Order F23-34

# MINISTRY OF ATTORNEY GENERAL

Lisa Siew
Adjudicator

May 8, 2023

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**Summary:** An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records related to the application and appointment of a specific BC Supreme Court master. The Ministry of Attorney General (Ministry) provided the applicant with partial access to the requested records, but withheld information under multiple exceptions to access. In some cases, the Ministry applied one or more exceptions to the same information. The adjudicator determined the Ministry was authorized or required to withhold some information in the responsive records under ss. 12(1) (cabinet confidences), 13(1) (advice or recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. Given their finding on s. 22(1), the adjudicator did not need to consider whether s. 15(1)(l) (harm to security of property or system) also applied to the same information. The Ministry was ordered to provide the applicant with access to the information it was not authorized or required to withhold under FIPPA. The Ministry also argued, and the adjudicator confirmed, that some of the responsive records fell outside the scope of FIPPA under s. 3(3)(c); therefore, the applicant had no right to access those records under FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 3(1), 3(3)(c), 12(1), 12(2)(c), 13(1), 13(2), 13(3), 14, 15(1)(l), 22(1), 22(2), 22(2)(a), 22(2)(f), 22(3)(d), 22(4). *Provincial Court Act*, RSBC 1996, c. 379, s. 22. *Supreme Court Act*, RSBC 1996, c. 443, s. 11.

## INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Ministry of Attorney General (Ministry) provide access to records related to the application and appointment of a specific master of the BC Supreme Court.

[2] The Ministry provided the applicant with partial access to the responsive records and withheld information in those records under multiple exceptions to

access. The Ministry also argued it was not required to provide the applicant with access to some of the responsive records because those records fell outside the scope of FIPPA under s. 3.

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. Later, the Ministry notified the applicant that it had located additional records, but it was withholding those records in their entirety under ss. 12(1) and 14. The Ministry then reconsidered its severing of the responsive records and released additional information to the applicant.

[4] The OIPC's investigation and mediation process did not resolve the issues between the parties. The applicant requested the matter proceed to this inquiry. The Ministry then reconsidered its severance of the responsive records and released further information to the applicant. After the additional disclosures, the Ministry revised its decision and is now relying on ss. 3(3)(c), 12(1), 13(1), 14, 15(1)(l) and 22(1) to withhold information in the records.

[5] The applicant chose not to provide any submissions for the inquiry. Only the Ministry provided a submission, which includes pre-approved *in camera* materials. Where information is approved *in camera*, the decision-maker considers this information privately and the other party will receive the inquiry submissions with the *in camera* material redacted.

## ISSUES AND BURDEN OF PROOF

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

1. Are some of the records requested by the applicant excluded from the scope of FIPPA under s. 3(3)(c)?

2. Is the Ministry required to refuse to disclose the information at issue under s. 12(1)?

3. Is the Ministry authorized to refuse to disclose the information at issue under s. 13(1)?

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

5. Is the Ministry authorized to refuse to disclose the information at issue under s. 15(1)(l)?

6. Is the Ministry required to refuse to disclose the information at issue under 22(1)?

[7] Section 57 of FIPPA establishes the burden of proof in an inquiry. This provision does not specify which party has the burden of proof for cases involving s. 3. However, previous orders have established that the public body bears the burden of establishing that the records are excluded from the scope of FIPPA under s. 3.[1] I adopt that approach here. The Ministry also accepts that it bears the burden of proof under s. 3.[2]

[8] Section 57(1) of FIPPA places the burden on the Ministry to prove the applicant has no right of access to the information withheld under ss. 12(1), 13(1), 14 and 15(1)(l).

[9] Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of the information at issue would not unreasonably invade a third-party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue qualifies as personal information.[3]

## DISCUSSION

### *Background*

[10] Subject to certain conditions, s. 11 of the *Supreme Court Act* allows the lieutenant governor to appoint one or more masters of the court.[4] A competition was previously held for the appointment of a master for the BC Supreme Court.[5] A successful candidate was chosen and appointed.

[11] The process for the appointment of a master involves the following steps:

- All applications are reviewed by a committee consisting of the deputy attorney general, the chief justice of the BC Supreme Court (Chief Justice), the president of the Law Society of BC and the president of the Canadian Bar Association (or their delegates).
- The committee provides a short list of recommended candidates to the attorney general.
- The attorney general recommends a candidate to Cabinet after consulting with the Chief Justice.

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[1] Order F13-23, 2013 BCIPC 30 (CanLII) at para. 10. Order F17-13, 2017 BCIPC 14 (CanLII) at para. 5.
[2] Ministry's submission at para. 14.
[3] Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.
[4] *Supreme Court Act*, RSBC 1996, c. 443.
[5] The information in this background section is compiled from the Ministry's submission and information disclosed in the responsive records.

- The final appointment is made through a Cabinet order-in-council.[6]

[12] The applicant sought access to all records relating to the application process and the process leading to the decision to appoint the selected candidate as a master of the BC Supreme Court.

### *Records at issue*

[13] The records at issue total 74 pages with the information at issue on approximately 41 of those pages. The records consist of emails and other documents such as letters, a resume, cover letter and speaking notes.

### *Judicial administration record – s. 3(3)(c)*

[14] Section 3 of FIPPA identifies categories of records that are excluded from and not subject to disclosure under FIPPA. Sections 3(1) and 3(3)(c) are relevant in this case. Read together, these provisions mean that FIPPA applies to all records in the custody or under the control of a public body, including court administration records, but it does not apply to a judicial administration record. In other words, an applicant cannot use FIPPA to gain access to a judicial administration record even though a public body may have custody or control of such a record.

[15] The Ministry submits s. 3(3)(c) applies to some of the records at issue in this inquiry because they are judicial administration records. Schedule 1 of FIPPA defines a "judicial administration record" as:

> **"judicial administration record"** means a record containing information relating to a judge, master or a justice of the peace including:
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> (a) scheduling of judges and trials,
> (b) content of judicial training programs,
> (c) statistics of judicial activity prepared by or for a judge, and
> (d) a record of the judicial council of the Provincial Court.

[16] The Ministry submits some of the records at issue qualify as judicial administration records because they contain information relating to a judge or master and only address the competition and appointment. The Ministry says the successful candidate was appointed to the role of master and currently occupies that role.[7]

[17] Additionally, the Ministry says it was unable to find an OIPC order that explains what type of records would be excluded from FIPPA under s. 3(3)(c).

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[6] Information disclosed on p. 54 of the records.
[7] Ministry's submission at paras. 20-21.

However, it submits the exclusions under s. 3(3) related to the judiciary are aimed at protecting judicial independence, specifically security of tenure, financial security and administrative independence.[8]

[18] The Ministry also proposes the following definitions in a 2013 memorandum of understanding (MOU) between the then Minister of Justice and Attorney General[9] (Minister) and the three Chief Justices of BC are useful:

> **3.12. "Judicial Administration"** means the management and direction of matters related to judicial functions, and includes, at a minimum, matters connected to the preparation, management, and adjudication of proceedings in the Courts and all other matters assigned to the judiciary by law or through this Memorandum of Understanding. Judicial Administration specifically excludes Court Administration.
>
> **3.13. "Judicial Administration Record(s)**" means a record or records relating to Judicial Administration, and includes, as defined in the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, a record or records containing information relating to a judge, master, or justice of the peace. For greater certainty, it includes a record or records relating to a registrar, judicial justice, or judicial case manager. Judicial Administration Record(s) includes information in aggregate and/or electronic form, but does not include a Court Record or Court Administration Record.[10]

[19] Considering these definitions, the Ministry argues a judicial administration record under FIPPA "extends to all records which can be said [to] be about 'judicial administration' and that could adversely impact the administrative independence of the judicial branch."[11]

### Analysis and findings on s. 3(3)(c)

[20] I am not aware of any previous OIPC orders or court decisions that applied the definition of a "judicial administration record" under FIPPA or considered it for records that are similar to the ones at issue here. However, I note the definition of a "judicial administration record" under Schedule 1 of FIPPA first uses "means" and then "including" to define the term. The Ministry argues the use of the word "including" means the definition is "open-ended and not exhaustive."[12] However, that is not an accurate interpretation or a correct application of the rules of statutory interpretation.

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[8] Ministry's submission at paras. 24-25.
[9] The Ministry of Attorney General was formerly the Ministry of Justice and Attorney General.
[10] Ministry's submission at para. 28. As set out in clause 2.1 of the MOU, its purpose "is to describe the roles and responsibilities of the Attorney and the Chief Justices in the administration of the Courts."
[11] Ministry's submission at para. 26.
[12] Ministry's submission at para. 27.

[21] Where a statutory definition uses both "means" and "including" to define a term, the principles of statutory interpretation dictate that the word "means" is used "to stipulate a definition that displaces ordinary meaning" and the word "including" is used to "enlarge, clarify or illustrate the stipulated definition."[13] These type of statutory definitions are considered "exhaustive" definitions in that the meaning of the word has been fixed by the legislature and displaces whatever meaning the term may have in ordinary or technical usage.[14]

[22] Furthermore, the effect of this kind of statutory definition is that "anything that comes within the stipulated definition is within the meaning of the defined term regardless of whether it also comes within the list that follows 'includes'; similarly, anything that comes within that list is within the meaning of the defined term regardless of whether it comes within the stipulated definition."[15] To phrase it in simpler terms, if the records at issue here contain information relating to a judge, master or justice of the peace, then it is a judicial administration record under FIPPA even though the information or record is not one of the items listed in the definition.

[23] Conversely, if the information or record at issue falls under one of the listed items in the definition, then it is a judicial administration record under FIPPA even though it may not contain information relating to a judge, master or justice of the peace. For instance, item (d) in the definition of a "judicial administration record" is a record of the judicial council of the Provincial Court. The judicial council is responsible for considering proposed appointments and reappointments of Provincial Court judges and justices and, among other things, reporting to the Attorney General on matters the Attorney General considers necessary.[16] Therefore, in certain cases, a record of the judicial council may not contain information relating to a judge, master or justice of the peace and concern other matters under its jurisdiction; however, the record will qualify as a judicial administration record under FIPPA.

[24] Taking all of the above into account, the question is whether the records at issue under s. 3(3)(c) contain information relating to a judge, master or justice of the peace or falls under one of the items listed under (a) to (d) of the definition. If it does, then it is a judicial administration record under FIPPA and the applicant cannot use FIPPA to gain access to those records. Furthermore, considering the clear wording of the definition, I conclude if a record contains *information* relating to a judge, master or justice of the peace or falls under one of the items listed in the definition, then the *entire record* is a judicial administration record that falls outside the scope of FIPPA.

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[13] *Law Society of British Columbia v. Guo*, 2022 BCCA 154 (CanLII) at para. 40.
[14] *Law Society of British Columbia v. Guo*, 2022 BCCA 154 (CanLII) at para. 40 and *R v. Cosh*, 2015 NSCA 76 (CanLII) at paras. 42-43.
[15] *Law Society of British Columbia v. Guo*, 2022 BCCA 154 (CanLII) at para. 40.
[16] *Provincial Court Act*, RSBC 1996, c. 379 at s. 22.

[25] For the reasons that follow, I find the records at issue under s. 3(3)(c) qualify as judicial administration records because they contain information relating to a judge or master.

[26] The term "relating to" is not defined in FIPPA and I am not aware of an OIPC order that considered what the term means. However, the term "relating to" has been judicially considered in the context of another province's access to information statute. In *Ministry of Attorney General v. Toronto Star*, the court considered the phrase "relating to" in s. 65(5.2) of Ontario's FIPPA which excludes records "relating to a prosecution if all proceedings in respect of the prosecution have not been completed."[17] The court concluded that the ordinary and plain meaning of the term "relating to" means there has to be some connection between the two "subject matters" identified in the provision, in that case between the "record" and the "prosecution."[18]

[27] I agree with the Ontario court's analysis and findings. Section 65(5.2) is similar to s. 3(3)(c) of BC's FIPPA in that it is an exclusion rather than an exception to access and there is also nothing in the text, context and purpose of s. 3(3) or in BC's FIPPA to indicate that the ordinary meaning of the term "relating to" should not apply. Therefore, I conclude that for s. 3(3)(c) to apply there has to be some connection between the information in the records at issue and a judge, master or justice of the peace.

[28] The Ministry describes the records at issue under s. 3(3)(c) as:

- Letters from the Chief Justice to the Minister regarding the competition.[19] The Ministry says these letters contain information related to the Chief Justice, the appointed master and "the judges involved in the appointment process."[20]

- An email sent on behalf of the Chief Justice announcing the appointment of the successful candidate.[21] The Ministry says this email contains information related to the Chief Justice, the appointed master or both.[22]

- Emails between the Chief Justice and the deputy attorney general regarding the appointment process and details about the appointment.[23]

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[17] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31
[18] *Ministry of Attorney General v. Toronto Star*, 2010 ONSC 991 (CanLII) at paras. 41-43.
[19] Information located on pp. 44-45, 64-65 and 70-71 of the records. Ministry's submission at para. 33.
[20] Ministry's submission at para. 36.
[21] Information located on pp. 20-21 of the records. Ministry's submission at para. 33.
[22] Ministry's submission at para. 36.
[23] Information located on pp. 15-16 and 18 of the records. Ministry's submission at para. 33.

The Ministry says these emails contain information related to the Chief Justice, the appointed master or both.[24]

- Emails between administrative staff of the BC Supreme Court and the Ministry regarding the appointment process and details about the appointment.[25] The Ministry says these emails contain information related to the appointed master and, in some cases, the Chief Justice.[26]

[29] Based on my review of these emails and letters, I find the information in these records are clearly connected to the Chief Justice or the appointed master in that the records involve communications directly from the Chief Justice regarding the competition and appointment process or contain information about the appointed master. Therefore, I agree with the Ministry that the information in these communications either relate to the Chief Justice or the appointed master or both individuals.

[30] There is also no doubt that the Chief Justice is a judge and although the successful candidate was not yet a master at the time, I am satisfied that the information relates to a master because the successful candidate was appointed as a master and currently occupies that role. Taking all of this into account, I conclude the records at issue meet the definition of "judicial administration record" in FIPPA; therefore, s. 3(3)(c) applies and the applicant has no right to access those records under FIPPA.

### *Solicitor-client privilege – s. 14*

[31] The Ministry applied s. 14 to information located on several pages of the records.[27] Section 14 states that 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.[28] The Ministry is claiming legal advice privilege over the information withheld under s. 14.[29]

[32] Legal advice privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice, opinion or analysis.[30] The courts and previous OIPC orders accept privilege can only be claimed document by document, with each document being required to meet the following criteria:

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[24] Ministry's submission at para. 36.
[25] Information located on pp. 1 and 33-34 of the records. Ministry's submission at para. 33.
[26] Ministry's submission at para. 36.
[27] The entirety of pp. 38-39, information on p. 41 of the records and a two-page email described by the Ministry as located on pp. 1-2 of the "Officer Records."
[28] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26
[29] Ministry's submission at para. 101.
[30] *College, supra* note 27 at paras. 26-31.

1. A communication between a solicitor and client (or their agent);

2. Which entails the seeking or giving of legal advice; and

3. Which is intended by the parties to be confidential.[31]

[33] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.[32] However, if the conditions set out above are satisfied, then legal advice privilege applies to the communication and the records relating to it.[33] The scope of legal advice privilege also applies to information that would reveal the content of those privileged communications between a lawyer and their client.[34]

**Ministry's submission on s. 14**

[34] The Ministry chose not to provide the records at issue under s. 14 for my review. However, there is one record which the Ministry only partially withheld under s. 14 so some of the information in this record has been disclosed.[35] The Ministry also provided an affidavit from a senior legislative coordinator from the Office of the Deputy Attorney General (Legislative Coordinator) and an affidavit from a lawyer with the Office of Legislative Counsel (Lawyer), both of whom provide evidence about the s. 14 information. Furthermore, the Ministry provided a table that identifies the number of pages, the date and a brief description of each record.

[35] From that evidence, the records at issue under s. 14 can be described and listed in sequential order as follows:

- An email and an attachment that a Ministry employee sent to the Office of Legislative Counsel requesting legal advice and assistance with drafting an Order in Council.[36]

- A document titled, "Order in Council – Cabinet Summary Information" prepared by Ministry employees for Cabinet Operations about the proposed Order in Council required to appoint the successful candidate to the position of master (Summary Document).[37]

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[31] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13.
[32] *Keefer Laundry Ltd v. Pellerin Milnor Corp et al,* 2006 BCSC 1180 at para. 61.
[33] *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22.
[34] Order F22-16, 2022 BCIPC 18 (CanLII) at para. 31.
[35] Page 41 of the records. The Ministry withheld the rest of the information in this record under s. 12(1).
[36] Described by the Ministry as located on pp. 1-2 of the "Officer Records."
[37] Page 41 of the records.

- A document provided to Cabinet that was drafted, reviewed and signed by the Lawyer and includes a copy of the draft Order in Council (Cabinet Document).[38]

[36] Both the Legislative Coordinator and the Lawyer attest that they are familiar with the information at issue because of the work they did to assist with the appointment of the master.[39] As part of that work, the Lawyer attests that a named Ministry employee sought and received legal advice and assistance from the Office of the Legislative Counsel with drafting the Order in Council. The Legislative Coordinator confirms the Ministry sought and received legal advice from the Lawyer in confidence about the proposed Order in Council.[40]

[37] The Lawyer deposes they reviewed the draft Order in Council sent by the Ministry at that time and then provided legal advice "in the form of drafting and 'tagging.'"[41] The Lawyer explains that, as part of their responsibilities, legislative counsel reviews Orders in Council and provides written legal advice in the form of a "tag" for each order.[42] The Ministry disclosed information in the Summary Document that indicates the tag is either "yellow or red", which means a "cautions" or "concern" from legislative counsel about the proposed order.[43]

[38] The Lawyer further deposes they provided legal advice to Cabinet in the form of the Cabinet Document, which includes a draft Order in Council and the relevant tagging of that order.[44] The Lawyer attests that this legal advice was supplied with an expectation of confidentiality "such that it will not be disclosed more broadly than necessary based on the duties of employees."[45] The Lawyer then attests that their legal advice to Cabinet appears in the Summary Document.[46] The Legislative Coordinator confirms that disclosing the redacted information in the Summary Document would reveal the Lawyer's legal advice and "the colour of tag that [the Lawyer] attached to the Order in Council."[47]

**Analysis and findings on s. 14**

[39] For the reasons that follow, I accept the Lawyer provided legal advice in confidence to the Ministry and to Cabinet about the proposed Order in Council required to appoint the successful candidate to the position of master.

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[38] Pages 38-39 of the records. Described at para. 9 of the Legislative Coordinator's affidavit and the Lawyer's affidavit at para. 7.
[39] Legislative Coordinator's affidavit at para. 11 and Lawyer's affidavit at para. 12.
[40] Legislative Coordinator's affidavit at para. 14.
[41] Lawyer's affidavit at para. 12.
[42] *Ibid* at para. 10.
[43] Information disclosed on p. 41 of the records.
[44] Lawyer's affidavit at para. 7.
[45] *Ibid* at para. 11.
[46] *Ibid* at para. 13.
[47] Legislative Coordinator's affidavit at para. 15.

[40] The BC Supreme Court has advised that in terms of s. 14 "the task before an adjudicator is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege."[48] In the present case, the Ministry provided evidence from the lawyer who gave the legal advice and from a Ministry employee who was involved in some of the relevant events. Both the Legislative Coordinator and the Lawyer confirm the Lawyer provided legal advice in confidence to the Ministry and to Cabinet.[49]

[41] They also both attest to reviewing the information and records at issue under s. 14 and specifically discuss that information in their affidavits. Furthermore, as previously mentioned, the Ministry also disclosed information in the Summary Document which supports its position about the applicability of s. 14 to the redacted information. Therefore, I conclude the Ministry's affidavit evidence and the records establishes the disclosure of the information at issue under s. 14 would reveal legal advice that the Lawyer provided in confidence to the Ministry and to Cabinet.

***Cabinet confidences – s. 12(1)***

[42] The Ministry applied s. 12(1) to information located on several pages of the records.[50] The Ministry also withheld some of the s. 14 information under s. 12(1).[51] Given my conclusion on s. 14, it is not necessary to also consider whether this information should be withheld under s. 12(1). I will only consider whether s. 12(1) applies to the other information at issue.

[43] Section 12(1) requires a public body to withhold information that would reveal the substance of deliberations of Executive Council (also known as Cabinet) and any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[44] The purpose of s. 12(1) is to protect the confidentiality of the deliberations of Cabinet and its committees, including committees designated under s. 12(5).[52] Past OIPC orders and court decisions have recognized the public interest in maintaining Cabinet confidentiality to ensure and encourage full discussion by Cabinet members.[53]

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[48] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 (CanLII) at para. 86.
[49] Legislative Coordinator affidavit at paras. 14-18 and Lawyer's affidavit at paras. 7, 11-15.
[50] Information located on pp. 36-37 and 40-41 of the records.
[51] Information located on p. 41 of the records.
[52] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at para. 92.
[53] Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 69-70. *Babcock v Canada (Attorney General)*, [2002] S.C.J. No. 58, 2002 SCC 57 at para. 18 (McLachlin C.J.'s comments were made

[45] Determining whether information is properly withheld under s. 12(1) involves a two-part analysis. The first question is whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. The BC Court of Appeal has determined that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.[54] According to the Court of Appeal, the appropriate test under s. 12(1) is whether the information sought to be disclosed forms the basis for Cabinet or any of its committee's deliberations.[55] In other words, the term "substance of deliberations" includes any recorded information Cabinet or one of its committees considered in its deliberations. I am bound by this interpretation of s. 12(1).

[46] The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) applies. If so, then the information cannot be withheld under s. 12(1).

**Ministry's position on s. 12(1)**

[47] The Ministry submits s. 12(1) applies to the information that it redacted in the Summary Document[56] and another document that it describes as "speaking notes."[57] The Ministry says these documents "on their face…clearly contain advice, recommendations and policy considerations within the meaning of s. 12(1)."[58] The Ministry also says Cabinet deliberated on the contents of those documents; therefore, it argues the redacted information is part of the body of information considered by Cabinet. Therefore, the Ministry submits disclosing the information at issue under s. 12(1) "would reveal the substance of deliberations of Cabinet either directly or by allowing an accurate inference as to the deliberations."[59]

[48] In support of the Ministry's position, the Legislative Coordinator describes the "speaking notes" as a document titled, "Ministry of Justice OIC – Master Appointment Speaking Notes."[60] The Legislative Coordinator explains the speaking notes were prepared by a named employee for the Minister. They say the speaking notes were to assist the Minister in their presentation to Cabinet regarding the appointment of the successful candidate to the position of master.

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in regards to federal legislation, but previous OIPC orders recognize its applicability to interpreting s. 12 of FIPPA: see, for example, Order 02-38 at para. 69).

[54] *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner),* 1998 CanLII 6444 (BC CA) [*Aquasource*] at para. 39.

[55] *Aquasource* at para. 48.

[56] Located on pp. 40-41 of the records. The Ministry disclosed the title of the record.

[57] Ministry's submission at para. 62. Speaking notes located on pp. 36-37 of the records.

[58] Ministry's submission at para. 63.

[59] *Ibid* at para. 64.

[60] Legislative Coordinator's affidavit at para. 7.

The Legislative Coordinator deposes the Minister did ultimately speak to Cabinet on this matter.[61]

[49] The Legislative Coordinator also attests to being familiar with the Summary Document and is listed within the record as one of the individuals to contact about the document. The Legislative Coordinator says the Summary Document was part of the package of documents that informed Cabinet Operations about an item being taken to Cabinet. The Legislative Coordinator deposes that the Ministry did not send this document to Cabinet; however, the substance of this document would have been presented to Cabinet on a set date via another summary on the matter prepared by the "OIC Coordinator at Cabinet Operations."[62] The Legislative Coordinator believes any disclosure of the information withheld under s. 12(1) would "reveal the content of information already deliberated on by Cabinet, either directly or by implication."[63]

**Section 12(1) – substance of deliberations**

[50] As mentioned, the first question in the s. 12 analysis is to consider whether disclosure of the withheld information would reveal the "substance of deliberations" of Cabinet or any of its committees. The term "substance of deliberations" includes any recorded information Cabinet or one of its committees considered in its deliberations.

[51] The speaking notes and the Summary Document were not submitted to Cabinet for consideration nor were these documents prepared for submission to Cabinet. Instead, the Ministry's position is that s. 12(1) applies because the content of the two documents was conveyed to Cabinet either by the Minister during their oral presentation to Cabinet or through a different document prepared by the OIC Coordinator which later did go to Cabinet.

[52] Previous OIPC orders have found s. 12(1) applies to information that would reveal the same or similar information considered by Cabinet or one of its committees.[64] In those cases, the adjudicator first concluded there was information in a document that was submitted to Cabinet or one of its committees. Using that document as a comparison, the adjudicator was then able to determine there was information in a different document that was the same or similar. Therefore, the adjudicator was satisfied disclosing all of this information would reveal information considered by Cabinet or one of its committees.

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[61] *Ibid* at para. 7.
[62] *Ibid* at para. 10.
[63] *Ibid* at para. 12.
[64] Order F09-26, 2009 CanLII 66959 (BC IPC) at paras. 21-23. Order F21-63, 2021 BCIPC 72 (CanLII) at paras. 69-71 and 84-85.

[53] For the reasons that follow, I find some but not all of the information in the two documents at issue here is the same or similar to information that was submitted to Cabinet for consideration.

[54] Starting with the speaking notes, the Legislative Coordinator attests the Minister spoke to Cabinet about the appointment of the successful candidate to the position of master. Although the Legislative Coordinator does not identify the source of their belief or provide supporting evidence, I accept that the Minister did speak to Cabinet about the matter. There is evidence that shows the successful candidate was appointed as a master.[65] In order to be appointed, the Minister (who was also then the Attorney General) must have recommended the successful candidate to Cabinet.[66] There is also information in the records that shows the matter was placed on the agenda for Cabinet consideration and that Cabinet approved the recommended candidate.[67] Therefore, I am satisfied that all of this information confirms the Minister spoke to Cabinet about the recommended appointment of the successful candidate.

[55] The next question is whether there is any evidence that the Minister communicated all of the information in the speaking notes to Cabinet. The Legislative Coordinator attests the speaking notes are advice to the Minister to help guide their presentation, but ultimately the Minister was free to choose how they presented this material to Cabinet.[68] Based on this evidence, it is clear the Minister had the discretion to choose what information in the speaking notes, if any, to convey to Cabinet. There was no evidence about what the Minister actually chose to say in their presentation to Cabinet about the matter. However, based on my review of the speaking notes, I accept that the Minister would have conveyed most of the information in the speaking notes. I find the redacted information consists of information that would have been necessary to explain the recommendation to Cabinet and obtain their approval.

[56] I do find, however, that there is a small amount of information in the speaking notes that the Minister would not have provided to Cabinet. This information consists of administrative details such as the title of the document, headings, page numbers and other information in the footer of the document. I find it unlikely the Minister would have told Cabinet about this information, such as informing Cabinet that their speaking notes total a certain number of pages. As a result, except for the information of an administrative nature, I find disclosing the speaking notes would reveal information considered by Cabinet in its deliberations.

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[65] Information disclosed on pp. 22 and 29 of the records.
[66] Information disclosed on p. 26 of the records.
[67] Information disclosed on pp. 7-12, 31 of the records.
[68] Legislative Coordinator's affidavit at para. 8.

[57] Turning now to the Summary Document, the Legislative Coordinator says it was part of the package of documents that informed Cabinet Operations about an item being taken to Cabinet. From the information disclosed in this document, it is clear that the item being taken to Cabinet is the Order in Council required to appoint the successful candidate to the position of master. Furthermore, as previously mentioned, I accept the Minister spoke to Cabinet about the recommended appointment of the successful candidate. Therefore, I am satisfied the Ministry would have provided the necessary documentation for Cabinet to approve the required Order in Council for the appointment. As a result, I accept the Ministry provided the Summary Document to Cabinet Operations as part of obtaining the necessary approval from Cabinet.

[58] The next question is whether there is any evidence that the redacted information in the Summary Document is the same or similar to information submitted to Cabinet for consideration. The Legislative Coordinator says the Ministry did not send the Summary Document to Cabinet; however, they attest that the "substance of this document" was presented to Cabinet via another summary prepared by the OIC Coordinator at Cabinet Operations.[69] The Legislative Coordinator does not identify how they know this information or provide evidence to support their statement. The Ministry also did not provide a copy of this other summary for my review so I am unable to compare the two documents to determine whether the information is the same or similar.

[59] What remains as evidence is the document itself. The information in the Summary Document is organized into a table with two columns titled "section" and "detail" and twelve rows of information related to the proposed Order in Council. The Ministry redacted information under three rows titled, "Required Effective Date", "Processing Instructions after approval" and "Purpose, Content and Context (OIC 'Essence')."[70] Considering the redacted information, I accept that the information withheld under the sections "Required Effective Date" and "Purpose, Content and Context" would have been provided in a summary to Cabinet. I find this information would have been relevant for Cabinet to consider in determining whether to approve the Order in Council.

[60] However, I am not satisfied that the information redacted under the section "Processing instructions after approval" would have been provided in a summary to Cabinet. It is unclear and the Ministry does not explain why procedural information about what happens after Cabinet approval would be provided to Cabinet for their consideration. This information seems more relevant and directed to staff at Cabinet Operations rather than intended for Cabinet deliberation. Therefore, without more, I am not satisfied this information would have been forwarded to Cabinet. As a result, except for the processing

[69] Legislative Coordinator's affidavit at para. 10.
[70] Information disclosed on pp. 40-41 of the records.

instructions, I accept that disclosing the redacted information in the Summary Document would reveal information considered by Cabinet in its deliberations.

**Section 12(2)(c): background explanations or analysis**

[61] The second step in the s. 12 analysis is to decide if any of the circumstances under ss. 12(2)(a) to (c) apply to the information that I found would reveal the substance of Cabinet's deliberations, specifically the information Cabinet considered in making a decision about the recommended appointment of the successful candidate to the position of master.

[62] Section 12(2) says:

> 12(2) Subsection (1) does not apply to
>
> (a) information in a record that has been in existence for 15 or more years,
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
>
> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered.

[63] I find ss. 12(2)(a) and (b) do not apply in this case and neither party suggests they do.[71] The only circumstance that may be relevant is s. 12(2)(c).

[64] Previous OIPC orders have found that background explanations "include, at least, everything factual that Cabinet used to make a decision" and have also said that analysis "includes discussion about the background explanations, but would not include analysis of policy options presented to Cabinet."[72] However, any information of a factual nature that is interwoven with any advice, recommendations or policy considerations would not be considered "background explanations or analysis" under s. 12(2)(c).[73]

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[71] Ministry's submission at para. 66.
[72] Order No. 48-1995, July 7, 1995 at p. 12. The Court in *Aquasource* confirmed that Order No. 48-1995 correctly interpreted s. 12(2)(c) in relation to s. 12(1). Other BC Orders that have taken the same approach include Order 01-02, 2001 CanLII 21556 (BC IPC).
[73] Order No. 48-1995, July 7, 1995 at p. 13 and *Aquasource* at para. 49.

[65] The Ministry submits any background explanations or analysis contained in the records at issue under s. 12(1) are "inextricably interwoven with the policy proposals and on that basis are not subject to section 12(2)(c)."[74] However, it is not apparent and the Ministry does not sufficiently explain how any of the information withheld under s. 12(1) is inextricably interwoven with policy proposals. From what I can see, no policy proposals were presented to Cabinet about this matter and the redacted information is not interwoven with that kind of information, as argued by the Ministry. The redacted information is about recommending and appointing the successful candidate for the position of master and, in this case, none of this information has anything to do with policy options or considerations.

[66] Based on my review of the withheld information, I find some of the information redacted in the speaking notes qualifies as background explanations and analysis in accordance with s. 12(2)(c).[75] This redacted information consists of information of a factual nature about the recommended appointment. It is clear to me that the purpose of providing this information is to present background explanations or analysis to Cabinet for its consideration in making a decision about approving the successful candidate for the position of master.

[67] The next question is whether the information that I find qualifies as background explanation or analysis in the speaking notes meets the remaining requirements of s. 12(2)(c). For s. 12(2)(c) to apply, *one* of the following circumstances must also apply: (i) the decision has been made public, (ii) the decision has been implemented, or (iii) 5 or more years have passed since the decision was made or considered.

[68] I find one or more of those circumstances apply here. There is information in the records that confirms the successful candidate was appointed as master and that the decision was publicly announced.[76] Therefore, I find the decision to appoint the successful candidate for the position of master was implemented and also made public. As a result, I conclude ss. 12(2)(c)(i) and (ii) apply in these circumstances and this information in the speaking notes cannot be withheld under s. 12(1).

**Conclusion on s. 12(1)**

[69] To conclude, I find the Ministry has established that it is required under s. 12(1) to refuse to disclose some of the redacted information in the speaking notes and the Summary Document.

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[74] Ministry's submission at para. 68.
[75] Information located on pp. 36-37 of the records.
[76] Information disclosed on pp. 22 and 29 of the records.

[70] However, for the reasons discussed previously, I find s. 12(1) does not apply to the administrative details in the speaking notes, the background explanations or analysis in the speaking notes that falls under s. 12(2)(c) and the processing instructions in the Summary Document.[77] I conclude the Ministry is not required to withhold this information under s. 12(1).

***Advice and Recommendations – s. 13***

[71] The Ministry also applied s. 13(1) to the information in the speaking notes that I found could not be withheld under s. 12(1).[78] Therefore, I will now consider whether s. 13(1) applies to that information.

[72] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or minister. Previous OIPC orders recognize that s. 13(1) protects "a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."[79]

[73] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. The term "recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.[80]

[74] The term "advice" has a broader meaning than "recommendations."[81] "Advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.[82]

[75] A public body is also authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.[83]

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[77] Information located on pp. 36-37 and 41 of the records.
[78] Information located on pp. 36-37 of the records.
[79] For example, Order 01-15, 2001 CanLII 21569 at para. 22.
[80] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.
[81] *Ibid* at para. 24.
[82] *College*, *supra* note 27 at para. 113.
[83] Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

[76] As well, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.[84] This includes facts compiled and selected by an expert, using their expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.[85]

[77] The analysis under s. 13 has two steps. If I find the information at issue would reveal advice or recommendations under s. 13(1), then the next step is to consider if any of the categories or circumstances listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

**Ministry's submission on s. 13**

[78] The Ministry submits the information that it has withheld in the speaking notes would directly or by inference disclose advice and recommendations developed by Ministry staff for the Minister. It says the speaking notes were created for the purpose of giving the Minister speaking points to consider in their presentation and appearance before Cabinet and that the Minister was free to accept or reject this advice.

[79] In support of the Ministry's position, the Legislative Coordinator deposes that a named Ministry employee prepared the speaking notes for the Minister. The Legislative Coordinator says the speaking notes are advice to the Minister to help guide their presentation to Cabinet regarding the appointment of the successful candidate to the position of master, but ultimately the Minister was free to choose how they presented this material.[86]

[80] The Ministry also submits none of the information withheld under s. 13(1) is "factual material" and that none of the other s. 13(2) provisions apply. As well, the Ministry also says the speaking notes were "not created more than 10 years ago"; therefore, it submits "the application of s. 13(1) is not affected by section 13(3) in this case."[87]

**Analysis and findings on s. 13**

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[84] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.
[85] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[86] Legislative Coordinator's affidavit at para. 8.
[87] Ministry's submission at para. 92.

[81] The information at issue in the speaking notes under s. 13 is information of a factual nature about the recommended appointment and information of an administrative nature such as the title of the document, headings, page numbers and other information in the footer of the document.

[82] I accept that the Minister had the option to choose what information in the speaking notes, if any, to convey to Cabinet regarding the recommended appointment of the successful candidate to the position of master. Therefore, I am satisfied that the information of a factual nature in the speaking notes constitutes advice developed by Ministry staff to the Minister about what information to tell Cabinet about the recommended appointment. I accept that the Minister had to decide what to say in their presentation to Cabinet and could choose whether or not to convey this suggested information to Cabinet.

[83] Furthermore, I conclude none of the categories or circumstances under ss. 13(2) and (3) applies to this factual information in the speaking notes. In particular, I find s. 13(2)(a) does not apply because the information at issue does not consist of factual material that can be severed from the advice to the Minister. In the context of this case, the information of a factual nature in the speaking notes is the advice to the Minister about what to tell Cabinet about the recommended appointment. I am also satisfied that, at the time of this inquiry, s. 13(3) does not apply since the information in the speaking notes has not been in existence for 10 or more years. For all those reasons, I conclude the Ministry is authorized to withhold the information of a factual nature in the speaking notes because it would reveal advice developed by public body employees for the Minister.

[84] However, I conclude Ministry staff would not be advising the Minister to inform Cabinet about the information of an administrative nature in the speaking notes, such as the title of the speaking notes and that their speaking notes total a certain number of pages. This information is about the document itself rather than the recommended appointment; therefore, it is not apparent and the Ministry does not explain why the Minister or Cabinet would be interested in this information for making a recommendation or a decision about approving the successful candidate. I conclude, therefore, that s. 13(1) does not apply to this information and the Ministry is not authorized to withhold it under s. 13(1). Given my finding about this information, I do not need to consider whether any of the circumstances under s. 13(2) applies to this information.

[85] To conclude, I find the Ministry is authorized to withhold the information of a factual nature in the speaking notes under s. 13(1); however, it may not withhold some of the information of an administrative nature in the speaking notes under s. 13(1).

### *Unreasonable invasion of third-party personal privacy – s. 22*

[86] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information the disclosure of which would unreasonably invade a third-party's personal privacy. Numerous OIPC orders have considered the application of s. 22(1) and, as set out below, I will apply the same approach in this inquiry.

#### Personal information

[87] Section 22 only applies to personal information; therefore, the first step in the s. 22 analysis is to determine if the information at issue is personal information.

[88] "Personal information" is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information." Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.

[89] "Contact information" is also defined in Schedule 1 of FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[90] The Ministry describes the information withheld under s. 22(1) as the resume and cover letter of a third party.[88] The information at issue under s. 22 also includes the usernames of several former and current employees that are part of the credentials needed to log into the government's Internal Directory and Authentication Service (IDIR).[89]

[91] I find the information withheld under s. 22(1) is about identifiable individuals. The Ministry disclosed information in the records that shows the resume and cover letter belong to the appointed master.[90] The Ministry's evidence also establishes that the usernames are composed of a combination of letters derived from an employee's name and that the usernames are a particular login identifier assigned to a former or current employee.[91] Therefore, I am satisfied the withheld information is about those identifiable individuals. Furthermore, I find none of this information is contact information as defined in FIPPA and interpreted by past OIPC orders. As a result, I conclude the

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[88] Resume and cover letter located on pp. 46-49, 58-61 and 66-69 of the records.
[89] IDIR usernames located on pp. 19 and 62 of the records. The Ministry applied s. 22(1) to information withheld on pp. 44, 64 and 70 of the records that it also argued s. 3(3)(c) applied to. Given my finding under s. 3(3)(c), it is not necessary and I do not have the jurisdiction to determine whether s. 22(1) also applies to that information.
[90] For example, information located on pp. 46 and 47 of the records.
[91] Affidavit of GP at paras. 4-5 and 13.

information withheld under s. 22(1) is the personal information of several individuals.

### Section 22(4) – disclosure not an unreasonable invasion

[92] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an unreasonable invasion of a third party's personal privacy and the information cannot be withheld under s. 22(1).

[93] The Ministry submits that none of the provisions in s. 22(4) apply to the redacted information. The applicant made no submissions about s. 22(4). I have considered the types of information and circumstances listed under s. 22(4) and find none apply.

### Section 22(3) – disclosure presumed to be an unreasonable invasion

[94] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third-party personal privacy.

[95] The Ministry submits the presumption under s. 22(3)(d) applies. The applicant made no submissions about s. 22(3). I have considered all the presumptions under s. 22(3) and, based on the materials before me, I agree with the Ministry that s. 22(3)(d) is the only presumption that requires consideration.

*Employment, occupational or educational history - s. 22(3)(d)*

[96] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational or educational history of a third party.

[97] Relying on previous OIPC orders, the Ministry submits s. 22(3)(d) applies to a third party's resume.[92] Therefore, the Ministry submits s. 22(3)(d) applies to the cover letter and resume of the third party at issue here since it reveals their employment and educational history.

[98] I am satisfied that s. 22(3)(d) applies to the information withheld by the Ministry in the resume and cover letter of the appointed master since it describes their employment and educational history. Without disclosing the information at

[92] Ministry's submission at paras. 174-176, citing Order 01-18 at para. 15 and Order F14-41 at para. 46.

issue, I can say that the resume and cover letter contains the type of personal information one would expect a person to provide when applying for the position of master of the BC Supreme Court, including details about their previous employment and completed education. Therefore, I conclude the presumption under s. 22(3)(d) applies to that information.

[99] Citing Order F21-35, the Ministry also submits that s. 22(3)(d) applies to the IDIR usernames of both the current and former employees. I was the adjudicator who decided the inquiry that led to Order F21-35. In that inquiry, I determined s. 22(3)(d) applied to the IDIR usernames of several public body employees for the following reasons:

> I can see that the usernames and IDs are a unique combination of letters derived from an employee's name. Previous OIPC orders have found that personal identifiers for an employee may form part of their employment history under s. 22(3)(d). I agree with that conclusion. I find the presumption under s. 22(3)(d) applies to the IDIR username or logon ID of these employees since it is assigned to them and used by them as part of their employment. Therefore, I conclude this personal identifier is a part of their employment history and its disclosure is presumed to be an unreasonable invasion of third party personal privacy under s. 22(3)(d).[93]

[100] I find those reasons equally applicable here since it is the same type of information. The usernames at issue here are personal identifiers derived from the public body employees' names. The IDIR usernames were also assigned to each employee and are currently being used or were used by those persons as part of their employment. Therefore, I conclude the usernames withheld by the Ministry are a part of those individuals' employment histories and its disclosure is presumed to be an unreasonable invasion of third-party personal privacy under s. 22(3)(d).

### Section 22(2) – relevant circumstances

[101] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances. Section 22(2) requires a public body to consider the circumstances listed under ss. 22(2)(a) to (i) and any other relevant circumstances to determine whether disclosing the personal information at issue would be an unreasonable invasion of a third party's personal privacy. One or more of these circumstances may rebut the s. 22(3)(d) presumption that I found applies to the information at issue under s. 22(1).

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[93] 2021 BCIPC 43 (CanLII) at para. 189 (citations omitted), cited by the Ministry at para. 179 of its submission.

[102] The Ministry submits s. 22(2)(a) does not weigh in favour of disclosure, while s. 22(2)(f) favours withholding some of the redacted information. I will consider those circumstances below.

[103] I have considered the other circumstances listed under s. 22(2) and I find none of them are relevant here nor was I made aware of any other relevant circumstances to consider. The applicant made no submissions about s. 22(2).

*Subjecting a public body's activities to public scrutiny – s. 22(2)(a)*

[104] Section 22(2)(a) requires a public body to consider whether disclosing the personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. Where disclosure would foster the accountability of a public body, this may be a relevant circumstance that weighs in favour of disclosing the information at issue.[94]

[105] The Ministry submits s. 22(2)(a) is not a circumstance that favours disclosure because none of the withheld information would subject it to public scrutiny. It says disclosing the information at issue would, at most, subject third parties to public scrutiny. The applicant did not respond to the Ministry's arguments about s. 22(2)(a).

[106] One of the purposes of s. 22(2)(a) is to make public bodies more accountable.[95] Therefore, for s. 22(2)(a) to apply, the disclosure of the specific information at issue must be desirable for subjecting a public body's activities to public scrutiny as opposed to subjecting an individual third party's activities to public scrutiny.[96]

[107] I find disclosing the information at issue here would only subject the activities of an individual to public scrutiny. For instance, the redacted information would show what the successful candidate provided in terms of a resume and cover letter for the position of master. Likewise, I find the disclosure of the usernames would not subject a public body's activities to public scrutiny. The withheld information would only reveal which public body employees worked on or provided information about the appointment process. As a result, I conclude s. 22(2)(a) is not a circumstance that favours disclosing the information withheld by the Ministry under s. 22(1).

*Supplied in confidence – s. 22(2)(f)*

[108] Section 22(2)(f) requires a public body to consider whether the personal information was supplied in confidence. In order for s. 22(2)(f) to apply, there

[94] Order F05-18, 2005 CanLII 24734 at para. 49.
[95] Order F18-47, 2018 BCIPC 50 (CanLII) at para. 32.
[96] Order F16-14, 2016 BCIPC 16 (CanLII) at para. 40.

must be evidence that a third party supplied personal information to another and, at the time the information was provided, it was done so under an objectively reasonable expectation of confidentiality.[97]

[109] The Ministry argues s. 22(2)(f) is a relevant circumstance which favours withholding the resume and cover letter of the successful candidate. To support its position, the Minister cites the following passage from Order F14-41:

> …There is no evidence before me that the applicant's resumes were submitted explicitly in confidence. However, I note that resumes typically are supplied implicitly in confidence because of their sensitive contents and the nature of the job application process typically assures applicants confidentiality. I therefore place little weight on the absence of an explicit statement of confidentiality in the resumes and I find that s. 22(2)(f) is a factor in favour of withholding the information at issue.[98]

[110] The Ministry submits the adjudicator's reasoning in Order F14-41 should apply here in that it is presumed the successful candidate submitted their resume and cover letter with an expectation of confidentiality. The applicant did not respond to the Ministry's arguments about s. 22(2)(f).

[111] I find there are no explicit indicators or statements of confidentiality in the cover letter and resume of the successful candidate. The Ministry also did not provide any evidence about the successful candidate's expectations of confidentiality when they provided their resume and cover letter to the hiring committee.

[112] However, subject to any evidence to the contrary, I agree that the nature of the job application process typically presumes that the information a job candidate provides to a potential employer is given and received in confidence. There is nothing in the materials before me to suggest that this general expectation of confidentiality normally associated with a job competition does not apply here for someone who is competing for the judicial role of a master. Therefore, I find it reasonable to conclude that the successful candidate provided their resume and cover letter to the hiring committee in confidence. As a result, I find s. 22(2)(f) is a circumstance that favours withholding the successful candidate's resume and cover letter.

**Conclusion on s. 22(1)**

[113] I found the information withheld by the Ministry under s. 22(1) is the personal information of several individuals. Considering all the relevant

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[97] Order F11-05, 2011 BCIPC 5 (CanLII) at para. 41, citing and adopting the analysis in Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 23-26 regarding s. 21(1)(b).
[98] Ministry's submission at para. 185, citing Order F14-41, 2014 BCIPC 44 (CanLII) at para. 61.

circumstances, I find it would be an unreasonable invasion of a third party's personal privacy to disclose this information since it is subject to the presumption under s. 22(3)(d) and I did not find, nor was I made aware of, any circumstances to rebut this presumption. The applicant made no submissions about any relevant circumstances that may favour disclosing the redacted information. I also find it relevant that some of this information was supplied in confidence in accordance with s. 22(2)(f). Therefore, for all those reasons, I find disclosing the redacted information would be an unreasonable invasion of a third party's personal privacy and the Ministry is required to withhold it under s. 22(1).

[114] The Ministry also applied s. 15(1)(l) to the usernames that it withheld under s. 22(1). Given my finding under s. 22(1), it is not necessary for me to consider whether s. 15(1)(l) also applies to this information.

## CONCLUSION

[115] For the reasons previously given, I make the following order under s. 58:

1. I confirm the Ministry is authorized or required to refuse access to the information withheld under ss. 14 and 22(1).

2. Subject to item 3 below, I confirm the Ministry is required or authorized to refuse access to the information withheld under ss. 12(1) and 13(1).

3. The Ministry is not required under s. 12(1) or authorized under s. 13(1) to refuse access to the information I have highlighted (in green) on pages 36-37 and page 41 of the records. A highlighted copy of those records will be provided to the Ministry with this order.

4. I require the Ministry to give the applicant a copy of the records with the highlighted information unredacted. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, along with a copy of the relevant records.

[116] Under s. 59 of FIPPA, the Ministry is required to give the applicant access to the information it is not authorized or required to withhold by June 20, 2023.

May 8, 2023

**ORIGINAL SIGNED BY**

Lisa Siew, Adjudicator

OIPC File No.: F20-85339