Order F23-19

MINISTRY OF EDUCATION AND CHILD CARE

Allison J. Shamas
Adjudicator

March 22, 2023

CanLII Cite: 2023 BCIPC 22
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 22

Summary:

The applicant requested records from the Ministry of Education and Child Care (Ministry) related to the Ministry's policies regarding third party requests for information and his court claim against the Ministry. The Ministry withheld some information under ss. 13(1) (policy advice and recommendations) and 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator confirmed the Ministry's decision to withhold information under s. 14 in full, and under s. 13(1) in part, and ordered the Ministry to disclose some information withheld under s. 13(1) to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ss. 13(1), 13(2), 13(2)(a), 13(2)(m), 13(2)(n) and 14.

INTRODUCTION

[1] The applicant submitted two requests to the Ministry of Education and Child Care (Ministry)[1] for access to records under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Ministry disclosed 163 pages of records, but withheld some information and documents in the records under ss. 13(1) (policy advice and recommendations), 14 (solicitor-client privilege), and 22 (harmful to personal privacy) of FIPPA.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decisions to refuse access. Mediation did not resolve the issues in dispute, and the matter proceeded to inquiry.

[1] The Ministry of Education became the Ministry of Education and Child Care on February 8, 2022.

[3] The applicant and the Ministry both provided submissions during the inquiry. The applicant's submissions included an affidavit in which he detailed his decades long relationship with the Ministry, and the ways in which, in his view, the Ministry mistreated him throughout much of that history. While I have considered all of the parties' submissions, I will only refer to what is necessary to decide the issues before me in this inquiry.

PRELIMINARY MATTERS

Section 22 - No Longer in Dispute

[4] During the inquiry, the Ministry reconsidered its application of s. 22 and disclosed the information withheld under this provision to the applicant. The applicant has received this information, and has not requested that the inquiry into the s. 22 issue proceed. Accordingly, I find that s. 22 is no longer at issue and will not deal with it further.

ISSUES AND BURDEN OF PROOF

[5] The issues to be decided in this inquiry are:

1. Is the Ministry authorized to refuse to disclose the information at issue under s. 14?

2. Is the Ministry authorized to refuse to disclose the information at issue under s. 13?

[6] Section 57(1) of FIPPA places the burden on the Ministry as the public body, to prove the applicant has no right of access to the information in dispute under ss. 13(1) and 14.

DISCUSSION

Background

[7] The Ministry is the public body responsible for the education of school aged children in the province of BC. The applicant is the owner of a company (Company) that offers reports to school districts aimed at improving student achievement in BC schools.

[8] In preparing its reports the Company relies on records that contain information about students (Student Records) which it obtains from the Ministry and school districts. The applicant's access to Student Records has been a source of discord between the parties. While the parties have a long history, the matters that relate directly to this inquiry are as follows.

[9] On September 30, 2011 the applicant sued the Ministry alleging that it had breached an agreement to provide the Company with Student Records and exercised its discretion inappropriately when it denied the Company access to records. As of the date of the inquiry, this litigation remains outstanding.

[10] In 2019 the Ministry reported an information and privacy incident related to the disclosure of Student Records (the Incident). An investigator (Investigator) from the Information Management Investigations Unit (Investigations Unit) of the Ministry of Citizens' Services (Citizens' Services) was assigned to investigate. The Investigator worked closely with Ministry employees to investigate and resolve the Incident. The Investigator closed the file in early 2020, finding that no actual privacy breach occurred.[2]

[11] Also, in 2019 the Ministry advised the applicant that his future requests for information should be submitted through the Ministry's formal Freedom of Information processes.

[12] The applicant subsequently made two requests for information from the Ministry. It is these requests that are before me. He requested information relating to efforts to settle his court claim against the Ministry including information related to a document he provided the Ministry detailing his position regarding the harms he suffered as a result of the Ministry's conduct (the Harms Document), and information related to the Ministry's policies regarding the release of data to third parties.

Records and Information at Issue

[13] The responsive records consist of 163 pages, 15 of which contain the withheld information.

[14] The records containing withheld information consist of a Ministry Briefing Note (Briefing Note) prepared by a Ministry employee for the then Assistant Deputy Minister of Education (ADM) and four email chains amongst Ministry employees and in some cases the Investigator.

[15] The Ministry provided the records containing the information withheld under s. 13 for my review, but not the information withheld under s. 14.

Section 14 - Solicitor Client Privilege

[16] Section 14 provides that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 encompasses

[2] Affidavit of applicant, Exhibit E, pages 23 and 24.

both legal advice privilege and litigation privilege.[3] The Ministry claims both legal advice privilege and litigation privilege apply to the withheld information.

Evidentiary basis for s. 14

[17] The Ministry did not provide the information withheld under s. 14 for my review. Instead, it provided two tables of records and affidavit evidence from five people: three lawyers (Lawyer 1, Lawyer 2 and Lawyer 3) from the Ministry of Attorney General's Legal Services Branch (LSB), an executive director with the Ministry's Education Analytics Branch (ED) and an LSB paralegal (Paralegal).

[18] After conducting a preliminary review of the Ministry's submission, I determined that it was not sufficient to allow me to assess its claim of solicitor-client privilege. While s. 44(1) authorizes me, as the commissioner's delegate, to order production of records to review during the inquiry, due to the importance of solicitor-client privilege to the proper functioning of the legal system, I would only do so when absolutely necessary.[4] For that reason, I first wrote to the Ministry to offer it the opportunity to address the evidentiary issues identified in my letter.[5] The Ministry filed additional submissions and an affidavit from the Investigator.[6] Based on that additional information, I determined I had sufficient information to determine whether s. 14 applies.

[19] The applicant declined to respond to the Ministry's additional submissions and evidence.

Legal Advice Privilege

[20] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[7] 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.[8]

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[3] Order F22-64, 2022 BCIPC 72 (CanLII) at para. 15.
[4] See for example Order F18-33, 2018 BCIPC 36 (CanLII) at para. 2, Order F20-09, 2020 BCIPC 10 (CanLII) at paras. 13 and 14, and Order F22-04, 2022 BCIPC 4 (CanLII) at paras. 20 and 21.
[5] My letter is dated February 10, 2023.
[6] The Ministry's additional submission is dated February 23, 2023.
[7] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.
[8] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at page 837, and *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.

[21] Legal advice privilege extends to more than the individual document that actually communicates or proffers legal advice. It includes communications that are "part of the continuum of information exchanged" [9] between the client and the lawyer in order to obtain or provide the legal advice. This "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[10] It also covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[11]

[22] The withheld information is found in the Briefing Note and two email chains between Ministry employees and the Investigator.

Applicant's Submission

[23] The applicant made one argument regarding legal advice privilege, which is premised on his belief that the Ministry conducted an internal review upon receiving the Harms Document before seeking legal advice about it. Relying on this belief, the applicant argues that the resulting internal review is not protected by legal advice privilege because it pre-dated any legal advice. I have considered the applicant's argument. It is apparent from the records that what his understanding regarding the timing of events is not correct and the withheld information was created after the receipt of legal advice. Accordingly, I do not accept the applicant's argument because it is not supported by the facts.

[24] As the onus is on the Ministry to prove that the withheld information is privileged, I now turn to the records which contain information at issue.

Briefing Note

Ministry's Submission

[25] The Ministry withheld a single line of text from the Briefing Note.[12] The redaction immediately follows a statement that the applicant advised that he wished to discuss a resolution of his court action against the Ministry.

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[9] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83. See also *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 40-46 [*Camp Developments*].
[10] *Camp Developments*, *supra* note 9 at para. 40.
[11] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 at paras. 22-24.
[12] The Briefing Note is located at pages 6 and 7 of the records in File F20-82829 and pages 1 and 2 of the records in File F20-83268. The information that is withheld under legal advice privilege is a single line on the first page of the Briefing Note.

[26] In support of this redaction, the Ministry relies on the ED's affidavit in which the ED attests that she is the author of the Briefing Note and the withheld information "contains legal advice that was provided to [her] in [her] capacity as an employee of the Ministry by …. legal counsel to the Ministry."[13] The ED affirms that she treated the advice as confidential, and that she believes that all Ministry employees who received the advice understood that it was confidential."[14] She also states that the lawyer who provided the advice is now retired.

Findings and Analysis

[27] The ED is the author of the Briefing Note and personally received the information which she attests is legal advice. She holds a senior position within the Ministry in which she communicates with legal counsel and briefs senior officials. The context of the sentence at issue bolsters the ED's evidence that the withheld information is legal advice. A reference to legal advice about the claim is exactly the kind of information that one would expect to follow a statement that the applicant wished to resolve the claim.

[28] In these circumstances, I accept the ED's evidence in support of the Ministry's claim of legal advice privilege over the withheld information in the Briefing Note. I am satisfied that the ED has direct knowledge of the nature and content of the communications reflected in the records, as well as the ability to determine that the information in the Briefing Note was legal advice.

[29] I find that the withheld information is a communication between a Ministry employee about legal advice received from a Ministry lawyer. In my opinion, it is part of the protected continuum of communications which fall under s. 14. I also find that to require disclosure of the withheld information would disclose the legal advice itself.

[30] With regard to confidentiality, there is nothing to suggest that anyone other than Ministry and its lawyer were involved in the communication of legal advice. I am satisfied that the communication was confidential.

[31] I find that legal advice privilege applies to the information in the Briefing Note for the reasons discussed above, and the Ministry is authorized to withhold it under s.14.

Email Communications

Ministry's Submission

[13] Affidavit of the ED at para. 7.
[14] Affidavit of the ED at para. 10.

[32] The Ministry also withheld information from two email chains under legal advice privilege. The withheld information consists of two emails that were sent from a Ministry employee to the Investigator[15] and two emails that were sent from the Investigator to Ministry employees.[16] There are six employees on the email chains, the Investigator and five Ministry employees. Both email chains relate to the investigation into the Incident. The Ministry relies on the affidavits of the Investigator, Lawyer 1, Lawyer 2 and the records tables in support of its assertion of privilege over the information in the email chains.

[33] In the first, the Investigator explains the role of the Investigations Unit within the BC government as well as the roles of the individuals involved in the email chains.

[34] According to the Investigator, the BC government deals with suspected incidents involving information and privacy issues through a centralized system. These incidents are governed by the "Incident Management Policy," a central policy applicable to all government Ministries. Under the policy the employees of all ministries are required to report suspected and actual information incidents, and the Investigations Unit is responsible for providing all ministries with advice, support and investigative services to assist them in navigating the information incident process. In addition, the Incident Management Policy sets out detailed responsibilities for both representatives of government ministries and representatives from the Investigations Unit in resolving information and privacy issues.

[35] The Investigator states that he was responsible for investigating and advising the Ministry with respect to the Incident.

[36] Addressing the information in dispute, the Investigator explains that all six employees on the email chains were involved in reporting, investigating and managing the Incident. He states that the two emails the Ministry employee sent to him reference legal advice the Ministry obtained in relation to the Incident, and that the two emails he sent to Ministry employees reference the legal advice that he obtained to conduct his investigation. Finally, the Investigator states that he treated the legal advice in the emails as confidential and believes that all Citizens' Services and Ministry employees who received the advice understood that it was confidential and should not be shared with anyone outside of government.[17]

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[15] The email chain is located at pages 10 - 12 of the records in File F20-82829. The information withheld under legal advice privilege is found on page 11.
[16] The email chain is located at pages 22 – 26 of the records in File F20-82829. Portions of pages 23, 24, 25 and 26 have been withheld under legal advice privilege.
[17] Affidavit of Investigator at para. 17.

[37] Lawyer 1 provides further evidence about the email from the Ministry employee to the Investigator. She attests that she personally provided legal advice to the Ministry on the issues discussed in the emails, and describes the withheld information as "a reference to the Ministry seeking legal advice … and a reference to the Ministry's receipt of legal advice."[18] Furthermore, Lawyer 1 states that she always intended her advice to be confidential, that she believes that all Ministry employees who received her legal advice understood that it was confidential and should not be shared with any person or entity outside the government, and that to the best of her knowledge, there has been no intentional or unintentional waiver of the privilege.

[38] Lawyer 2 provides evidence about the email from the Investigator to the Ministry employee. Lawyer 2 attests that he was the colleague and supervisor of another LSB lawyer who is now retired. He explains that while he did not personally provide the information at issue, he worked with the retired lawyer as her colleague and supervisor and has personal knowledge of that lawyer advising on the withheld information.

[39] Lawyer 2 describes the withheld information as a summary of the legal advice the retired lawyer provided to the Investigator, and a summary of information to be provided by the Investigator to the retired lawyer for the purpose of receiving legal advice.[19] He also states that based on his own recollections and review of the advice, that the retired lawyer "did provide advice to the Ministry on those matters."[20] Finally, Lawyer 2's statements about confidentiality and waiver echo those of Lawyer 1.

[40] The Ministry argues that the client for the purposes of its claim of legal advice privilege is "the government of [BC], as represented by the Ministry and [Citizens' Services]."[21] However, it submits all six of the email recipients are clients for the purposes of the confidentiality element of privilege because they "are employees of the Province, as represented by the Ministry and by Citizens' Services, and the Ministry was required by the Incident Management Policy to report the incident to Citizens' Services, which in turn was required by that policy to conduct this investigation."[22] Furthermore, it explains that the legal advice referred to in the email communication was "treated confidentially by the recipients, and was only shared with those employees for whom it was necessary to investigate, manage, and respond to the Incident."[23]

[18] Affidavit of Lawyer 1 at para. 6.
[19] Affidavit of Lawyer 2 at para. 6.
[20] Affidavit of Lawyer 2 at para. 9.
[21] Ministry's Initial Submissions at para 53.
[22] Ministry's February 23, 2023 submissions at para. 19.
[23] Ministry's February 23, 2023 submissions at para. 20.

[41] In support of its position that the emails are covered by solicitor-client privilege, the Ministry cites Orders F21-08[24] and F20-18,[25] in which the OIPC accepted that legal advice shared between two government ministries in circumstances where one was providing centralized services to the other on a specific issue satisfied the test for legal advice privilege.

[42] The Ministry also argues that the privilege extends to its own internal discussions of the legal advice even where the discussions did not involve the lawyer who provided the advice, as disclosure of its internal discussions would reveal the advice.

Analysis and Findings

[43] I accept the Ministry's sworn evidence in support of its assertion of legal advice privilege over the information in the email chains. I am satisfied that the Investigator, Lawyer 1 and Lawyer 2 have direct knowledge of the nature and content of the communications reflected in the records, and in the case of the lawyers, a strong understanding of the scope and purpose of the s. 14 solicitor-client privilege exemption.

Who is the Client?

[44] While the Ministry makes extensive submissions about the identity of the client, its evidence can be distilled down to a few key facts.

[45] The emails relate to the Incident. Lawyer 1 states she gave advice to the Ministry on the matters at issue in the emails. Lawyer 2 states that the retired lawyer communicated legal advice to the Citizens' Services Investigator, not Ministry employees. The Investigator deposes that under the BC government's Incident Management Policy, the Ministry and Citizens' Services shared the responsibility for investigating and resolving the Incident, and that the two Ministries worked together to resolve the Incident.

[46] In this case I am satisfied that Citizens' Services was providing a centralized investigative service to the Ministry. The government-wide Incident Management Policy required the Ministry and the Investigator to work together to resolve the Incident. They shared a single goal of resolving the privacy concerns raised by the Incident. Both Ministry employees and the Citizens' Services Investigator sought legal advice from LSB lawyers regarding the Incident.

[47] The OIPC has in past orders accepted that multiple government entities are the client where, as in the instant case, the public body provides evidence to

[24] 2021 BCIPC 12 (CanLII).
[25] 2020 BCIPC 20 (CanLII).

support its position that multiple entities were the client for the purpose of the record at issue.[26]

[48] In the circumstances, based on the evidence as a whole in this case, I accept that both the Ministry and Citizens' Services were the client for the purposes of the legal advice concerning the Incident.

Nature of the Withheld Information?

[49] I find that the withheld information from the email communications between Ministry employees and the Investigator relate to:

- the Ministry seeking legal advice from an LSB lawyer in relation to the Incident,
- the Ministry's receipt of legal advice from an LSB lawyer in relation to the Incident,
- legal advice provided to the Investigator by an LSB lawyer in relation to Incident, and
- information to be provided by the Investigator to an LSB lawyer for the purpose of receiving legal advice in relation to the Incident.

[50] The withheld information is client communications amongst the Ministry and Citizens' Services employees involved in the Incident about legal advice and its implications. While these communications do not capture the actual communications between the lawyers and the clients, they are discussions between clients about that legal advice and the information to be provided so lawyers can formulate legal advice. The communications clearly form part of the continuum of communications in giving or receiving legal advice in regard to the Incident involving student records. Finally, the descriptions of the communications support the Ministry's assertion that disclosure of the withheld information would reveal the legal advice itself.

[51] I am satisfied that disclosing the withheld information would reveal communications between clients and solicitors that entail the seeking or providing of legal advice.

Confidentiality

[52] Lawyer 1 deposed that she always intended her advice to be confidential, that she believed that all Ministry employees who received her legal advice

[26] See for example Order F22-11, 2022 BCIPC 11 (CanLII) at paras. 36 – 38 and Order F20-18, 2020 BCIPC 20 (CanLII), at paras. 35 – 43.

understood that it was confidential. Lawyer 2's evidence about the retired lawyer's intention and belief mirrored those of Lawyer 1. The Investigator's evidence echoes that of the lawyers, and also explains that the advice was only shared with those Ministry and Citizens' Services employees who were involved in the investigation into the Incident.

[53] I accept this evidence, and I find that the legal advice discussed in the communications satisfies the confidentiality requirement of the solicitor-client privilege test.

[54] Accordingly, I find that legal advice privilege applies to the information in the email chains discussed above, and the Ministry is authorized to withhold it under s. 14.

Litigation Privilege

[55] Litigation privilege protects a party's ability to effectively conduct litigation. Its purpose is to ensure the efficacy of the adversarial process.[27] It does so by creating a protected area in which parties to pending or anticipated litigation are free to investigate, develop and prepare their contending positions in private, without adversarial interference into their thoughts or work product and without fear of premature disclosure.[28] Once the litigation ends, so does the privilege, unless related litigation is ongoing or reasonably apprehended.[29]

[56] To succeed in a claim of litigation privilege the party invoking it must establish that:

> (1) Litigation was ongoing or was in reasonable prospect at the time the document was created; and
>
> (2) The dominant purpose of creating the document was to prepare or aid in the conduct of that litigation.[30]

[57] The threshold for determining whether litigation is "in reasonable prospect" is a low one and it does not require certainty.[31] The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?[32]

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[27] *Blank v. Canada (Minister of Justice*), 2006 SCC 39 [*Blank v. Canada*] at para. 27.
[28] *Ibid*, at para. 27; *Raj v. Khosravi*, 2015 BCCA [*Raj v. Khosavari*] at para. 7.
[29] *Blank v. Canada, supra* note 27 at para. 34 – 39.
[30] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para. 32, and *Raj v. Khosravi*, *supra* note 28 at paras. 12 and 20.
[31] *Raj v. Khosravi*, *supra* note 28 at para. 10.
[32] *Raj v. Khosravi*, *supra* note 28 at para. 11 citing *Sauvé v. ICBC*, 2010 BCSC 763 at para. 30.

[58] There is no absolute rule for determining whether litigation was the "dominant purpose" for the document's production. A finding of dominant purpose is a factual determination that must be made based on all of the circumstances and the context in which the document was produced.[33]

Parties' Submissions

[59] The Ministry withheld one, 8-page document under litigation privilege. As previously mentioned, the Ministry did not produce a copy of the document for my review. Instead, it relies on affidavit evidence from Lawyer 3 and the Paralegal.

[60] Lawyer 3 attests that the document is an email chain between himself and client representatives for the Ministry in which he provided updates related to preparation for ongoing litigation.[34] He specifies that the litigation was the court action filed by the applicant against the Ministry on September 30, 2011,[35] and confirms that the dominant purpose of the communications was to prepare for litigation.[36] He states that the only individuals on the email chain were client representatives of the Ministry, an LSB paralegal, and himself. Lawyer 3 also attests that he was informed by another lawyer in the LSB who now has carriage of the file that the litigation remains outstanding.

[61] The Paralegal attests that the email chain commenced on December 18, 2012 and ended on January 17, 2013.

[62] The Ministry argues that the affidavit evidence it provided is sufficient to meet the test for litigation privilege. It also submits that severance is not appropriate unless it can be accomplished without any risk that privileged legal advice will be revealed.

[63] The applicant says that that efforts to resolve the litigation began in October of 2016 and he confirms that the litigation remains unresolved.[37]

[64] The applicant points out that his access request was for records about attempts to settle the litigation, so he suggests that the dominant purpose of the redacted document was for settlement purposes and not to prepare for litigation. On this basis he argues that litigation privilege does not apply.

Analysis and Findings

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[33] *Raj v. Khosravi*, *supra* note 28 at para. 17.
[34] Lawyer 3's affidavit at para. 5.
[35] Lawyer 3's affidavit at para. 7.
[36] Lawyer 3's affidavit at para. 6.
[37] Applicant's affidavit at paras. 21 and 36. While paragraph 36 states that negotiations began in 2006, it is clear from the context that this is a typographical error and that the paragraph should read 2016.

[65] In assessing the Ministry's application of litigation privilege, I will apply the two-part test set out above.

> (1) Was litigation ongoing or reasonably contemplated at the time the records were created?

[66] Both the applicant and the Ministry confirmed that the litigation commenced in 2011 and is ongoing. The email chain was created roughly one year after the litigation was commenced, and three or more years before efforts to resolve the litigation began. I am satisfied that litigation was ongoing at the time the records were created.

> (2) Were the records created for the dominant purpose of preparing for the litigation?

[67] In the email chain Lawyer 3 says he provided his clients with "updates related to preparation for ongoing litigation"[38].

[68] The purpose of litigation privilege is to ensure the efficacy of the litigation process by creating a "zone of privacy"[39] in which parties to anticipated or ongoing litigation are free to investigate, develop and prepare their positions without interference. Status updates from a lawyer to a client are a fundamental part of the process of preparing for litigation. Disclosure of communications about preparation would undermine the purpose of litigation privilege. In addition, past OIPC orders have held that similar communications are covered by litigation privilege.[40]

[69] In light of the evidence that the email chain was created roughly three years before the parties began efforts to resolve the litigation, I reject the applicant's argument that litigation privilege does not apply because the document relates to settlement. Finally, I am also satisfied that the litigation is still ongoing so the privilege still exists.

[70] I find that litigation privilege applies to the email chain and that the Ministry is authorized to withhold it under s. 14.

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[38] Lawyer 3's affidavit, para. 5.
[39] *Blank v. Canada*, *supra* note 27 at para. 34.
[40] See Order F20-24, 2020 BCIPC 28 (CanLII) at para. 63 in which the adjudicator ruled that "updates about the litigation" were created for the dominant purpose of litigation. See also Order F21-21, 2021 BCIPC 26 (CanLII) at para. 54 in which the adjudicator ruled that communications between ICBC staff and lawyers "about various aspects of the litigation" were created for the dominant purpose of litigation; and Order F22-52, 2022 BCIPC 59 (CanLII) at paras. 70 and 79 in which the adjudicator ruled that internal emails created for the purpose of preparing for litigation were created for the dominant purpose of litigation.

Advice and Recommendations - Section 13

[71] Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.

[72] The test under s. 13 of FIPPA is well-established. To determine whether s. 13(1) applies, I must first decide whether disclosing the information at issue would reveal advice or recommendations developed by or for a public body or a minister. If so, the next step is to decide whether the information falls into any of the categories in s. 13(2) or whether it has been in existence for more than 10 years under s. 13(3). If ss. 13(2) or 13(3) apply to any of the information, that information cannot be withheld under s. 13(1). In this case the disputed records do not go back 10 years so s. 13(3) is not in issue.

[73] There was some overlap between the Ministry's application of ss. 13 and 14 to the records. I will only consider the application of s. 13 to the information that I have not already found that the Ministry is authorized to withhold under s. 14.

Section 13(1) – Would disclosure reveal advice or recommendations

[74] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.[41]

[75] "Recommendations" are words that recommend courses of action or lay out alternatives.[42] The term "advice" has a broader meaning than the term "recommendations".[43] As the BC Court of Appeal explained in in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)* the meaning of advice includes:

- "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact." [44]

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[41] See for example Order 02-38, 2002 CanLII 42472 (BCIPC), Order F10-15, 2010 BCIPC 24 (CanLII) and Order F21-15, 2021 BCIPC 19 (CanLII).
[42] See for example Order 00-08, 2000 CanLII 9491 (BC IPC) at para. 37 (reviewed in *College, supra* note 7 but, as discussed therein, the Court of Appeal added to rather than overturning these definitions); Order 01-28, 2001 CanLII 21582 (BC IPC), at para. 48.
[43] *John Doe v. Ontario (Finance)* 2014 SCC 36 [*John Doe*] at para 24.
[44] *College, supra* note 7 at para. 113; Order No. F21-15, 2021 BCIPC 19 (CanLII) at para. 59.

- "expert opinion on matters of fact on which a public body must make a decision for future action." [45]

- "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."[46]

Parties' submissions

[76] The Ministry withheld two paragraphs of the Briefing Note, and the body of two emails.

[77] The Ministry submits that the information it has withheld under s. 13 was developed both by and for the Ministry, and involves the professional expertise of Ministry employees who are advising on issues being considered by the Ministry. It also submits that the disclosure of the information would in all instances enable the applicant to draw accurate inferences about advice or recommendations.

[78] The applicant argues that the Ministry's failure to provide affidavit evidence in support of its s. 13 redactions brings the veracity of its submissions into question.

[79] Furthermore, citing what are in his view, errors and omissions in the Briefing Note, the applicant argues that the withheld information cannot be advice because its author is not qualified to provide expert advice.

[80] Finally, he argues that because Citizens' Services ultimately closed its privacy investigation into his use of Student Records without taking any action, the Ministry's statement that some of the withheld information includes options for how to proceed and to prevent a similar incident from occurring is false.

[81] In reply the Ministry argues that affidavits are not required because the "information in dispute is itself directly probative to the application of s. 13." Addressing the applicant's argument about the expertise of the Briefing Note's author, the Ministry argues that s. 13 does not require that information in the unredacted portion of the record be comprehensive.

Analysis and Findings – s.13(1)

[82] I have considered the applicant's argument that the absence of affidavit evidence brings the veracity of the Ministry's submissions on s. 13 into question. I am not troubled by the absence of affidavit evidence in support of the Ministry's

[45] *College, supra* note 7 at para. 113.
[46] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94. See also *College, supra* note 7 at para. 110.

submissions regarding s. 13. I have reviewed the withheld information, and I am satisfied that the records themselves provide a sufficient evidentiary basis on which to determine the s. 13 issues.

[83] I will now consider whether disclosure of the withheld records would reveal advice or recommendations developed by or for a public body or minister under s. 13(1).

Briefing Note

[84] The Ministry refuses to disclose the final two paragraphs of the Briefing Note prepared by a Ministry employee for the then ADM under s. 13(1). The withheld information consists of the employee's assessments of the methodology discussed in the Briefing Note, her proposal as to how to proceed, and her suggestion about additional issues to be considered.

[85] The employee's proposals as to how to proceed and suggestions about additional issues to be considered are advice (or opinion) in the simple sense of the word. Her assessments of the methodology clearly involve the exercise of judgement and skill to weigh the significance of matters of fact and fall within the broader definition of advice in *College.*

[86] I am not persuaded by the applicant's argument that the information should not be withheld because the author is not an expert. Where the employee provided a proposal as to how to proceed and suggestions about additional issues to be considered I am satisfied she provided advice. There is no requirement that the advice be correct or expert to be protected under s. 13(1).

[87] I am also not persuaded that the question of the employee's expertise is relevant to whether her assessments of the methodology should be withheld. It is clear from the records that her assessments involved the exercise of judgement and skill to weigh the significance of matters of fact. In my view, this finding is sufficient to satisfy the definition of "advice" established by the Court in *College.*

[88] I find that the information withheld from the Briefing Note constitutes advice developed by or for the Ministry within the meaning of s. 13(1).

Email amongst Ministry Employees

[89] The Ministry has also withheld the body of an email between Ministry employees, with the exception of the to, from, subject and date lines.[47]

[90] The majority of the email is the author's opinions and analysis concerning the interpretation of a category of document being considered by the Ministry. It

[47] This email is located at pages 13 - 20 of the records in File F20-82829.

is clear that the email's author relied on her knowledge of legislative interpretation and the category of document being discussed to provide analysis and opinions about the matters that the Ministry was deciding. I find that this information is advice.

[91] However, I find that the balance of the email does not reveal advice because it reveals only the general nature of the topic being discussed and the dates on which certain events took place. It does not reveal the advice in the remainder of the email, nor would it allow the applicant to draw accurate inferences about that advice, or even to infer the specific topic on which the advice was given. Furthermore, the OIPC has recognized that s. 13(1) does not apply to this kind of factual information.[48] Accordingly, the Ministry is not authorized to refuse to disclose the factual information under s. 13(1).[49]

Email amongst Ministry Employees and the Investigator

[92] The Ministry has also withheld the body of an email between Ministry employees and the Investigator except the salutations, to, from, subject and date lines.[50] The withheld information consists of a list of 10 recommendations for how the Ministry should proceed on an issue being considered by the Ministry, and it is a clear example of recommendations that were developed for the Ministry to guide its decision making. To disclose this information would reveal recommendations made to the Ministry.

[93] The applicant's argument that the withheld information could not include options for how to proceed because the public body ultimately closed its privacy investigation into his use of Student Records without taking any action, is not borne out on the facts. I have reviewed the information at issue and find that it is recommendations developed by and for the Ministry.

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

[94] Having found that the information in dispute reveals advice or recommendations within the meaning of s. 13(1), I must also consider whether any of the provisions in s. 13(2) apply. Section 13(2) sets out types of records and information that cannot be withheld under s. 13(1). If any of these circumstances apply, the information cannot be withheld.

Subsection 13(2)(a) – Factual Material

[48] See for example Order F19-27, 2019 BCIPC 29 (CanLII) at para. 29; Order F20-44, 2020 BCIPC 53 (CanLII) at para. 29; and Order F21-23, 2021 BCIPC 28 (CanLII) at para. 94.
[49] The information that does not reveal advice or recommendations is found in the second paragraph of the email on pages 13 of the records.
[50] This email is located at pages 22 - 26 of the records in File F20-82829.

[95] Section 13(2)(a) provides that the head of a public body must not refuse to disclose any "factual material". "Factual material" is distinct from factual "information" and includes source materials or background facts not necessary to an expert's advice or the relevant deliberative process.[51]

[96] The Ministry submits that s. 13(2)(a) does not apply. It argues that despite s. 13(2)(a), it is permitted to withhold factual statements which are integral to and inextricably interwoven with advice such that they cannot be reasonably severed.

[97] With the exception of the information that I have already found is not covered by s. 13(1), I agree with the Ministry that the information at issue is not the kind of discrete material contemplated by s. 13(2)(a). I find that s. 13(2)(a) does not apply.

Subsection 13(2)(m) and (n) – Information cited publicly

[98] The applicant submits that ss. 13(2)(m) and (n) apply to the withheld information. These sections provide that a public body cannot refuse to disclose:

> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy,
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[99] The applicant argues that the exceptions found in ss. 13(2)(m) and (n) apply "to the information that the [ADM] claims to have received from [the Corporate Information and Management Records Office (CIRMO)] to impose the FIPPA requirement to almost all data requests."[52]

[100] I have reviewed the information withheld under s. 13 and the applicant's assumptions about its content are not accurate. Furthermore, I see no evidence that the withheld information has been cited publicly as the basis for any decision or policy. For these reasons, I find that s. 13(2)(m) does not apply. In addition, the withheld information is not a decision or the reasons of a decision, so s. 13(2)(n) does not apply.

[101] In summary, I find that s. 13(2) does not apply to the information that I have found constitutes advice and recommendations. Therefore, the Ministry may refuse to disclose that information under s. 13(1).

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[51] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner*), 2013 BCSC 2322 at paras 91 – 94.
[52] Applicant's submissions at paras. 10 and 11.

CONCLUSION

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

1. I confirm the Ministry's decision that it is authorized to refuse access to the information under s. 14.

2. Subject to item 3 below, I confirm in part the Ministry's decision that it is authorized to refuse access to the information under s. 13(1).

3. The Ministry is not authorized by s. 13(1) to refuse to disclose the information that I have highlighted in a copy of page 13 of the records in File F20-82829 which is provided to the Ministry with this order.

4. I require the Ministry to give the applicant access to the highlighted information described in item 3 above.

5. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant in compliance with this order.

[103] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by May 5, 2023.

March 22, 2023

ORIGINAL SIGNED BY

Allison J. Shamas, Adjudicator

OIPC File No.: F20-82829 & F20-83268