Order F22-64

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Elizabeth Barker
Director of Adjudication

December 9, 2022

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Summary: An applicant requested the Ministry of Children and Family Development (Ministry) provide access to records about birth alerts. The Ministry refused to disclose some information in the records under ss. 13(1) (policy advice and recommendations) and 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and disputed the applicant's claim that disclosure was required in the public interest under s. 25(1)(b) of FIPPA. The adjudicator found the Ministry was authorized to refuse access under s. 14 and it was not necessary to decide if s. 13(1) also applied to the same information. The adjudicator ordered the Ministry, pursuant to s. 44(1), to provide the disputed information so the adjudicator could decide if s. 25(1)(b) applied.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 2, 13(1), 14, 25(1)(b), 25(2), 44(1), 44(2.1), 56(1) and 58(2)(b).

INTRODUCTION

[1] This inquiry concerns a request by a digital news platform, IndigiNews, to the Ministry of Children and Family Development (Ministry) for access to records about birth alerts. The Ministry disclosed records but withheld some information in them under ss. 13(1) (policy advice or recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] IndigiNews asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to refuse access. It also complained the Ministry was required to disclose the information pursuant to s. 25(1)(b) because disclosure is in the public interest. Mediation by the OIPC resolved the s. 22(1) issue but not the other issues. IndigiNews requested an inquiry to decide the remaining issues.

[3] A month after the OIPC issued the notice of inquiry, the Ministry requested the OIPC exercise its discretion under s. 56(1) to not conduct the inquiry on the basis that it is plain and obvious that s.14 applies and s. 25(1)(b) does not apply. The Ministry's request was denied by another adjudicator who concluded the matters at issue between the parties merit an inquiry and the inquiry would continue.[1]

[4] Both IndigiNews and the Ministry provided written submissions and evidence in the inquiry.

ISSUE

[5] The issues I must decide in this inquiry are the following:

1. Is the Ministry authorized to refuse to disclose the information at issue under ss. 13(1) and 14 of FIPPA?

2. Is the Ministry required by s. 25(1)(b) of FIPPA to disclose the requested information without delay?

[6] Section 57 of FIPPA says the Ministry has the burden of proving that ss. 13(1) and 14 apply. While FIPPA does not say who has the burden of proving that s. 25(1)(b) applies, I will follow previous BC orders which have said that it is in the interests of both parties to provide the adjudicator with whatever evidence and argument they have regarding s. 25.[2]

DISCUSSION

Background

[7] A birth alert was a practice the Ministry used to flag expectant mothers in the health care system. It was a means to alert hospitals that there were concerns the woman may put their newborn at risk. The alert would be activated when the woman entered the hospital to give birth. Social workers would then typically attend the hospital and assess whether the child was safe and would receive adequate care or whether they needed to be taken into government care. Birth alerts were placed without the expectant parent's consent and often without their knowledge. They were used for decades in BC as well as other provinces and territories, and they were primarily issued for marginalized women and, disproportionately, Indigenous women.[3]

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[1] Adjudicator's August 2, 2022 letter.
[2] For example, see: Order 02-38, 2002 CanLII 42472 (BC IPC); Order F07-23, 2007 CanLII 52748 (BC IPC).
[3] The information in this paragraph comes from the parties' submissions and supporting evidence and was not in dispute.

[8] BC ended the practice of issuing birth alerts on September 16, 2019. At the time, the then Minister responsible spoke of the trauma birth alerts cause and specifically acknowledged the calls to end the practice from Indigenous communities, organizations and the report from the National Inquiry into Missing and Murdered Indigenous Women and Girls.[4]

[9] IndigiNews' access request is for all records including briefing notes and reports of birth alerts from June 1, 2019 to September 1, 2020.

Records and information at Issue

[10] The Ministry disclosed 68 partially and completely severed pages of responsive records to IndigiNews. The disclosure took place in two phases.

[11] Shortly after the Ministry disclosed the records, it wrote IndigiNews to say that certain information that is subject to solicitor-client privilege had been disclosed in error. The Ministry requested IndigiNews return the entire records package and refrain from retaining or disseminating the records or their contents in any way. IndigiNews did not comply with this request and it published news stories revealing information about the legal advice contained in the inadvertently disclosed records.[5]

[12] During the course of this inquiry, the parties agreed that the application of s. 14 to the already inadvertently disclosed information would not be at issue in the inquiry.[6]

[13] IndigiNews and the Ministry agree that the only information remaining in dispute is information that was not inadvertently disclosed, which is at pages 33-34 and 47 of the phase one disclosure and page two of the phase two disclosure.[7] All of this information was withheld under s. 14 and some of it under s. 13.[8] For ease of reference and clarity I will refer to this as the Disputed Information.

[14] IndigiNews says in its inquiry submission that based on the solicitor's affidavit evidence, it "is prepared to withdraw its inquiry into whether the public body was authorized to withhold information in the released records on the basis of solicitor-client privilege."[9] However, I will still make a decision about whether s. 14 applies to the Disputed Information because a finding about that is important to the s. 25 analysis.

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[4] This comes from a September 16, 2019 Ministry news release that IndigiNews cites at para. 10 of their submission: https://news.gov.bc.ca/releases/2019CFD0090-001775.
[5] The links to IndigiNews's public reporting on this is cited in footnote 3 of its submission.
[6] IndigiNews also says this in its inquiry submission at para. 9.
[7] IndigiNews' submission at para. 21 and the Ministry's initial submission at para. 15.
[8] The s. 13 severing is on pages 33-34 and 47 of the phase one records.
[9] IndigNews' submission at para. 16.

Solicitor-client privilege, s. 14

[15] The Disputed Information has been withheld under s. 14 of FIPPA, so I will begin with that exception. Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[10] The Ministry is claiming legal advice privilege.[11]

[16] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[12] In order for information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.[13]

[17] Not every communication between a solicitor and their client is privileged, however, if the conditions above are satisfied, then legal advice privilege applies.[14]

Evidentiary basis for solicitor-client privilege

[18] The Ministry did not provide me with a copy of the Disputed Information for my review.[15] Instead, it relied on affidavit evidence from a solicitor with the Ministry of Attorney General's Legal Services Branch (LSB). The solicitor says she reviewed the Disputed Information and she describes how it meets the elements needed to establish legal advice privilege applies. The Ministry also supplied a table of records (Table) that provides the page number and date of each record, a brief description of the record, the names of the individuals involved in the communication and the FIPPA exceptions applied.

[19] The Ministry says that its initial submission and affidavit provide sufficient evidence to decide if s. 14 applies.[16] IndigiNews does not speak to this issue.

[20] Section 44(1) gives me, as the commissioner's delegate, the power to order production of records in order to review them during the inquiry. However,

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[10] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[11] Ministry's initial submission at para. 45.
[12] *College, supra* note 10 at para. 31.
[13] *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837; *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.
[14] *Solosky*, *Ibid,* at p. 829.
[15] It also did not provide me with access to the inadvertently disclosed information.
[16] Ministry's initial submission at para. 17 and its reply at para. 8.

due to the importance of solicitor-client privilege to the proper functioning of the legal system, I would only order production of records being withheld under s. 14 when absolutely necessary to adjudicate the issues.

[21] In this case, I have sufficient evidence to decide if s. 14 applies. There is the solicitor's sworn affidavit evidence which establishes that she is a practicing lawyer and an officer of the court with a professional duty to ensure that privilege is properly claimed. I am also satisfied that she has reviewed the specific records at issue and she was directly involved in the communications. Further, the Table gives some detail about the Disputed Information, and the parts of the records that I am able to see also provide context.

Parties' submissions

[22] The Ministry submits the evidence it provided shows that the information withheld under s. 14 is subject to solicitor-client privilege because it reveals confidential communications about legal advice that was sought from, and was provided by, the Ministry's legal counsel. The Ministry says that it is clear from the evidence that the records are written communications between the Ministry, as client, and the solicitor who is its legal counsel at LSB.

[23] In her affidavit, the solicitor says the Disputed Information is as follows:

- a memo from the Ministry to LSB. It contains a summary of the solicitor's legal advice and a request by the Ministry for additional legal advice.[17] Where the records reflect that the Ministry sought further legal advice on certain issues, she confirms that she provided the advice.
- an email between Ministry employees.[18] The redacted information is a summary of legal advice the solicitor provided to the Ministry.
- a Ministry briefing note.[19] The redacted portion is a summary of legal advice that she provided to the Ministry.

[24] The solicitor says that she always intended her legal advice to be confidential and she believes Ministry employees who received it understood that it was confidential and should not be shared with any person or entity outside the government. She says she has no reason to believe that the Ministry and its employees treated her legal advice as anything other than confidential. She asserts her legal advice is subject to solicitor client privilege.

[17] Pages 33-34 of phase one.
[18] Page 47 of phase one.
[19] Page two of phase two.

[25] The solicitor adds, "I cannot be more specific about the nature of the legal advice sought by or given to the Ministry in my role as legal counsel without disclosing the legal advice sought or given or allowing an individual to draw accurate inferences as to the legal advice sought or given."[20]

[26] IndigiNews says that based on the solicitor's affidavit evidence, it withdraws its inquiry into whether the public body was authorized to withhold information in the released records on the basis of solicitor-client privilege.

Analysis and findings, s. 14

[27] I accept the solicitor's evidence about the Disputed information and find that it is communications between solicitor and client about the seeking and providing of legal advice. I am also satisfied that both client and solicitor intended their communications to be confidential. Therefore, the Ministry has established that s. 14 applies to the Disputed Information.

Advice or recommendations, s. 13(1)

[28] Most of the Disputed Information withheld under s. 14 was also withheld under s. 13. Given my finding that s. 14 applies, it is not necessary to decide if s. 13 also applies.

Public Interest Override, s. 25

[29] IndigiNews submits the Ministry must release the Disputed Information because s. 25(1)(b) applies. The following provisions in s. 25 are relevant in this case:

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> …
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies despite any other provision of this Act.
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> …

[30] Section 25 requires the disclosure of "information", not necessarily the disclosure of the entire record that contains that information. In many instances the obligation under s. 25 to disclose information to the public, an affected group of people or an applicant will be satisfied by disclosing the pertinent, relevant,

[20] Solicitor's affidavit at para. 10.

information from the record.[21]

[31] Given what s. 25(2) states, if s. 25(1) applies, it overrides every other provision in FIPPA, including the exceptions to disclosure and the privacy protections in FIPPA. Therefore, the threshold for proactive disclosure under s. 25(1) is very high. The s. 25(1) duty to disclose exists only in the "clearest and most serious of situations" and the disclosure must be "not just arguably in the public interest, but clearly (i.e., unmistakably) in the public interest."[22]

[32] What constitutes "clearly in the public interest" under s. 25(1)(b) is contextual and determined on a case-by-case basis. The issue is whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest.[23]

[33] The first question to answer when deciding if s. 25(1)(b) applies is whether the information concerns a matter that engages the public interest. For instance, is the matter the subject of widespread debate in the media, the Legislature, or by officers of the Legislature or oversight bodies? Does the matter relate to a systemic problem rather than to an isolated situation?

[34] If the matter is one that engages the public interest, the next question is whether the nature of the information itself meets the high threshold for disclosure. The list of factors that should be considered include whether disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available;
- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

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[21] OIPC Investigation Report F16-02 [Report F16-02] https://www.oipc.bc.ca/investigation-reports/1972 at pp. 38-39; Investigation Report F13-02, https://www.oipc.bc.ca/investigation-reports/1588 at p. 10; Order 00-16, 2000 CanLII 7714 (BC IPC) at p. 13 citing, Adjudication Order No. 3 (June 30, 1997), https://www.oipc.bc.ca/adjudications/1166 at p. 7.

[22] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.

[23] For the principles discussed here, see also OIPC Investigation Report F16-02 *supra* note 21 at pp. 26-27 and the OIPC's guide "Section 25: The Duty to Warn and Disclose", December 2018 [Guide] https://www.oipc.bc.ca/resources/guidance-documents/.

[35] In any given set of circumstances there may be competing public interests, weighing for and against disclosure, and the threshold will vary according to those interests. FIPPA exceptions themselves are indicators of classes of information that, in the appropriate circumstances, may weigh against disclosure of the information.[24]

Does the matter engage the public interest?

[36] I will first decide whether birth alerts are a matter that engages the public interest.

[37] IndigiNews submits that the subject of birth alerts is one of interest to the general public and is a systemic issue that has attracted considerable attention from the media.[25] It provides links to ten news articles it published and four published by other news outlets that discuss birth alerts. The news articles range from September 16, 2019 to late September 2021.[26]

[38] IndigiNews also explains that the subject of birth alerts was addressed by the National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry). IndigiNews cites the National Inquiry's 2019 final report which found that birth alerts against Indigenous mothers "are racist and discriminatory and are a gross violation of the rights of the child, the mother, and the community."[27] IndigiNews reported that 58% of parents impacted by birth alerts in 2018 were Indigenous.[28] IndigiNews also cites a January 14, 2021 news release from BC's Representative for Children and Youth in which she says she learned from IndigiNews that the Ministry of Attorney General formally advised the Ministry that birth alerts were unlawful several months before birth alerts were discontinued.[29]

[39] IndigiNews also says that it is untenable to suggest that the issue of birth alerts is not of current public interest simply because birth alerts are no longer issued in BC. It asserts that the practice still has ongoing repercussions felt by those who were subjected to a birth alert. For instance, the discrimination caused by a birth alert can cause women to be reluctant to seek health care.[30] It also points out that there is an ongoing class action lawsuit in the Supreme Court of

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[24] Guide, *ibid* at p. 3 and Report F16-02, *supra* note 21 at p. 38.
[25] IndigiNews' submission at para. 38.
[26] The IndigiNews' submission is dated August 26, 2022.
[27] *Reclaiming Power and Place – The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Volume 1a at p. 355. https://www.mmiwgffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.
[28] IndigiNews' submission footnote #3.
[29] Representative for Children and Youth (January 14, 2021) *Statement/press release*. https://rcybc.ca/wp-content/uploads/2021/01/RCY-Statement_birth-alerts_14-Jan-2021.pdf.
[30] IndigiNews' submission at para. 40.

BC involving parents who were subjected to birth alerts, so in that way the matter is still currently of public interest.[31]

[40] The Ministry submits that because s. 25(1) requires that information be disclosed "without delay" it means that the information at issue should be about a current or ongoing issue, not a historical issue.[32] The Ministry says that because the practice of issuing birth alerts was discontinued on September 16, 2019, it is not "an issue that is of current, plain and obvious public interest, such that s. 25(1)(b) would apply".[33] The Ministry also submits that because birth alerts were discontinued, it is inconsistent for IndigiNews to say that they "are a systemic issue".[34]

[41] The Ministry says that while the practice of birth alerts may have been of interest to the media and oversight bodies prior to being discontinued, most of the media articles after the practice was discontinued were written by IndigiNews. That is not sufficient, the Ministry submits, to establish that IndigiNews' "clear interest in the topic… is currently reflected in the wider public media landscape."[35] The Ministry also says that IndigiNews's evidence only shows that one oversight body has shown interest in birth alerts since they were discontinued.[36]

[42] I have no difficulty finding that the first element required to establish that s. 25(1)(b) applies is met. I am satisfied that BC's use of birth alerts, even though they were discontinued in September 2019, is still a matter that engages the public interest. IndigiNews' evidence, in particular the National Inquiry's report, persuades me that the negative repercussions of birth alerts is not a matter that ended in September 2019 or is only of clear concern to IndigiNews, as the Ministry suggests. Birth alerts played a role in the healthcare and child welfare systems for decades, and the National Inquiry's report explains the ongoing negative impacts the past use of birth alerts has on Indigenous people. In addition, IndigiNews' evidence demonstrates that other news outlets reported on the issue with the most recent new report no older than last September. The evidence in this case as a whole satisfies me that the issue of birth alerts is a matter of ongoing public interest.

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[31] IndigiNews' submission at para. 15 citing *Nikida Steel v. Her Majesty the Queen in Right of the Province of British Columbia*, No. S-217852, Vancouver Registry.
[32] Ministry's initial submission at para. 68.
[33] Ministry's initial submission at paras. 68 -70.
[34] Ministry's reply at para. 3.
[35] Ministry's reply at para. 4.
[36] The Ministry does not say which oversight body it means, but I understand it to mean either BC's Representative for Children and Youth or the National Inquiry.

Is disclosure clearly in the public interest?

[43] As mentioned above, what constitutes "clearly in the public interest" under s. 25(1)(b) is contextual and determined on a case-by-case basis. Disclosure will be required under s. 25(1)(b) only where a disinterested and reasonable observer, knowing the information and knowing all of the circumstances would conclude that disclosure is plainly and obviously in the public interest.

[44] The Ministry says the issue in this inquiry "is not only whether it is clearly in the public interest for the public to know the redacted information about birth alerts, but whether that public interest is so overwhelming so as to override the consistently acknowledged fundamental public interest in the preservation of solicitor-client privilege."[37] It says that it is not clearly in the public interest to disclose the Disputed Information because to do so "would be contrary to the public interest, by compromising the public confidence in solicitor client privilege, and by extension, the justice system."[38] The Ministry cites the Supreme Court of Canada's *Alberta (Information and Privacy Commissioner) v. University of Calgary* (*University of Calgary*) where Justice Cote speaking for the majority said:

> It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice… It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances"...[39]

[45] The Ministry submits that deciding whether s. 25(1)(b) applies requires weighing the public interest in maintaining solicitor-client privilege against any public interest in overriding that privilege.[40] Even in previous BC orders where there was evidence of considerable public interest in a matter, the Ministry says, it was not sufficient to abrogate solicitor-client privilege and override the application of s. 14. It cites Orders 02-38 and F18-36 where the adjudicators found that s. 25(1)(b) did not apply to privileged legal costs in two high profile court proceedings. The Ministry submits that if s. 25(1)(b) was not triggered with respect to the bare amount of legal fees in those instances, it cannot be triggered to require disclosure of the actual legal advice provided in this instance.[41]

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[37] Ministry's initial submission at para. 77.
[38] Ministry's initial submission at para. 78.
[39] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 [*University of Calgary]*, at para. 34, citations omitted. The Ministry also cites *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 [Blood Tribe], at para. 10, for the principle that solicitor-client privilege is to be maintained as close to absolute as possible to ensure public confidence and retain its relevance.
[40] Ministry's initial submission at paras. 72, 77 and reply submission at para. 6.
[41] Ministry's reply submission at para. 7.

[46] IndigiNews says that while the competing public interest in solicitor-client privilege is certainly important, the factors present in this case weigh in favour of disclosure under s. 25(1)(b).[42] It provides several arguments about why disclosing information about birth alerts is clearly in the public interest. Amongst other things, it says that the Disputed Information may assist in understanding why the birth alerts were issued and why the Province decided to stop them. It may also allow individuals who were not aware they were the subject of a birth alert to self-identify as having been impacted, so they can seek redress by joining the class action litigation. IndigiNews also says:

> The broader population also has a clear interest in the disclosure of the Records. We are all partners in reconciliation, and we cannot take meaningful steps forward if we do not have all of the information necessary to understand the injustices perpetrated against Indigenous peoples. Under the cloak of secrecy these same mistakes can be repeated again and again.[43]

The s. 25(1)(b) evidence

[47] For the reasons that follow, I find that I do not have sufficient evidence about the Disputed Information to decide if it meets the high threshold for disclosure under s. 25(1)(b).

[48] The Ministry says the public interests protected by solicitor-client privilege are paramount and outweigh the public interest in the Disputed Information. However, I am unable to decide that issue with the level of evidence I currently have. I recognize that there are situations where it may be possible to decide if s. 25(1)(b) applies without seeing the information in dispute. That was the case in Order F18-36, which the Ministry cited. In that case, the public body's affidavit evidence described the information in the record in some detail explaining that it was a summary of legal fees and disbursements as well as a breakdown of those fees and disbursements by cost type, including billing amounts by type of position and disbursement type, including expert witness fees. I do not have that type of disputed information or evidence here.

[49] What I have in this case is the broad-brush descriptions provided in the solicitor's affidavit and the Table. I know the dates of the records, that they are portions of emails and a briefing note and that, in some way, they are about birth alerts. I also know that the Disputed Information contains the solicitor's legal advice and a request for additional legal advice. In my view, without more, it is not possible to decide if disclosing the Disputed Information is, or is not, clearly in the public interest under s. 25(1)(b).

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[42] IndigiNews' submission at para. 47.
[43] IndigiNews' submission at para. 46.

[50] During the inquiry, I wrote to the Ministry to explain that while the solicitor's affidavit and the Table provide sufficient information for me to decide if s. 14 applies, it is not enough to decide if s. 25(1)(b) applies, even when combined with the context provided by the records that I can see. I provided the Ministry an opportunity to provide additional and more detailed evidence to assist me in understanding the specifics of the Disputed Information in the context of s. 25(1)(b).[44]

[51] The Ministry replies that it cannot offer further evidence without disclosing the substance of legal advice confidentially sought and given. It says it has established its claim for solicitor-client privilege and no further evidence is necessary.

[52] The Ministry also submits that once solicitor-client privilege over records has been established, the Commissioner lacks statutory authority to order that privileged information be disclosed to the public under s. 25(1)(b). It says:

> The public body takes this position because section 25(1)(b) lacks the express language required to abrogate solicitor-client privilege. Solicitor-client privilege cannot be set aside by inference; anything less than "explicit and unequivocal" direction by the legislature will fail to abrogate the "substantive" rule which protects against the disclosure of solicitor-client privileged information. The language in section 25 falls short of this standard.[45]

[53] The Ministry cites Supreme Court of Canada decisions that say solicitor-client privilege is a fundamental common law privilege essential to the proper functioning of our legal system and it can only be set aside by legislative language that is clear, explicit and unequivocal.[46] For instance, in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (*Blood Tribe*) Justice Binnie said that solicitor-client privilege "cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents".[47]

[54] The Ministry also mentions the public interest override provisions in Ontario's *Freedom of Information and Protection of Privacy Act* and Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*. Those provisions are worded differently than s. 25(1)(b) in that they list the specific exceptions to disclosure that may be overridden by a public interest in

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[44] November 14, 2022 letter. I also said that if the Ministry wished to provide any additional evidence *in camera*, I would consider that request.
[45] The Ministry's November 28, 2022 letter. This argument was not part of its initial or reply submissions.
[46] The Ministry cites: *University of Calgary*, *supra* note 39 at paras 2, 28, 44; *Blood Tribe*, *supra* note 39 at para 11; *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31, para 33.
[47] *Blood Tribe, supra* note 39 at para. 11.

disclosure.[48] The listed exceptions do not include records protected by solicitor-client privilege.

[55] I am not persuaded by the Ministry's submission that s. 25 fails to provide the kind of clear, explicit and unequivocal indication that the Supreme Court of Canada says is required to abrogate privilege. Section 25(2) says that subsection 1 applies "despite any other provision of this Act." I read s. 25(2) as an unambiguous statement of legislative intent, namely that when disclosure meets the threshold for disclosure that is in the public interest under s. 25(1), it overrides any provision in FIPPA that provides an exception to access, including s. 14. The language used in Ontario and Newfoundland and Labrador's public override provisions merely illustrate that if the BC Legislature had similarly meant for s. 25 not to apply to s. 14, it would have said so.

[56] This interpretation of s. 25(2) it is consistent with one of the central purposes of FIPPA stated in s. 2(1), which is "to make public bodies more accountable to the public". Accountability is provided through the access to information provisions in Part 2 of FIPPA which provide a scheme for ensuring the public has a right to access information that is in the custody or under the control of a public body. Section 25(2) fosters accountability by ensuring the public has access to information that is clearly in its interests to access.

[57] Further, s. 2(1)(e) says that one of the ways FIPPA achieves its purposes is by providing for an independent review of decisions made under the Act. Section 56(1) gives the Commissioner the statutory authority to decide all questions of fact and law in an inquiry, and I am satisfied this authority includes deciding whether s. 25(1)(b) applies to records to which s. 14 applies.[49]

Power to order production, s. 44

[58] As the commissioner's delegate, s. 44 authorizes me to order the Disputed Information be produced for my view. The relevant parts of s. 44 state as follows:

> 44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
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> …
>
> (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

[48] *Freedom of Information and Protection of Privacy Act*, RSO 1990 C.F.31, s.23. *Access to Information and Protection of Privacy Act*, SNL 2015, c A-1.2, s. 9.

[49] In addition, s. 2(1)(e) provides for an independent review of decisions made under the Act.

> (2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.
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> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).
> …

[59] The wording of ss. 44(2.1) and (3) demonstrates that the Legislature intended the commissioner to have the power to order production and review records protected by solicitor-client privilege in order to fulfill the commissioner's statutory functions. In particular, s. 44(2.1) expressly considers and provides for the consequences of producing solicitor-client privileged records to the commissioner. As Justice Cromwell said in his partially concurring reasons in *University of Calgary*, s. 44(2.1) would be meaningless unless the Legislature meant s. 44(1) to authorize the commissioner to order production of records protected by solicitor-client privilege. He said, "The legislature must have assumed that s. 44(1) permits the commissioner to require production of solicitor-client privileged records. Otherwise, there could be no record subject to solicitor-client privilege disclosed to the commissioner under s. 44(1) to which the amendment could refer." [50]

[60] Given that solicitor-client privilege protects principles that are vital to the justice system and the public interest, I recognize the significance of ordering the Ministry to produce solicitor-client privileged records for my review. Therefore, in order to interfere with solicitor-client privilege as minimally as possible, I offered the Ministry an opportunity to provide additional evidence about the nature of the Disputed Information. As discussed above, the Ministry chose not to do so and I concluded I had insufficient information to decide if s. 25(1)(b) applies. Therefore, I find that it is absolutely necessary to order the Ministry to produce the Disputed information for my review pursuant to s. 44(1)(b) so that I can fulfill my duty under the Act and make an independent and informed decision about whether s. 25(1)(b) applies.

CONCLUSION

[61] For the reasons provided above, pursuant to s. 58(1)(b) of FIPPA, I confirm the Ministry's decision that it is authorized to refuse to disclose the Disputed Information to IndigiNews under s. 14 of FIPPA.

[62] For the reasons provided above, pursuant to s. 44(1)(b) of FIPPA, I require the Ministry to produce to me all of the Disputed Information, so I can

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[50] *University of Calgary*, *supra* note 39 at para. 117.

decide if s. 25(1)(b) applies. For added clarity, the Disputed Information is on pages 33-34 and 47 of the phase one disclosure and page two of the phase two disclosure.

[63] Pursuant to s. 44(3), the Ministry must comply with this order by December 23, 2022.

December 9, 2022

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC Files: F21-84994 and F21-85040