Order F22-39

BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Ian C. Davis
Adjudicator

August 17, 2022

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Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Investment Management Corporation (BCI) for copies of 2014-2015 BCI employee engagement and satisfaction survey reports, including results and analysis. BCI withheld the responsive records and information on the basis of common law case-by-case privilege and ss. 13(1) (advice or recommendations), 17(1) (harm to financial or economic interests of a public body), 21(1) (harm to business interests of a third party) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA. The adjudicator concluded that Division 2 of Part 2 of FIPPA is a complete code of exceptions to disclosure abrogating case-by-case privilege, so BCI was not entitled to rely on that privilege as an access exception. The adjudicator then determined that BCI was authorized to withhold most of the disputed information under s. 13(1), but that it was not authorized or required to withhold the balance of the information under the other exceptions BCI applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 4(2), 13(1), 13(2)(a), 13(2)(b), 13(2)(c), 13(2)(d), 13(2)(g), 13(2)(i), 17(1), 21(1)(c)(i) and 21(1)(c)(iii).

INTRODUCTION

[1] An individual (applicant) made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Investment Management Corporation (BCI) for access to records. Specifically, the applicant requested access to all BCI "employee engagement and satisfaction survey reports for 2014 and 2015, including, but not limited to, employee feedback and analysis of results."[1]

[1] Email from the applicant to BCIT dated January 7, 2016.

[2] BCI withheld the requested records and information under ss. 13(1) (advice or recommendations), 17(1) (harm to financial or economic interests of a public body), 21(1) (harm to business interests of a third party) and 22(1) (unreasonable invasion of a third party's personal privacy) of FIPPA.[2]

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BCI's decision. Mediation did not resolve the matter and it proceeded to this inquiry. BCI then sought permission from the OIPC to add as an inquiry issue whether BCI is authorized to withhold the disputed records on the basis of case-by-base privilege. The OIPC granted BCI's request.[3]

[4] Pursuant to s. 54(b) of FIPPA, the OIPC invited a third party to participate in this inquiry, but it chose not to make submissions.[4]

ISSUES AND BURDEN OF PROOF

[5] The issues in this inquiry are:

1. Is BCI authorized to refuse access to the disputed records on the basis of common law case-by-case privilege?

2. Is BCI authorized under ss. 13(1) and 17(1) to refuse access to the information it withheld under those sections?

3. Is BCI required under ss. 21(1) and 22(1) to refuse access to the information it withheld under those sections?

[6] The burden of proof is on BCI to show that ss. 13(1), 17(1), 21(1) and case-by-case privilege apply.[5] The applicant has the burden to show that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).[6] However, BCI bears the initial burden to show that the information in dispute under s. 22(1) is personal information.[7]

BACKGROUND

[7] BCI was established in 2000 under the *Public Sector Pension Plans Act* to provide investment management services to public sector bodies designated by

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[2] Investigator's Fact Report at paras. 2-5 and 9.
[3] Investigator's Fact Report at paras. 8-9.
[4] Email from the third party to the OIPC dated February 24, 2022.
[5] FIPPA, s. 57(1); *R. v. Valkonen*, 2004 ABQB 322 at para. 32 (regarding case-by-case privilege).
[6] FIPPA, s. 57(2).
[7] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

the government of British Columbia.[8] Its clients include 12 public sector pension plans, three insurance funds, and various special purpose funds. BCI generates the investment returns that help its institutional clients build a financially secure future for their beneficiaries.[9] BCI manages over $100 billion of net assets.

[8] In September 2014, a new Chief Executive Officer and Chief Investment Officer (CEO/CIO) started at BCI. Shortly after his arrival, the CEO/CIO articulated a proposal for a new business strategy (Strategy).

[9] BCI identified employee engagement as an important feature of successfully implementing the Strategy. In 2014-2015, BCI engaged a consultant (Consultant) to assist it in developing and implementing an employee engagement survey and to provide insight and analysis relating to the survey results. The Consultant conducted the survey and provided reports to BCI presenting and analyzing the results. BCI conducted a subsequent employee survey in 2016.

RECORDS AND INFORMATION IN DISPUTE

[10] There are 660 pages of disputed records in the package before me. Based on my review, I find that the disputed records are reports created by the Consultant for BCI that present and analyze the results of the 2014-2015 employee engagement survey.

[11] I find that the disputed information in the records falls into the following categories,[10] which I will use for the purposes of my analysis below:

- survey questions asking the survey participants to indicate the extent to which they agree with a statement;[11]
- survey results expressed in various ways including statements, figures, percentages and graphs, indicating how the survey participants

[8] The information in this background section is based on the evidence, which the applicant does not contest and I accept, in Affidavit #1 of BCI's Executive Vice-President (EVP) at paras. 7-15.
[9] BCI also made submissions about how it is distinguishable in several ways from other public bodies, which the applicant describes as an attempt to gain "special status" (applicant's submissions at para. 7). I have considered those submissions as context for this inquiry, while recognizing that BCI is listed as a public body in Schedule 2 of FIPPA and each case is to be decided on its own facts.
[10] As is often the case, different categories of information may overlap within individual records.
[11] Records at pp. 13, 19-40, 44-86, 100-104, 165-188, 190, 193, 195, 198-199, 202-203, 205, 207, 259, 267, 272, 277-278, 286-288, 292-294, 296-303, 305-308, 310-332, 335-337, 339-346, 349-351, 353-360, 364, 366, 373, 377, 379, 386, 390, 392, 399, 403, 405, 412, 416, 418, 425, 429, 431, 438, 442, 444, 451, 455, 457, 464, 468, 470, 477, 481, 483, 490, 494, 496, 503, 506-508, 510-517, 520-522, 524-531, 534-536, 538-545, 548-550, 552-559, 561-583, 586-588, 590-597, 600-602, 604-611, 614-616, 618-625, 628-630, 632-639, 649-651 and 653-660.

responded in the aggregate to particular survey questions or survey topic areas;[12]
- verbatim written comments from survey participants in response to open-ended invitations for comments;[13]
- the Consultant's views about the survey results and the areas BCI should focus on for improvement;[14]
- the Consultant's background explanations about concepts relating to the survey and aspects of the survey methodology, including survey objectives, the level of participation, how to interpret certain charts, why the Consultant measures certain things, and how certain scores are calculated;[15]
- benchmark information indicating the average survey results of other employers, which the Consultant used to compare BCI's results;[16] and
- miscellaneous, largely non-substantive, information such as the Consultant's company name, statements regarding disclosure of the records, document cover pages, subject headings, formatting and page numbers.[17]

[12] To be clear, as I discuss further below, except for the written comments, the records do not contain each individual survey participant's actual responses to the survey questions. Rather, the records present the survey results in aggregate and anonymized form and do not identify the individual survey participants by name or job title. However, some of the survey participants' written comments refer to individuals by job title.

[13] BCI is withholding all of the records in their entirety under common law case-by-case privilege and all of the disputed information in its entirety under s. 13(1) of FIPPA. It is also withholding various parts of the records under

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[12] Throughout the Records, but examples include pp. 19-40, 165-172, 247 and 292-303.
[13] Records at pp. 88, 106-164, 209-212, 214, 216, 218-219, 221-222, 224-225, 227, 229-231, 233-234, 236-237 and 239-241. Also, some information on p. 281 would reveal the substance of the written comments.
[14] Records at pp. 18, 43, 103-105, 249, 253, 258-263, 272-277, 280-281 (mostly in purple comment boxes).
[15] Records at pp. 2-3, 8-9, 12-13, 17, 42, 44, 91-92, 244-245, 253-255, 266-267, 288-289, 291-296, 334-339, 348-353, 362-364, 372-373, 375-377, 385-386, 388-390, 398-399, 401-403, 411-412, 414-416, 424-425, 427-429, 437-438, 440-442, 450-451, 453-455, 463-464, 466-468, 476-477, 479-481, 489-490, 492-494, 502-503, 505-510, 519-524, 533-538, 547-552, 585-590, 599-604, 613-618, 627-632, 641-642 and 648-653 (many of these pages duplicate information). I have highlighted the information in a copy of the Records that the OIPC will provide to BCI with this order.
[16] The benchmark information appears throughout the Records in many forms, but examples (many of which are repeated in the same form on multiple pages) include pp. 4, 10, 12-13, 15, 90, 94-98, 100-102, 165-180, 191, 246-247, 249, 262-263, 268, 272, 292-303 and 305-308.
[17] This information appears throughout the Records, but a representative example is most of the information on the cover pages at pp. 1 and 5. I have highlighted the information in this category in a copy of the Records that the OIPC will provide to BCI with this order.

ss. 17(1), 21(1) and 22(1) of FIPPA. Since BCI is withholding all of the records in their entirety on the basis of case-by-case privilege, I will consider that issue first. I take this approach because if I find that case-by-case privilege applies to all of the records in their entirety, there is no need to consider whether the other exceptions also apply to parts of the same records.

COMMON LAW CASE-BY-CASE PRIVILEGE

[14] BCI submits that it is authorized to refuse to disclose all of the disputed records in their entirety on the basis of case-by-case privilege.[18] Case-by-case privilege is a common law doctrine that protects records from disclosure where the following criteria, known as the "Wigmore test", are met:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[19]

[15] BCI submits that the Wigmore test is satisfied in respect of the disputed records because of the confidential relationship between BCI and its employees in relation to the survey.[20]

[16] It is first important to recognize the statement of FIPPA's legislative purposes found in ss. 2(1)(a) and (c). These sections state that FIPPA's legislative goals "are to make public bodies more accountable to the public and to protect personal privacy" by, among other things, "giving the public a right of access to records" and "specifying limited exceptions to the right of access".

[17] Section 4(1) establishes the public's right of access to records. It says that, subject to s. 4(2), an applicant who makes a request under s. 5 has a "right of access" to a record in the custody or under the control of a public body, including a record containing personal information about the applicant. There is

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[18] BCI's initial submissions at paras. 61-78.
[19] *R. v. McClure*, 2001 SCC 14 at para. 29. Although the fourth part of the Wigmore test refers to "litigation", I am satisfied that the absence of underlying litigation in the access to information context does not preclude the potential application of case-by-case privilege under FIPPA. The "benefit for the correct disposal of litigation" part of the test can easily be modified to something that fits the context, such as benefit gained by public access to the disputed information.
[20] BCI's initial submissions at paras. 69-78.

no question in this case that the disputed records are in BCI's custody and under its control.

[18] Section 4(2) states that an applicant's right of access to a record does not extend to information that is excepted from disclosure under Division 2 of Part 2 (Division 2), but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. Division 2 contains ss. 12 to 22.1, which specify what s. 2(1)(c) stipulates are "limited exceptions" to the "right of access". None of those exceptions mention Wigmore, or case-by-case, privilege.

[19] The only exception to disclosure in FIPPA that refers to a "privilege" is s. 14. Section 14 states that the head of a public body may refuse to disclose to an applicant information that is subject to "solicitor client privilege." Solicitor-client privilege protects confidential communications between a lawyer and a client that relate to the seeking or giving of legal advice.[21] Section 14 has also been held to encompass litigation privilege for FIPPA purposes.[22] Litigation privilege protects documents produced for the dominant purpose of conducting ongoing or reasonably apprehended litigation.[23]

[20] Although BCI did not argue that solicitor-client privilege or litigation privilege encompass case-by-case privilege, there is no doubt that neither of them do so at common law or as components of s. 14. Case-by-case privilege is, accordingly, not one of the "limited exceptions" to disclosure that the Legislature has specified in Division 2. This raises the question of whether BCI may nevertheless, as it contends, rely on case-by-case privilege as a common law exception to disclosure.

Can BCI rely on case-by-case privilege as a common law exception to disclosure?

Positions of the parties

[21] BCI submits that it is entitled to rely on case-by-case privilege as an exception to the "right of access" despite the fact that, as already noted, none of the access exceptions specify or encompass case-by-case privilege. Specifically, BCI argues that:

> As a common law privilege, case-by-case privilege applies to protect records from disclosure under [FIPPA]. [FIPPA] does not contain express language that would abrogate case-by-case privilege, and it should not have been interpreted to have done so. Rather, recent decisions by the

[21] *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 1979 CanLII 9 (SCC) at p. 837 [cited to S.C.R.].
[22] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [*College*].
[23] *Raj v. Khosravi*, 2015 BCCA 49 at para. 20.

> British Columbia Supreme Court and the BCIPC support the recognition and application of case-by-case privilege in the circumstances of this inquiry.[24]

[22] The decisions BCI relies upon are the 2017 decision of the Supreme Court of British Columbia in *Richmond (City) v. Campbell* [*Richmond*],[25] and OIPC orders that apply it. In *Richmond*, the Court held that a public body may rely on settlement privilege as a basis to withhold information despite the fact that settlement privilege is not found in FIPPA. Settlement privilege protects communications made for the purpose of resolving ongoing or anticipated litigious disputes.[26]

[23] In response, the applicant submits that case-by-case privilege should not apply in this case and BCI's arguments "should stand on their own merits under the exceptions already written in FIPPA."[27]

Analysis and conclusions

[24] Since BCI's position relies exclusively upon *Richmond* (and orders that apply it), I begin with a discussion of that decision. The Court's analysis in *Richmond* of why settlement privilege applies in the context of FIPPA is brief, with the key paragraphs being as follows:

> … This leaves the question of whether the common law settlement privilege applies to protect an agency from producing documents which it would otherwise be required to produce under *FIPPA*.
>
> Section 4 of *FIPPA* gives an individual a right of access to a record in the custody of a public body, but that does not extend to information excepted from disclosure under Division 2 of that Part of *FIPPA*. That Division includes sections 12 through 22.1.
>
> As discussed in para. 38 of *Magnotta OCA*, settlement privilege is a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit statutory language. There is an overriding public interest in settlement. It would be unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by government, of the settlement privilege available to all other litigants. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions.

[24] BCI's initial submissions at para. 63.
[25] 2017 BCSC 331 [*Richmond*].
[26] See, for example, *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*].
[27] Applicant's submissions at para. 18.

> *FIPPA* does not contain express language that would abrogate settlement privilege and, accordingly, it should not be interpreted to have done so.[28]

[25] In the third paragraph quoted above, the Court is referring to the 2010 decision of the Ontario Court of Appeal in *Liquor Control Board of Ontario v. Magnotta Winery Corporation* [*Magnotta*].[29] *Magnotta* dealt with whether settlement privilege applies in the context of Ontario's access to information legislation. At para. 38 of *Magnotta*, which *Richmond* cites, the Ontario Court of Appeal stated the following:

> Further, based on recent judgments of the Supreme Court of Canada, I understand that fundamental common law privileges, such as settlement privilege, ought not to be taken as having been abrogated absent clear and explicit statutory language: see *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 11 [*Blood Tribe*]; and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61, at para. 18 [*Lavallee*]. While both of these cases relate to solicitor-client privilege, many of the same considerations apply to settlement privilege. Section 19 [of Ontario's freedom of information statute] does not contain express language that would abrogate settlement privilege. Accordingly, in my view, it ought not to be so interpreted.

[26] *Magnotta* cites *Blood Tribe* and *Lavallee* as support for the proposition that "fundamental common law privileges" ought not to be taken as having been abrogated absent clear and explicit statutory language.

[27] In *Blood Tribe*, the Court stated that solicitor-client privilege is "fundamental to the proper functioning of our legal system."[30] This is because the privilege provides the confidentiality required for clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients, resulting in improved quality of justice and access to justice.[31] In other words, solicitor-client privilege is a "fundamental policy of the law" and in the public interest because it encourages the "free flow of legal advice".[32]

[28] Given the fundamental importance of solicitor-client privilege to the legal system, the Court held in *Blood Tribe* that clear and explicit statutory language is "necessary to permit a regulator or other statutory official to 'pierce' the

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[28] *Richmond*, *supra* note 25 at paras. 69-72 (paragraph numbers omitted).
[29] 2010 ONCA 681 [*Magnotta*].
[30] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9 [*Blood Tribe*].
[31] *Blood Tribe*, *ibid*. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34 and *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) per Doherty J.A.
[32] *Blood Tribe*, *ibid* at paras. 9-10.

privilege."[33] Citing *Lavallee*, the Court set out the following principles of statutory interpretation:

> … legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents[.][34]

[29] *Richmond* and *Magnotta* expanded these principles concerning solicitor-client privilege to settlement privilege in the context of access to information legislation. In *Magnotta*, the Court simply stated that "many of the same considerations" that justify requiring clear and explicit language to abrogate solicitor-client privilege also apply to settlement privilege.[35] In *Richmond*, the Court provided more detail, stating, in summary, that by encouraging settlements settlement privilege, like solicitor-client privilege, "serve[s] the goal of the effective administration of justice".[36]

[30] In *Richmond*, the Court accepted that settlement privilege, like solicitor-client privilege, is a "fundamental common law privilege" and therefore clear and explicit language is required to abrogate it. The Court found that no such clear and explicit language existed in FIPPA, so settlement privilege had not been abrogated. The Court concluded from this that a public body could rely on settlement privilege as a common law exception to disclosure in response to an access request under FIPPA.

[31] I note, firstly, that *Richmond* relies heavily on *Magnotta*, but *Magnotta* is distinguishable. The Ontario Court of Appeal held in *Magnotta* that settlement privilege is covered by the express language of s. 19 of Ontario's freedom of information statute, which sets out an exception to disclosure for a record "prepared by or for Crown counsel … for use in litigation."[37] The Court of Appeal held that "litigation" includes mediation and settlement discussions, which are protected by settlement privilege, and that records relating to these discussions are covered by s. 19. By contrast, in *Richmond*, the Court found that settlement privilege did not fit within any of the exceptions set out in FIPPA, so the issue was whether the public body could rely on settlement privilege as it exists at common law. *Magnotta* never considered that issue, so it did not, with respect, support the reasoning in *Richmond*.

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[33] *Blood Tribe*, *ibid* at para. 2.
[34] *Blood Tribe*, *ibid* at para. 11, citing *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 18 [*Lavallee*] and *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 33.
[35] *Magnotta*, *supra* note 29 at para. 38.
[36] *Richmond*, *supra* note 25 at paras. 67 and 71.
[37] *Magnotta*, *supra* note 29 at para. 21.

[32] I also note that the reasoning in *Richmond* relies, through *Magnotta*, upon *Blood Tribe* and *Lavallee*, but those cases focus exclusively on solicitor-client privilege. *Blood Tribe* and *Lavallee* make no reference to settlement privilege at all. I see no indication in *Blood Tribe* or *Lavallee* that the Supreme Court intended for the principles applied there to be extended to settlement privilege, as they were in *Richmond*.

[33] Nor, with deference, did the Court's statement in *Richmond* that settlement privilege "serve[s] the goal of the effective administration of justice" advance the analysis of whether that privilege applies in the context of FIPPA. Even if *Blood Tribe* and *Lavallee* left open the possibility of extending the principles set out there beyond the context of solicitor-client privilege, I question the basis for extending them to settlement privilege in particular. *Richmond* recognizes that:

> … While both privileges serve the goal of the effective administration of justice, they are very different. Legal advice privilege serves that goal through protecting the confidentiality of communications between a lawyer and client, while settlement privilege serves that goal by encouraging free discussion between adverse parties towards reaching a settlement and the terms of any settlement.[38]

[34] Beyond this, there are other key differences between solicitor-client privilege and settlement privilege. In Order F22-34, the adjudicator explained that, unlike solicitor-client privilege, settlement privilege is not as close to absolute as possible, does not confer a substantive right with constitutional status,[39] and it can be set aside where a competing public interest outweighs the public interest in encouraging settlement.[40]

[35] In other words, despite some commonalities, settlement privilege and solicitor-client privilege are, as the Court acknowledged in *Richmond*, "very different", and settlement privilege simply does not have the same significance within the legal system as does solicitor-client privilege. For this reason, and with respect, I doubt whether it was appropriate in *Richmond* to apply to settlement privilege principles of statutory interpretation that were developed exclusively in relation to solicitor-client privilege.

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[38] *Richmond*, *supra* note 25 at para. 67.

[39] Solicitor-client privilege is a substantive right with constitutional status (see *Lavallee*, *supra* note 34 at para. 21), but I am not aware of any authority bestowing the same status on settlement privilege.

[40] Order F22-34, 2022 BCIPC 38 at para. 87. See also *Betser-Zilevitch v. Prowse Chowne LLP*, 2022 ABCA 134 at para. 27, where the Alberta Court of Appeal stated that while settlement privilege and solicitor-client privilege are both class privileges with strong public policy justifications, settlement privilege is "perhaps less formidable".

[36] Furthermore, in addition to being developed in relation to a significantly different type of privilege, the principles in *Blood Tribe* and *Lavallee* were developed in response to a different legal issue than the one raised in *Richmond*. In *Richmond*, the issue was whether a public body could limit an access applicant's right of access to records under FIPPA by resorting to common law principles despite the fact that FIPPA sets out "limited exceptions" to disclosure, with settlement privilege not being one of those exceptions, as the Court itself found.

[37] Neither *Blood Tribe* nor *Lavallee* dealt with the issue of supplementing legislation by resort to the common law. Rather, they dealt with whether particular statutory language governing production of documents justified interference with solicitor-client privilege. *Blood Tribe* concerned whether the *Personal Information Protection and Electronic Documents Act*[41] authorized the federal Privacy Commissioner to compel a government institution to produce allegedly privileged records to him to review the institution's privilege claim. The Supreme Court of Canada held that the statutory language was not clear enough to permit the Privacy Commissioner to compel production. Similarly, *Lavallee* concerned the constitutionality of a *Criminal Code* provision setting out a procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant. These are very different issues from whether an access to information statute specifying exceptions to the public's right of access to records, properly interpreted, permits or precludes a public body from relying upon a common law privilege.

[38] Given these differences, I doubt that the principles set out in *Blood Tribe* and *Lavallee* ought to have governed the issue in *Richmond*. *Blood Tribe* and *Lavallee* say that, absent clear and explicit language to the contrary, a statutory provision authorizing inspection of documents ought not to be interpreted to allow for the inspection of documents that are subject to solicitor-client privilege. That is clearly not the same as saying that legislation can only abrogate the common law if it contains clear and explicit language to that effect.

[39] Indeed, the requirement in *Richmond* that legislation contain clear and explicit language to abrogate a fundamental common law privilege is, with respect, inconsistent with various cases addressing the issue of supplementing legislation by resorting to the common law. Those cases frame the issue as whether the legislature intended the statute in question, or some part of it, to be a "complete", "comprehensive" or "exhaustive" code abrogating an aspect of the common law.[42]

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[41] S.C. 2000, c. 5.

[42] See, for example, Review Report 16-12, 2016 NSOIPC 12 at paras. 103-139; Report A-2018-022, 2018 CanLII 82316 (NL IPC); *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at paras. 193-203 per Côté J. (dissenting in part) [*Pioneer*]; *Process Automation Inc. v. Norstream Intertec Inc. & Arroyave*, 2010 ONSC 3987 at paras. 106-111 [*Norstream*]; *Tucci v. Peoples Trust Company*,

[40] The cases address this issue in accordance with the following principles:

- Whether a statute is a complete code is a question of statutory interpretation and the issue is whether it is permissible in the circumstances to supplement the legislation by resorting to the common law.[43]
- Statutory interpretation involves determining legislative intent, which is governed by the "modern principle": "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[44]
- The starting point in the analysis is the established principle that legislatures are presumed not to interfere with the common law.[45]
- However, this presumption can be rebutted where the evidence establishes that the legislature intended the legislation in question to be a complete code.[46] "An intention to create an exhaustive code may be expressly stated in the legislation or it may be implied."[47]

[41] *Richmond* does not refer to this required approach. It does not frame the issue as whether FIPPA is a "complete code" of access exceptions abrogating settlement privilege. It does not set out or apply the modern principle of statutory interpretation and, as a result, does not analyze the scheme of FIPPA or its purposes, which include, notably, "specifying limited exceptions to the right of access". *Richmond* also does not acknowledge the principle that an intention to create an exhaustive legislative code abrogating a common law privilege may be implied. It does not explain why the requirement for clear and explicit language, derived from *Blood Tribe* and *Lavallee* in relation to a different privilege and a

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2020 BCCA 246 at paras. 18-40; *Hopkins v. Kay*, 2015 ONCA 112 at paras. 29-62. The parties did not cite these cases. However, I am not bound to rely on the authorities they cited and am entitled to seek assistance beyond the authorities cited as long as I do not change the issues or raise new issues: *R. v. Badhesa*, 2019 BCCA 70 at para. 18.

[43] *Pioneer*, *ibid* at para. 195, citing R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014) at p. 549; Review Report 16-12, *ibid* at para. 112; Report A-2018-022, *ibid* at para. 65; *Norstream*, *ibid* at para. 107.

[44] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87. In applying the modern principle, other cases have considered factors adopted from *Sullivan on the Construction of Statutes*: Review Report 16-12, *ibid* at para. 116; Report A-2018-022, *ibid* at para. 65; *Norstream*, *ibid* at para. 108. In my view, these factors simply elaborate and specify the relevant considerations under the modern principle and it is not necessary to set them out specifically or address them individually.

[45] *Bryan's Transfer Ltd. v. Trail (City)*, 2010 BCCA 531 at para. 45; *Pioneer*, *supra* note 42 at para. 197.

[46] Review Report 16-12, *supra* note 42 at para. 116, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008) at p. 441; *Pioneer*, *ibid*; *Norstream*, *supra* note 42 at paras. 107-108.

[47] *Hopkins*, *supra* note 42 at para. 30. See also *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057,* [1990] 1 S.C.R. 1298, 1990 CanLII 110 (SCC) at pp. 1315-1316 [cited to S.C.R.].

different legal issue, overrides the Legislature's ability to abrogate an aspect of the common law by implied exclusion.

[42] For these reasons, I respectfully question the reasoning and the result in *Richmond*, and thus its value as a precedent, on the issue of whether a public body can rely on a common law exception to disclosure that is not found in FIPPA itself. In fact, for reasons set out below, I consider it likely that, were the Court to apply the required analytical framework, it would conclude that the Legislature intended the access exceptions in Division 2 to be a complete code, such that settlement privilege is not applicable.

[43] That said, despite the concerns raised above, *Richmond* has not been overturned and several BC OIPC orders[48] have applied it, allowing public bodies to withhold records and information on the basis of common law settlement privilege. BCI now cites *Richmond* as authority for allowing it to rely on case-by-case privilege even though that privilege is not set out in FIPPA. In the circumstances, I do not consider it open to me to disregard *Richmond*.[49]

[44] BCI submits that *Richmond* stands for the proposition that *any* common law privilege ought not to be taken as having been abrogated absent clear and explicit statutory language. However, as discussed above, that is not what *Richmond* said. It is clear that *Richmond* applied a different principle, namely that, if a privilege is "fundamental", like solicitor-client privilege, it ought not to be taken as having been abrogated absent clear and explicit statutory language to that effect. *Richmond* and *Magnotta*, the latter citing *Blood Tribe* and *Lavallee*, specifically refer to "fundamental" common law privileges—the quintessential one being solicitor-client privilege—not all privileges.

[45] Accordingly, the question here is not, as BCI argues, whether FIPPA contains clear and explicit language abrogating case-by-case privilege; rather, the question is whether case-by-case privilege, like solicitor-client privilege and settlement privilege, is a "fundamental common law privilege". If it is, then FIPPA requires clear and explicit language to abrogate it and the question becomes whether FIPPA contains the necessary language.

[46] As the Wigmore test makes clear, case-by-case privilege is about relations between parties that in the opinion of the community ought to be sedulously fostered. However, such relations do not necessarily have anything to do with the proper functioning of the legal system or the "effective administration of justice", the latter being a key consideration in *Richmond*'s analysis of the

[48] See, for example, Order F21-11, 2021 BCIPC 15; Order F19-20, 2019 BCIPC 22.
[49] *Bank of Montreal v. Li*, 2020 FCA 22 at para. 37, citing *Tan v. Canada (Attorney Genera)*, 2018 FCA 186 at para. 22 ("an administrative decision-maker is bound to follow applicable precedents originating from any court"). See also *Sanchez Herrera v. Canada (Public Safety and Emergency Preparedness*), 2021 FC 401 at paras. 72-92.

fundamental importance of settlement privilege. Indeed, in this case, I do not see how protecting information about the specific relations between BCI and its employees serves the broader interests of the legal system and the effective administration of justice.

[47] The same point can be made in relation to the well-established distinction between class privileges and case-by-case privileges.[50]

[48] Class privileges involve a presumption of non-disclosure based on general overriding policy reasons, subject only to limited recognized exceptions.[51] Class privileges include solicitor-client privilege, settlement privilege, litigation privilege and informer privilege.[52] These each facilitate the proper functioning of the legal system and the effective administration of justice.

[49] Case-by-case privileges, on the other hand, involve a presumption of disclosure unless the Wigmore test is satisfied, and each individual claim of that privilege requires, on the specific facts of each case, weighing competing policy reasons for and against disclosure.[53] Case-by-case privileges protect the confidentiality involved in certain relationships but, unlike class privileges, they do not generally or necessarily facilitate the proper functioning of the legal system or the effective administration of justice.

[50] As the comparison to class privileges makes clear, case-by-case privilege simply does not stand on the same legal footing as class privileges such as solicitor-client privilege or settlement privilege. Case-by-case privilege cannot be described as akin to, or similarly as "fundamental" as, class privileges because it does not have the same significance to the legal system and the administration of justice.

[51] I conclude from the above considerations that case-by-case privilege is not a "fundamental common law privilege" like solicitor-client privilege or settlement privilege. As a result, FIPPA does not need clear and explicit language to abrogate case-by-case privilege. Instead, it was open to the Legislature to exclude case-by-case privilege from application under FIPPA by implication rather than by explicit language.

[52] The question now is whether the Legislature impliedly intended Division 2 to be a complete code of exceptions to disclosure and to exclude common law case-by-case privilege, or whether it intended for FIPPA to be supplemented by

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[50] See, for example, *R. v. Gruenke*, [1991] 3 S.C.R. 263, 1991 CanLII 40 (SCC) [cited to S.C.R.]; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 32; *R. v. National Post*, 2010 SCC 16 at paras. 42-55.
[51] *Gruenke*, *ibid*; *Lizotte*, *ibid* at para. 32.
[52] See, for example, *Saskatchewan Crop Insurance Corporation v. Rick Peterson Farms Ltd.*, 2019 SKCA 19 at para. 21.
[53] *Gruenke*, *supra* note 50 at p. 286.

common law case-by-case privilege. This issue is governed by the general principles of statutory interpretation already set out above, which I apply here. The Legislature is presumed to have intended not to interfere with the common law, but that presumption can be rebutted by evidence of a contrary legislative intent. The modern principle applies, which involves determining the Legislature's intention based on the words, scheme and purposes of FIPPA.

[53] For the reasons that follow, I conclude that Division 2 is a complete code of access exceptions, and that case-by-case privilege is not one of those exceptions.[54]

[54] As noted earlier, the only reference to a privilege in Division 2 is to "solicitor client privilege" in s. 14. This is telling, as it is indicates that the Legislature turned its mind to the question of what privileges to protect and that it decided only to protect "solicitor client privilege".[55] In other words, the Legislature's choice to specify "solicitor client privilege" as an exception to the right of access under s. 14, coupled with the absence of any other exception referring to a privilege of any kind, indicates the Legislature's intention to impliedly exclude case-by-case and other common law privileges not specified in Division 2.

[55] This interpretation is supported by the scheme of FIPPA and the language in other provisions. As noted at the outset, s. 4 says that an applicant has a "right of access" to records in the custody or under the control of a public body, but that right does not extend to information that is excepted from disclosure "under Division 2 of this Part", i.e., Part 2. Section 4, in other words, explicitly derogates from the right of access with reference only to the exceptions in Division 2. It does not mention the common law, including any common law privileges. This indicates that the Legislature intended an applicant's right of access to be limited only by the exceptions specified in Division 2, which does not include case-by-case privilege.

[56] Section 4(2) also says that if information excepted from disclosure under Division 2 can reasonably be severed from a record, an applicant has a right of access to the remainder of the record. However, if a public body severed information from a record on the basis of a case-by-case privilege (or any other common law exception to disclosure not set out in FIPPA), it would be acting

[54] As the analysis indicates, if it were it open to me to do so, I would for the same reasons conclude that the Legislature intended to exclude settlement privilege from the FIPPA scheme. In other words, with great respect, I believe the Court in *Richmond* did not apply the required analytical principles, including the principles of statutory interpretation, and reached the wrong result.

[55] By contrast, I note that s. 27(1)(a) of Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, for example, authorizes a public body to refuse to disclose information subject to "any type of legal privilege", which clearly indicates the Alberta Legislature's intention to include case-by-case privilege as an exception to disclosure.

contrary to s. 4(2). That is because s. 4(2) only allows a public body to sever information excepted from disclosure "under Division 2 of this Part", which does not include case-by-case privilege.

[57] Another instructive provision within the scheme of FIPPA is s. 8, which sets out what a public body must tell an applicant in response to an access request. Section 8(1)(c)(i) requires the public body to tell the applicant, if access to the record or to part of the record is refused, the reasons for the refusal and "the provision of this Act" on which the refusal is based. This section clearly indicates that the Legislature only intended to authorize or require public bodies to refuse access to records or information on the basis of provisions of "this Act", i.e., FIPPA, and not common law exceptions existing outside of FIPPA.

[58] As with s. 4(2), a public body would not be able to comply with s. 8(1)(c)(i) if it were relying on case-by-case privilege because there is no "provision of" FIPPA that refers to or encompasses case-by-case privilege. The Legislature is presumed to have created a coherent, consistent and harmonious scheme.[56] However, interpreting FIPPA to allow a public body to rely on case-by-case privilege conflicts with s. 4(2) and s. 8(1)(c)(i), so a different interpretation is to be preferred.

[59] A further indication of the Legislature's intention to create a complete code of access exceptions is what is now s. 3(7) of FIPPA. This provision, which was s. 79 of FIPPA when BCI denied access,[57] provides that, "If a provision of this Act is inconsistent or in conflict with a provision of another Act, this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act."[58] This section means that, unless another British Columbia statute creates an access exception not found in FIPPA explicitly overriding FIPPA, the right of access to records under FIPPA prevails. This is further evidence that the Legislature intended Division 2 to be a complete code, subject only to express statutory derogation from that code.

[60] Again, the Legislature's avowed goal in enacting FIPPA includes making public bodies "more accountable to the public" by "giving the public a right of access to records" and "specifying limited exceptions to the right of access". Viewed through this lens, it is clear that the Legislature then set out, in Division 2, a range of "specified" exceptions to disclosure. These exceptions protect information ranging from local public body confidences (s. 12), to confidential sources of law enforcement information (s. 15(1)(d)), to personal information the disclosure of which would unreasonably invade personal privacy (s. 22(1)). It is

[56] See, for example, *R. v. Summers*, 2014 SCC 26 at para. 59.
[57] FIPPA was amended in late 2021 by the *Freedom of Information and Protection of Privacy Amendment Act*, S.B.C. 2021, c. 39. The amendments caused the former s. 79 to be renumbered as s. 3(7).
[58] This is the same language as was used in s. 79 of the former version of FIPPA.

difficult to accept that, having clearly turned its mind to the range of potential access exceptions, and having chosen to set out only the specific exceptions found in Division 2, the Legislature nevertheless intended to allow an indeterminate, open-ended basis for limiting the public's right of access.

[61] For these reasons, it is improbable that, despite its clearly stated intention to specify limited exceptions to the public's right of access to records, the Legislature nonetheless intended to impliedly permit importation of common law privileges. Put another way, Division 2 expressly specifies the intended "limited exceptions", so it would be inconsistent for the Legislature to then implicitly authorize the importation of common law privileges such as case-by-case privilege. Doing so would defeat the explicitly stated goal in s. 2(1)(c) of "specifying limited exceptions to the right of access".

[62] In saying this, I consider it especially problematic to suggest that FIPPA should be interpreted to implicitly recognize case-by-case privilege in particular. As its name suggests, case-by-case privilege requires assessment of the circumstances of individual cases to decide if it applies. It is implausible to view such a case-specific privilege as in any meaningful sense a "specified" or "limited" exception. I doubt that in aiming to specify limited exceptions to the right of access the Legislature intended to leave it up to public bodies to specify the particular relationships they consider privileged and that warrant protection depending on the idiosyncrasies of each matter.

[63] It is for these reasons clear that Division 2 is a comprehensive scheme and a complete code of exceptions to the public's right of access to records. Division 2 is, in other words, legislation that, "while not in direct conflict with the common law, [is] drafted in such a way as to make it clear that [it is] intended to comprehensively govern an area, leaving no room for the application of the common law."[59] Division 2 comprehensively governs the area of access exceptions, thus leaving no room for common law case-by-case privilege.

[64] I conclude, having regard to the words, scheme and purposes of FIPPA, that Division 2 is a complete code of exceptions to disclosure ousting case-by-case privilege. As a result, BCI is not entitled to rely on case-by-case privilege as an exception to disclosure in response to the applicant's access request. It is, therefore, not necessary for me to consider whether a case-by-case privilege applies to the disputed records in this case.

SECTION 13 – ADVICE OR RECOMMENDATIONS

[65] BCI also withheld all of the disputed information under s. 13(1). That section states that the head of a public body may refuse to disclose to an

[59] *Tucci*, *supra* note 42 at para. 22.

applicant information that "would reveal advice or recommendations developed by or for a public body or a minister."

[66] The purpose of s. 13(1) is "to ensure that a public body may engage in full and frank deliberations, including requesting and receiving advice, in confidence and free of disruption from requests from outside parties for disclosure."[60] Section 13 prevents the harm that would occur if a public body's deliberative process were subject to excessive scrutiny.[61]

[67] Past OIPC orders and court decisions, including judgments of the Court of Appeal and the Supreme Court of Canada, have established the following principles for the interpretation of s. 13(1):

- Section 13(1) applies to information that *would reveal* advice or recommendations and not only to information that *is* advice or recommendations.[62]
- The terms "advice" and "recommendations" are distinct, so they must have distinct meanings.[63]
- "Recommendations" relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised.[64]
- "Advice" has a broader meaning than "recommendations".[65] It includes setting out relevant considerations and options, and providing analysis and opinions, including expert opinions on matters of fact.[66] Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.[67]
- "Advice" also includes factual information "compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body".[68] This is because the compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process.

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[60] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 29 [*Automotive Retailers Association*]. See also *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 43-44.
[61] *Automotive Retailers Association*, *ibid* at para. 65.
[62] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.
[63] *John Doe*, *ibid* at para. 24.
[64] *John Doe*, *supra* note 60 at paras. 23-24.
[65] *John Doe*, *ibid* at para. 24.
[66] *John Doe*, *ibid* at paras. 26-27 and 46-47; *College*, *supra* note 22, at paras. 103 and 113.
[67] *College*, *ibid* at para. 103.
[68] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94 [*PHSA*]. See also *Automotive Retailers Association*, *supra* note 60 at paras. 52-53.

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

[69] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years. In this case, the records were created in 2014 and 2015; therefore, since they are not yet 10 years old, s. 13(3) does not apply.

Would the disputed information reveal advice or recommendations developed by or for BCI?

Positions of the parties

[70] BCI submits that all of the disputed information is part of BCI's deliberative process regarding the implementation of the Strategy and would reveal advice or recommendations developed for BCI.[69] It argues that the survey results reflect the opinions of BCI employees, which qualify as advice or recommendations developed for BCI. Further, BCI says the survey questions and the Consultant's analysis of the responses is expert advice developed for it by the Consultant.

[71] In support of its position under s. 13(1), BCI provided affidavit evidence from its Executive Vice President, Human Resources (EVP); its Director, Business Partnership; and the Consultant's Managing Director in Vancouver. These individuals provided evidence about BCI's engagement of the Consultant, the survey model, the development of the survey and the services the Consultant provided to BCI.

[72] In response, the applicant generally contests BCI's application of s. 13(1). He says BCI's arguments are speculative. However, the applicant did not make submissions specifically about whether the disputed information would reveal advice or recommendations. The applicant's s. 13 submissions focus on s. 13(2), which I address below.

Analysis and conclusions

[73] I make the following findings based on the EVP's and the Consultant's Managing Director's sworn evidence, which is uncontroverted.[70] The Consultant has expertise in the area of employee engagement and the specific drivers of engagement. The Consultant developed the survey in consultation with BCI,

[69] BCI's initial submissions at paras. 79-105.
[70] Affidavit #1 of the EVP at paras. 23-28; Affidavit #1 of the Managing Director at paras. 6-20.

based on BCI's needs and goals. The Consultant aggregated the survey responses, presented the results to BCI, and provided advice to BCI, based on the results, about how to improve employee engagement.

[74] Given this context, I am satisfied that the Consultant's views and the written comments would reveal advice developed for BCI. The Consultant's views are advice to BCI about how to interpret the survey results and which areas to focus on to improve employee engagement. The written comments qualify as advice from BCI employees to BCI regarding various aspects of their employment, which BCI considered in deciding how to implement the Strategy and improve employee engagement.

[75] I am also satisfied that the survey results would reveal advice developed for BCI. Like the written comments, I accept that this information expresses the opinions of BCI employees regarding various aspects of their employment, and is advice they developed for BCI regarding its decisions about how to improve employee engagement and implement the Strategy. The survey results were also compiled by the Consultant and form the very basis for, and are thus integral to, its advice to BCI. As such, I accept that the survey results would also reveal the Consultant's advice.

[76] In addition, I accept that the survey questions and the benchmark information would reveal advice developed for BCI. This is because the questions and benchmark information are, in the specific records in dispute in this case, inextricably linked to the survey results. The survey results are expressed in the records in relation to particular survey questions and specific benchmark information. The records say, for example, that a certain percentage of participants responded in a particular way *to a particular question* or that the percentage of participants that responded in a particular way to a particular question is *above or below average compared to other employers*. In this way, the survey questions and the benchmark information are an integral, inextricably intertwined part of the survey results, and thus are integral to the Consultant's analysis of those results, and if disclosed would reveal the results, which I have found qualify as advice developed for BCI.[71]

[77] However, I am not persuaded that the balance of the disputed information would reveal advice or recommendations developed by or for BCI.

[78] First, I am not persuaded that the background explanations about concepts relating to the survey and the survey methodology would reveal advice or recommendations developed by or for BCI. This information is general background information that does not reveal the survey results directly or

[71] In a few instances, for example in the Records at pp. 267 and 288, survey questions appear detached from survey results; however, I am satisfied that these would still reveal the survey questions tied to results and thus reveal advice developed for BCI.

indirectly. It does not reveal the opinions of BCI or the Consultant regarding the survey results or implementation of the Strategy. This information is too general and detached from the specific survey results to be reasonably capable of permitting inferences to be drawn that would reveal the Consultant's advice or the advice of the BCI employees.

[79] I am also not persuaded that the miscellaneous information—the Consultant's company name, statements regarding disclosure of the records, document titles, subject headings, formatting and page numbers—would reveal advice or recommendations developed by or for BCI. This information is general and largely non-substantive information that could not reasonably lead to disclosure of advice or recommendations, directly or by inference.

[80] To summarize, I conclude that the survey questions, the survey results, the written comments, the benchmark information and the Consultant's views would reveal advice or recommendations developed for BCI, but the balance of the disputed information would not reveal advice or recommendations developed by or for BCI.

Do any of the exceptions in s. 13(2) apply?

[81] The second step in the s. 13 analysis is to consider whether any of the information that I found would reveal advice or recommendations developed for BCI falls within s. 13(2). Section 13(2) sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1).

[82] BCI submits that s. 13(2) does not apply in this case.[72] The applicant submits that the disputed information fits within ss. 13(2)(a), (c), (d), (g) and (i).[73] I also consider s. 13(2)(b) to be relevant in this case and I will address it below. I am satisfied that the other s. 13(2) subsections clearly do not apply given the nature of the disputed information.

Factual material – s. 13(2)(a)

[83] Section 13(2)(a) says that a public body must not refuse to disclose "any factual material" under s. 13(1).

[84] The applicant says the disputed information is factual material but does not elaborate.

[72] BCI's initial submissions at para. 80; BCI's reply submissions at paras. 14-15.
[73] Applicant's submissions at paras. 11 and 26-29.

[85] In reply, BCI submits that the disputed information is opinion and advice, not factual material, and even to the extent that the information could be described as "factual", it is integral to and inextricable from the advice.[74]

[86] The term "factual material" is not defined in FIPPA. However, the courts have interpreted it to mean "source materials" or "background facts in isolation" that are not necessary to the advice provided.[75] If factual information is compiled and selected by an expert and is an integral component of their advice, then it is not "factual material" under s. 13(2)(a).[76]

[87] In my view, s. 13(2)(a) does not apply to the information I found would reveal advice. The Consultant's views are not factual material, but rather expert views. The survey questions, the results and the written comments are all opinion-based and not factual. Accordingly, I am satisfied that the information I found would reveal advice is not "factual material" under s. 13(2)(a).

Public opinion poll – s. 13(2)(b)

[88] Section 13(2)(b) states that a public body must not refuse to disclose a "public opinion poll". I accept that, through the survey, the Consultant polled BCI employees about their opinions concerning various aspects of their employment. However, since the Consultant only provided the survey to BCI employees, the opinion poll was internal and not "public". As a result, s. 13(2)(b) does not apply.

Statistical survey – s. 13(2)(c)

[89] Section 13(2) says that a public body must not refuse to disclose a "statistical survey" under s. 13(1).

[90] The applicant submits that the disputed information qualifies as a "statistical survey".[77]

[91] BCI submits that the disputed information is not part of a statistical survey because the surveys "are not statistical, in that they seek qualitative information rather than quantitative, numerical, data."[78]

[92] FIPPA does not define "statistical survey". However, it is clear from the words of s. 13(2)(c) alone that not every survey will fall within this exception. The exception only applies to a "statistical" survey. The disputed records clearly relate to a survey, so the question is whether the BCI survey is a "statistical" survey.

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[74] BCI's reply submissions at para. 14.
[75] *PHSA*, *supra* note 68 at para. 94; *Automotive Retailers Association*, *supra* note 60 at para. 52.
[76] *PHSA*, *ibid*.
[77] Applicant's submissions at para. 11.
[78] BCI's reply submissions at para. 15.

[93] The leading BC OIPC decision on s. 13(2)(c) is Order F11-23.[79] In that case, then Adjudicator (now Commissioner) McEvoy adopted the following definition of "statistical survey" set out in Alberta Order F2008-008:

> … a "statistical survey" is a collection, interpretation and presentation of numerical data relating to the study of a topic, issue, situation or program. The data being collected may consist of the general views of the subject being surveyed, and a poll can be an example of a statistical survey (but is not necessarily one).[80]

[94] After Order F11-23 was decided, in *John Doe v. Ontario (Finance)*, the Supreme Court of Canada considered the term "statistical survey" in the context of Ontario's *Freedom of Information and Protection of Privacy Act*. The Court considered that term in the course of interpreting "advice" and "recommendations" in s. 13(1) of the Ontario statute. Like s. 13(2)(c) of FIPPA, s. 13(2)(b) of the Ontario Act states that a public body must not refuse to disclose, under s. 13(1), a record that contains a "statistical survey". Writing for the Court, Rothstein J. characterized a "statistical survey" as an example of "objective information."[81] He adopted a distinction between "opinion" constituting "advice" and "objective information", such as that found in a statistical survey, which merely informs a public body "of matters that are largely factual in nature."[82]

[95] I note that the Supreme Court's interpretation of a "statistical survey" in *John Doe* aligns with various references to "statistical survey" evidence in court cases. For example, courts have considered statistical survey evidence regarding the fuel consumption rate of idling school buses, average reasonable notice periods in unlawful dismissal cases, the prices paid to acquire the goodwill of accounting practices during a specific period and police-reported impaired driving rates in certain years.[83] All of this information is objective and "largely factual in nature", not subjective opinion or other advice (or recommendations).

[96] Order F11-23 accepts that a statistical survey includes a survey that collects, interprets and presents the "general views" of the survey participants. However, to the extent that the "general views" of survey participants include their subjective opinions, the definition in Order F11-23 conflicts with *John Doe*,

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[79] Order F11-23, 2011 BCIPC 29. Order F18-43, 2018 BCIPC 46, at para. 55, follows Order F11-23 and relies on it exclusively in relation to s. 13(2)(c). The parties did not cite these cases. However, I am entitled to rely on them: *supra* note 42.
[80] Alberta Order F2008-008, 2008 CanLII 88742 (AB OIPC) at para. 20.
[81] *John Doe*, *supra* note 60 at para. 31.
[82] *John Doe*, *ibid*, citing *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 at para. 63.
[83] *Briggs Bros. Student Transportation Ltd. v. Alberta (Attorney General)*, 2012 ABQB 455 at paras. 17-18; *Carleton Co-Operative Ltd. v. Bishop*, 1996 CanLII 4867 (NB CA) at para. 12; *Lilly v. Johannesson and McWilliams et al.*, 2004 BCSC 1133 at para. 75; *R. v. Von Teichman*, 2021 QCCQ 4601 at para. 16.

which clearly considers a statistical survey as involving objective, or largely factual, information.

[97] It is acceptable to consider the interpretation of Ontario's Act in discerning the meaning of FIPPA.[84] Further, although *John Doe* is not, strictly speaking, binding in this case, I am required to give significant weight to the authoritative views of the Supreme Court of Canada in considering the same language in a similar freedom of information statute. Given the tension between Order F11-23 and the observations in *John Doe*, it is necessary to reconsider the meaning of the term "statistical survey" in s. 13(2)(c).

[98] Applying the required interpretive principles, and with the help of *John Doe* and the existing definition in Order F11-23, I conclude that a "statistical survey" within the meaning of s. 13(2)(c) involves the collection, interpretation and presentation of objective information, expressed numerically, relating to the study of a topic, issue, situation or program. Future cases may well require further discussion of the term, but this definition is sufficient for present purposes.

[99] Having assessed the records, I conclude that the disputed information does not constitute a "statistical survey". I accept that the disputed information consists of the Consultant's collection, interpretation and numerical presentation of the internal survey results relating to aspects of BCI's administration. However, those results are clearly not objective information. To the contrary, the results aggregate the subjective opinions, feelings, beliefs and perspectives of BCI employees concerning various aspects of their employment. This kind of information is by definition subjective and it does not fall within the meaning of a "statistical survey" under s. 13(2)(c).

[100] I emphasize in closing that interpreting the term "statistical survey" to involve objective information does not mean that subjective opinion collected through a survey or poll can never be accessed. As already noted, s. 13(2)(b) states that a public body must not refuse to disclose under s. 13(1) a "public opinion poll", which clearly captures subjective opinion information where the poll is a "public" opinion poll.

[101] For the reasons provided above, I conclude that s. 13(2)(c) does not apply to the information I found would reveal advice developed for BCI.

Appraisal – s. 13(2)(d)

[102] Section 13(2)(d) states that a public body must not refuse to disclose an "appraisal" under s. 13(1). In my view, the information I found would reveal

[84] See, for example, *Green v. University of Winnipeg et al*, 2020 MBCA 2 at para. 16; contrast *Li v. Rao*, 2019 BCCA 265 at paras. 85-86.

advice is clearly not an appraisal because it does not assess the value or worth of anything. As a result, s. 13(2)(d) does not apply.

Final report or audit on public body performance or efficiency – s. 13(2)(g)

[103] Section 13(2)(g) states that a public body must not refuse to disclose, under s. 13(1), "a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities".

[104] The applicant says s. 13(2)(g) applies but does not elaborate.

[105] BCI submits that s. 13(2)(g) does not apply because the surveys "are not a final report or audit, as they do not represent any inspection or review of accounts or otherwise."[85]

[106] I accept that the records qualify as "a report", but I am not satisfied that they constitute a "final" report as required under s. 13(2)(g). The EVP's evidence establishes that the records were part of an "initial consultation process" and include "preliminary analysis and advice" from the Consultant.[86] Further, BCI's Director of Business Partnership deposes that there was a subsequent employee survey conducted by BCI in 2016.[87] I conclude from this that the disputed records were preliminary, but not final, reports, so s. 13(2)(g) does not apply.

[107] I am also not satisfied that the reports are "on the performance or efficiency" of BCI. The survey questions and results are about employee engagement. However, these matters concern employees' views and personal opinions, which in my view are not sufficiently focused on the performance or the efficiency of BCI. The reports do not focus, for example, on how well BCI is performing in terms of its investment returns or its cost-effectiveness.

[108] For these reasons, I conclude that s. 13(2)(g) does not apply to the information I found would reveal advice.

Feasibility or technical study – s. 13(2)(i)

[109] Section 13(2)(i) states that a public body must not refuse to disclose, under s. 13(1), "a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body".

[110] The applicant says s. 13(2)(i) applies and BCI says it does not, but neither party elaborates.

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[85] BCI's reply submissions at para. 15.
[86] Affidavit #1 of the EVP at para. 12.
[87] Affidavit #1 of BCI's Director, Business Partnership, at para. 16.

[111] Section 13(2)(i) clearly does not apply. The records are not about the feasibility of a project or policy, but rather are about assessing the situation at BCI and pursuing a new strategic direction. Further, past orders interpret a "technical study" as an application of specialized engineering, mechanical or scientific expertise.[88] The records are about employee engagement, which is clearly not "technical" in that sense.

Conclusions regarding s. 13(1)

[112] I found above that some of the disputed information—the Consultant's background explanations relating to survey concepts and methodology, as well as miscellaneous information such as the Consultant's name, subject headings and page numbers—would not reveal advice or recommendations developed by or for BCI. As a result, BCI is not authorized to withhold this information under s. 13(1).

[113] I also found that the balance of the disputed information—the survey questions, the survey results, the benchmark information, the written comments and the Consultant's views—would reveal advice or recommendations developed for BCI. I found that none of the exceptions in s. 13(2) apply to this information. As a result, BCI is authorized to withhold this information under s. 13(1).

SECTION 17 – HARM TO FINANCIAL OR ECONOMIC INTERESTS OF BCI

[114] BCI also withheld under s. 17(1) the survey results, the written comments, cover pages for reports containing the written comments[89] and the Consultant's views about the results and comments.[90]

[115] Section 17(1) states:

> (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

[88] See, for example, Order F14-37, 2014 BCIPC 40 at paras. 62-64; Order F19-10, 2019 BCIPC 12 at paras. 12-26.
[89] Records at pp. 208, 213, 215, 217, 220, 223, 226, 228, 232, 235 and 238.
[90] The parts of the Records BCI marked at pp. 4, 10, 12-13, 15, 18, 19-40, 43-86, 88, 90, 94-98, 100-139, 141-150, 152-160, 162-172, 191, 193, 195, 198-199, 202-203, 205, 207-241, 246-249, 257-264, 268-270, 272-278, 280-281, 283-287, 292-294, 296, 303, 305-308, 310-332, 335-346, 349-360, 365-371, 373, 378-384, 386, 391-397, 399, 404-410, 412, 417-423, 425, 430-436, 438, 443-449, 451, 456-462, 464, 469-475, 477, 482-488, 490, 495-501, 503, 506-508, 510-517, 520-522, 524-531, 534-536, 538-545, 548-550, 552-559, 561-583, 586-588, 590-597, 600-602, 604-611, 614-625, 628-630, 632-639, 644-646, 649-651 and 653-660.

> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[116] Past orders establish that ss. 17(1)(a) through (f) are examples of the types of information the disclosure of which may result in harm, and that they are not standalone provisions.[91] Ultimately, the question under s. 17(1) is whether disclosure of the disputed information could reasonably be expected to harm the public body's financial or economic interests.

[117] The standard BCI must satisfy under s. 17(1) is a "reasonable expectation of harm". This standard is a "middle ground between that which is probable and that which is merely possible."[92] BCI is not required to prove that the alleged harm will occur, or even that the harm is more likely than not to occur, if the disputed information is disclosed.[93] It need only prove that there is a "reasonable basis for believing that harm will result" from disclosure.[94]

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[91] For the principles set out in this paragraph, see Order F19-10, 2019 BCIPC 12 at para. 28 and the cases cited there.
[92] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 201.
[93] *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 at para. 93.
[94] *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 v. British Columbia (Information and Privacy Commissioner)*, 2018 BCSC 1080 at para. 42.

[118] Further, the release of the disputed information itself must give rise to a reasonable expectation of harm.[95] There must be a "clear and direct connection" between the disclosure of the information and the alleged harm.[96]

[119] I already found above that BCI is authorized under s. 13(1) to refuse access to the survey results, the written comments and the Consultant's views, so it is not necessary to determine here whether BCI is also authorized to withhold the same information under s. 17(1).

[120] The only information in dispute under s. 17(1) that I have not already found that BCI can withhold is the cover pages for reports containing the written comments. I note that BCI's severing of these cover pages appears to be inconsistent with its severing elsewhere in the records, where it did not apply s. 17(1) to other similar cover pages.[97]

[121] BCI provided extensive affidavit evidence and argument[98] in support of its position under s. 17(1), but that material is not focused on the cover pages. In summary, BCI argues that disclosing the survey results, written comments, and the Consultant's views could reasonably be expected to break a promise BCI made to its employees that their participation in the survey would be confidential, causing a loss of trust and, in turn, financial harm to BCI. BCI also argues that disclosing the survey results, written comments, and the Consultant's views could reasonably be expected to harm its ability to recruit and retain employees, which has negative financial consequences for BCI.

[122] Without more from BCI specifically relating to the cover pages, I am not persuaded that BCI has met its burden to establish that s. 17(1) applies to that information. The cover pages contain dates and subject titles. This information is minimal and non-substantive. The cover pages do not contain any information that is or would reveal the survey results, the written comments or the Consultant's views, so I am not persuaded that any of this information could reasonably be expected to cause the harms BCI alleges. I conclude that BCI is not authorized to withhold the cover pages under s. 17(1).

SECTION 21 – HARM TO THIRD-PARTY BUSINESS INTERESTS

[123] BCI also withheld a significant amount of the disputed information under s. 21(1).[99] The parts of s. 21 that are relevant in this case state that:

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[95] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 43.
[96] Order 02-50, 2002 CanLII 42486 (BC IPC) at paras. 112 and 137, citing *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 58.
[97] For example, Records at pp. 271, 282, 290, 304 and 333.
[98] BCI's initial submissions at paras. 106-138; BCI's reply submissions at paras. 16-21.
[99] The records and information marked by BCI on all of the pages of the Records except for blank pages (e.g., p.161) and pp. 242-245, 250-252, 256, 260-261, 264-265, 271-279, 282, 290, 304,

> (1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party, …
>
> (iii) result in undue financial loss or gain to any person or organization ….[100]

[124] Section 21(1) creates a three-part test. BCI must establish all three parts: first, that the disputed information is one or more of the kinds of information described in s. 21(1)(a); second, that the information was supplied, implicitly or explicitly, in confidence, as required by s. 21(1)(b); and third, that disclosure of the information could reasonably be expected to result in one or more of the harms described in s. 21(1)(c).

[125] While BCI is not withholding all of the information under each category of information, it is withholding at least some information from each category. However, I already found above that BCI is authorized under s. 13(1) to withhold the disputed information in all categories except for:

- the Consultant's background explanations about concepts relating to the survey and aspects of the survey methodology, including survey objectives, the level of participation, how to interpret certain charts, why the Consultant measures certain things, and how certain scores are calculated; and
- miscellaneous, largely non-substantive, information such as the Consultant's company name, statements regarding disclosure of the records, document cover pages, subject headings, formatting and page numbers.

333, 347, 361-362, 371, 374-375, 378, 384, 387-388, 400-401, 410, 413-414, 423, 426-427, 430, 436, 439-440, 446, 449, 452-453, 456, 459, 462, 465-466, 469, 472, 475, 478-479, 482, 485, 488, 491-492, 495, 498, 501, 504-505, 518, 532, 546, 584, 598, 612, 626, 640, 643 and 646-647.

[100] Neither party raised s. 21(2) or s. 21(3), and it is clear that neither section applies in this case.

[126] I will only consider whether s. 21(1) applies to the information BCI is withholding under these two categories of information because BCI is already authorized to withhold the balance of the disputed information under s. 13(1).

[127] It is not at all clear to me that the background information and the miscellaneous information satisfies ss. 21(1)(a) and 21(1)(b). However, in this case, I do not consider it necessary to consider those issues.[101] Even assuming without deciding that the information in dispute satisfies ss. 21(1)(a) and (b), I am not persuaded, for the reasons provided below, that disclosure of the background information and the miscellaneous information could reasonably be expected to result in any of the harms described in s. 21(1)(c).

[128] The standard that BCI must satisfy under s. 21(1)(c) is the same one that applied under s. 17(1), a "reasonable expectation of harm".

[129] BCI does not explicitly state which subsections of s. 21(1)(c) it is relying on, but the substance of its submissions fit under ss. 21(1)(c)(i) and (iii). BCI submits that disclosure of the disputed information could reasonably be expected to significantly harm the Consultant's competitive or negotiating position under s. 21(1)(c)(i), or result in undue financial loss to the Consultant or undue financial gain to its competitors under s. 21(1)(c)(iii).[102]

[130] The details of BCI's harm arguments are set out in the evidence of the Consultant's Managing Director. Although the Consultant chose not to make its own submissions in this inquiry, its Managing Director provided evidence in support of BCI's position under s. 21(1). The Consultant's Managing Director deposes that:

> The disclosure of the Survey questions and benchmarks would be harmful to [the Consultant]. The questions and benchmarks have been developed over many years, through a great deal of investment, study and refinement by [the Consultant]. This is proprietary information that gives [the Consultant] a competitive advantage in the marketplace. Clients choose to work with [the Consultant] for myriad reasons, including our historical and wide-ranging benchmarking database. [The Consultant's] questions are also specifically tailored and fine-tuned based on years of experience and cannot be replicated by any other company. If these questions were made public, that competitive advantage would be completely diminished resulting in an undue loss to [the Consultant]. [The Consultant] would be deprived of its unique ability to provide clients with its particular set of

[101] I also note that the applicant appears to concede that the disputed information meets s. 21(1)(a): applicant's submissions at paras. 22 and 36-41. Further, BCI claims that the disputed information is "trade secrets": BCI's initial submissions at paras. 140 and 142-145. The definition of a "trade secret" in Schedule 1 of FIPPA requires that disclosure of the disputed information result in "harm or improper benefit", which overlaps with the harm analysis s. 21(1)(c). Given the overlap, it makes sense in this case to simply analyze s. 21(1)(c).
[102] BCI's initial submissions at paras. 148-154.

> designed questions, benchmarks and analysis. Further, a competitor would be positioned far ahead having not had to invest resources and time into the development of survey questions and benchmarks, akin to a "windfall" in strategic market position.
>
> Additionally, the disclosure of results outside of BCI would be harmful to [the Consultant's] reputation in the marketplace as a top employee engagement and consultancy firm. A commitment is made to all survey participants that survey results will be kept strictly confidential. [The Consultant] commits to providing aggregate results only to BCI, and to not disclose any responses outside such organization. A breach of these confidentiality obligations would result in [the Consultant's] reputational standing being harmed, potentially irreversibly.
>
> Questions being made public would again result in a loss to [the Consultant's] competitive advantage; [the Consultant] would no longer be able to offer a wholly unique product in the form of our survey and, further, a large portion of [the Consultant's] contracting power and negotiating leverage would be diminished due to our survey, data, format, and presentation being made public. For the foregoing reasons, we object to the requested disclosure in whole, and in any event, we request survey questions and benchmarks be fully redacted from any disclosures connected to this pending request.[103]

[131] This evidence focuses on the survey questions and the benchmark information, which I already found can be withheld. However, specifically with respect to the background explanations and miscellaneous information, the Consultant says its contracting power and negotiating leverage would be diminished due to its survey, data, format, and presentation being made public. BCI argues that disclosure of the information in dispute could reasonably be expected to cause the Consultant to lose the value of its "unique and proprietary methods used to present the results in coherent, synthesized mediums."[104]

[132] In response, the applicant submits that disclosure of the disputed information could not reasonably be expected to result in any of the harms described in s. 21(1)(c). The applicant says BCI's evidence is speculative and insufficient to establish harm under s. 21(1)(c).[105]

[133] Turning to my analysis, I first accept the well-established principle that disclosure of information under FIPPA is, in effect, disclosure to the world, which includes, in this case, the Consultant's competitors.[106]

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[103] Affidavit #1 of the Consultant's Managing Director at paras. 33-35.
[104] BCI's initial submissions at para. 150.
[105] Applicant's submissions at para. 22.
[106] See, for example, Order 03-35, 2003 CanLII 49214 (BC IPC) at para. 31.

[134] I am not persuaded that disclosure of the miscellaneous information showing the format of the reports and the manner in which the Consultant presented the survey results and its analysis of the results could reasonably be expected to result in harm under s. 21(1)(c). I consider it reasonable to assume that the Consultant's competitors already have their own formatting and presentation. Neither BCI nor the Consultant's Managing Director adequately explain how BCI's style of presentation is something its competitors could benefit from copying, resulting in undue financial gain for a competitor or a significant competitive harm to the Consultant. I do not see how disclosure of non-substantive aspects of a report such as presentation or formatting carry sufficient competitive value to result in the harms described in s. 21(1)(c).

[135] I am also not persuaded that disclosure of the Consultant's company name and statements regarding disclosure of the records could reasonably be expected to result in harm under s. 21(1)(c). BCI does not adequately explain how, and I am not persuaded that, this kind of generic information could reasonably be expected to provide the Consultant's competitors with an undue financial gain or significant competitive advantage.

[136] Further, I am not persuaded that disclosure of the Consultant's background explanations about the survey could reasonably be expected to result in harm under s. 21(1)(c). I recognize that this information sets out various aspects of the Consultant's survey methodology, such as the concepts it uses and how it calculates certain employee engagement scores. The Consultant's Managing Director asserts that this information is proprietary but does not in my view provide adequate supporting explanation to establish that the information is unique to the Consultant in a way that makes it a "trade secret" as defined in Schedule 1 of FIPPA, or otherwise proprietary to the Consultant, or in a way that provides a competitive advantage.

[137] Having reviewed the background explanations themselves, which are evidence for s. 21(1) purposes, much of it is quite general and predictable in nature, rather than information that only the Consultant knows and employs to its competitive advantage. For example, the information in dispute sets out and explains the employee engagement topic areas that the Consultant addresses in its survey questions, but most of those areas are so obviously related to employee engagement that I find it difficult to accept that the Consultant's competitors do not also address such areas in their surveys.

[138] Finally, in my view, with respect to both categories of information in dispute, even if it is proprietary, BCI's arguments and the Consultant's evidence do not establish the requisite connection between disclosure and harm under s. 21(1)(c). The Consultant's Managing Director says disclosure of the information could reasonably be expected to cause the Consultant to lose "contracting power and negotiating leverage". However, the evidence before me

does not adequately explain what contracts are available to the Consultant and its competitors, what negotiations are involved, who the Consultant's competitors are, how many there are, what the competitive market is like, or, most importantly, how exactly the specific information in dispute could reasonably be expected to provide a competitor with a competitive edge in "contracting" and "negotiating".

[139] For the above reasons, I conclude that BCI is not required under s. 21(1) to refuse to disclose the miscellaneous information in the records (such as the Consultant's company name, cover pages, headings and page numbers) or the background explanations about concepts relating to the survey and aspects of the survey methodology.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[140] Finally, BCI withheld parts of the written comments under s. 22(1).[107] Section 22(1) states that a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[141] I already found above that BCI is authorized to withhold the written comments in their entirety under s. 13(1). Given this finding, it is not necessary to also consider whether BCI is required to withhold parts of the written comments under s. 22(1).

CONCLUSION

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

1. Subject to subparagraph 2 below, under s. 58(2)(b), I confirm BCI's decision that it is authorized to withhold some of the disputed information under s. 13(1), which is the information I have not highlighted in a copy of the records that the OIPC will provide to BCI with this order.

2. Under s. 58(2)(a), I require BCI to give the applicant access to all of the disputed information that I have highlighted in a copy of the records that the OIPC will provide to BCI with this order, which is the information that I found BCI is not authorized or required to withhold under ss. 13(1), 17(1) or 21(1).

Pursuant to s. 59 of FIPPA, I require BCI to give the applicant access to the disputed records and information in accordance with the orders above by

[107] Records at pp. 88, 126-127, 134, 137, 139, 141-142, 144, 147, 149-150, 152-156, 158-159, 162-163, 209-212, 216, 219, 234 and 237.

September 29, 2022. Under s. 58(4) of FIPPA, and subject to s. 59, I require BCI to concurrently copy the OIPC registrar of inquiries on its cover letter or email to the applicant, together with a copy of the records, so that the OIPC can verify compliance with the orders above.

August 17, 2022

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F16-65744