dispute is information about the ethnicity of a third party.[204] The Ministry did not explicitly raise s. 22(3)(i) with regards to this information, but since this information clearly describes the ethnicity of a third party, I find it applies.

[211] In addition, I find that a small amount of information in an email indicates a third party's religious beliefs.[205] I find that s. 22(3)(i) applies to this information.

Section 22(2) – relevant circumstances

[212] The next step in the analysis is to determine whether there are any relevant circumstances. Section 22(2) says that when a public body decides whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, it must consider all relevant circumstances, including those listed in s. 22(2). Some circumstances weigh in favour of disclosure and some against. Relevant circumstances that weigh in favour of disclosure may rebut any applicable presumptions under s. 22(3).

Information about a deceased person – s. 22(2)(i)

[213] The Ministry says that s. 22(2)(i) applies. This section reads:

> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[214] In considering the length of time the person has been deceased, past orders have indicated that disclosure is typically not an unreasonable invasion of the deceased person's privacy after the individual has been dead for about 20-30 years.[206]

[215] The Ministry says that some records at issue relate to individuals that died in the last six to ten years.[207] The Ministry submits that these individuals' right to privacy has not significantly diminished over this period of time and therefore disclosure remains an unreasonable invasion of their privacy. The Ministry says that this circumstance weighs against disclosure.

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[204] Affidavit #1 of the Stewardship Officer at para 70(k). Information at page 484, part 5 of the records in dispute.
[205] Identifying the page number would reveal some of the personal information to which the presumption applies, so I decline to do so.
[206] Order F18-08, 2018 BCIPC 10 at paras 31-32; Order F14-32, 2014 BCIPC 35 at paras 34-37.
[207] Ministry's initial submissions, para 248.

[216] Some of the personal information at issue is clearly about deceased persons.[208] The length of time the individuals have been deceased is far less than the 20-30-year timeframe set out in previous orders. I find that, in this case, the length of time the individuals have been deceased favours withholding the information in dispute.

Supplied in confidence – s. 22(2)(f)

[217] While the Ministry did not identify it as a relevant circumstance, the records themselves indicate that some information was supplied in confidence.[209] Therefore, I find that s. 22(2)(f) is a relevant circumstance weighing against disclosure of that information.

Sensitivity

[218] The Ministry argues that some of the information, while not falling into a presumption under s. 22(3) or an enumerated circumstance in s. 22(2) is sensitive and that this is a factor weighing against disclosure. Many past orders have considered the sensitivity of personal information. Where information is sensitive, this is a factor that can favour withholding the information. Conversely, where information is not sensitive, the non-sensitivity of the information can favour disclosure.

[219] The Ministry says that some of the information is sensitive financial personal information of third parties, such as banking information.[210]

[220] The banking information identified by the Ministry is the name of a third party's financial institution. I do not find that this information on its own is sensitive such that it weighs against disclosure.

[221] The Ministry also says that details of a person's vacation are sensitive. In support of this, the Ministry refers to Order F16-52, where the adjudicator said that "details of a personal vacation should generally be considered sensitive in nature, as this in information about what an individual does in their private time away from work."[211]

[222] In my opinion, the information about personal vacations is vague and I do not agree that it is sensitive in the way that past orders have found. Further, the adjudicator in Order F16-52 found that the sensitivity of the information was reduced, in part because the information was three years old. In this case, all of

[208] For example, pages 812-814, part 3 of the records in dispute.
[209] Page 736, part 3 of the records in dispute.
[210] Ministry's initial submissions at para 242. Affidavit #1 of the Stewardship Officer at para. 70(i).
[211] Ministry's initial submissions at para 236 citing Order F16-52, BCIPC 58 at para 88.

the information is at least four years old. For these reasons, I find that sensitivity is not a factor weighing in favour of withholding this information.

Applicants personal information / personal information likely to be inaccurate or unreliable s. 22(2)(g)

[223] There is a small amount of information in dispute about the applicant.[212] The information in dispute is the name of a third party and a punctuation mark. The remainder of the information on the page has been disclosed and appears to be that third party's opinion about the applicant.

[224] Many past orders have found that information about an applicant is a circumstance weighing in favour of disclosure of that information to the applicant.[213] I make the same finding here. In this case, the punctuation mark indicates that the note writer appears to be uncertain about the third party's identity. This leads me to conclude this personal information is also likely to be inaccurate or unreliable, which is a circumstance enumerated in s. 22(2)(g). I find that this circumstance weighs against disclosure of this information.

Conclusion s. 22

[225] I found that a small amount of information is contact information as defined by FIPPA and therefore it cannot be withheld. In addition, I found that some personal information must be disclosed because it falls under s. 22(4)(e).

[226] For the remaining personal information, some is subject to a presumption under s. 22(3). In addition, some circumstances under s. 22(2) weigh in favour of withholding the information in dispute. The only circumstance weighing in favour of disclosure is with regards to a small amount of information about the applicant, but this is outweighed by the fact that the information is likely inaccurate or unreliable.

[227] As a result, I find that s. 22(1) applies to all of the personal information in dispute.

CONCLUSION

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

1. I order the Ministry to perform its duty to conduct an adequate search by searching for text messages and deleted emails in accordance with my comments in paragraphs 36 and 37 above.

[212] Page 115, part 3 of the records in dispute.
[213] Order F22-10, 2022 BCIPC 10 at para 150, for example.

2. I confirm the Ministry's decision to refuse access to the information it withheld under ss. 13(1) and 14 of FIPPA.

3. Subject to item 6 below, I confirm, in part, the Ministry's decision to withhold information under s. 16(1)(a)(iii) and s. 18(a).

4. I require the Ministry to give the applicant access to the information I considered under s. 16(1)(c).

5. Subject to item 6 below, I require the Ministry to refuse to disclose parts of the records in dispute under s. 12(1) and 22(1).

6. The Ministry is required to give the applicant access to the information I have highlighted in the copy of the records provided to the public body with this order. For the Site Inventory Forms, I have provided a highlighted copy of one set of the forms but the Ministry must sever both sets in accordance with my highlighting.

7. The public body must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 6 above.

[229] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with the orders by **August 26, 2022**.

In addition, under s. 44(1)(b), I require the Ministry to produce to me, through the Registrar of Inquiries, the records or portions of the records it is withholding on the basis of settlement privilege. Under s. 44(3), the Ministry must produce these records by **July 28, 2022**.

July 14, 2022

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F19-79973 & F19-81027