OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-57

Ministry of Energy, Mines and Low Carbon Innovation

Alexander R. Lonergan
Adjudicator

July 3, 2024

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Summary: An applicant requested access to records of communications that mention a website. The Ministry of Energy, Mines and Low Carbon Innovation (the Ministry) identified several records, severed information from them under several exceptions to disclosure under the *Freedom of Information and Protection of Privacy Act*, and disclosed the remainder to the applicant. The applicant requested that the OIPC review the Ministry's severing decision. The adjudicator determined that the Ministry was authorized to refuse to disclose almost all of the disputed information under s. 22(1) because its disclosure would be an unreasonable invasion of third parties' personal privacy. The adjudicator determined that neither ss. 22(1) nor 16(1)(a)(iii) (harm to intergovernmental relations or negotiations) applied to part of one sentence and required the Ministry to disclose that part to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 16(1)(a)(iii), 22(1), 22(2)(a), 22(2)(d), 22(2)(g), 22(3)(i).

INTRODUCTION

[1] An individual (the applicant) requested the Ministry of Energy, Mines and Low Carbon Innovation (the Ministry) provide her access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA),[1] to records of all communications from a three-year period that mention a website. The applicant provided a current name and a former name for the website.

[2] In response, the Ministry identified ten pages of responsive records. The Ministry severed information from the responsive records under ss. 15(1) (disclosure harmful to law enforcement), 16(1)(a)(iii) (harm to intergovernmental relations or negotiations) and 22(1) (unreasonable invasion of third-party personal privacy) and released the rest to the applicant.

[1] All sectional references in this Order refer to FIPPA unless otherwise noted.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. As a result of mediation by the OIPC, the Ministry withdrew its reliance on s. 15(1) and released additional information. However, mediation did not resolve the rest of the issues and the matter proceeded to this inquiry.

[4] The Ministry and the applicant provided written submissions for this inquiry. The OIPC permitted the Ministry to submit much of its submission *in camera* (material which only the adjudicator may see). In their submissions, the parties discuss the broader subjects of reconciliation and Indigenous governance regimes. Without devaluing the importance of these matters, I will refer to the parties' submissions only insofar as they relate to the FIPPA issues before me.

ISSUES AND BURDEN OF PROOF

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

1. Is the Ministry required under s. 22(1) to refuse to disclose the disputed information?
2. Is the Ministry authorized under s. 16(1)(a)(iii) to refuse to disclose the disputed information?

[6] Section 57(1) places the burden on the Ministry, which is a public body, to prove that the applicant has no right of access to the information withheld under s. 16(1).

[7] Under s. 57(2), the applicant has the burden of proving that disclosure of personal information in the records would not be an unreasonable invasion of a third party's personal privacy. However, the Ministry has the initial burden of proving the information at issue is personal information.[2]

DISCUSSION

Background[3]

[8] To supply natural gas to an international export facility on the Pacific coast, a pipeline was constructed across northern BC (the Pipeline). The Pipeline's route crosses the traditional territories of multiple Indigenous nations, one of whom is the Wet'suwet'en Nation. The Pipeline's construction was the subject of intense public interest and media attention, court injunctions, protests, and law enforcement activity.

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[2] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 9-11.

[3] This background information is based on the information provided in the parties' submissions. It is not information that is in dispute.

[9] The applicant is a journalist. The applicant requested access to "all internal communications" that mention a specific website. The applicant provided both a previous and a current internet address for the website while limiting her request to records created in the years 2019, 2020, and 2021.

Records and information in dispute

[10] The disputed records consist of 10 pages of emails sent and received by the Ministry. These emails contain written descriptions, images, information about protest activity pertaining to the Pipeline, and copies of letters. The Ministry disclosed some of the information in the emails but withheld the remainder.

[11] The Ministry provided detailed descriptions of the withheld information in its submissions. However, these descriptions were received by the OIPC on an *in camera* basis.[4] Therefore, the descriptions of this information in my analysis below are necessarily limited to avoid revealing the content of the *in camera* material.

Section 22 – Harm to personal privacy

[12] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[5]

[13] The Ministry says that disclosing the personal information in dispute would be an unreasonable invasion of third-party personal privacy.[6] In response, the applicant asks that I review the Ministry's severing decisions to ensure that the Ministry applied s. 22(1) correctly.[7]

[14] Numerous past OIPC orders have established the analytical approach for s. 22(1), which I will adopt and apply here.[8]

Section 22(1) - Personal information

[15] Section 22(1) applies only to personal information, so the first step of the analysis is to determine whether the severed information is personal information.

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[4] Only the adjudicator may view material accepted by the OIPC on an *in camera* basis.
[5] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons, or organization other than the person who made the request or a public body.
[6] Ministry's initial submission at para. 51.
[7] Applicant's response submission at para. 39
[8] Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58; Order F16-38, 2016 BCIPC 42 (CanLII) at para. 108.

[16] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." Contact information is defined 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."[9]

[17] Information is about an identifiable individual when it is reasonably capable of identifying an individual, either alone or when combined with other available sources of information.[10]

[18] Based on my review of the records, I find that all of the information withheld under s. 22(1) is about identifiable individuals. Specifically, this information includes names, statements made by individuals, social media activity by identifiable individuals, political affiliations and activities, images of individuals, and the membership status of individuals in certain organizations. I find that none of the withheld information is contact information.

[19] None of the identifiable individuals are the applicant or the public body, so they are third parties in this inquiry. I conclude that all of the information withheld under s. 22(1) is the personal information of one or more third parties.

Section 22(4) – Disclosure not an unreasonable invasion of privacy

[20] The second step in the s. 22(1) analysis is to determine whether the personal information falls into any of the circumstances listed in s. 22(4). If the circumstances in s. 22(4) apply, then disclosure would not be an unreasonable invasion of a third party's personal privacy.

[21] The Ministry says that none of the s. 22(4) circumstances apply to the disputed information.[11] The applicant does not discuss the applicability of s. 22(4).

[22] I have reviewed the circumstances set out in s. 22(4), and I conclude that none of them apply to the disputed information.

Section 22(3) – Presumptively unreasonable invasion of personal privacy

[23] The third step is to determine whether any of the circumstances set out at s. 22(3) apply. If one or more does, then disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

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[9] Schedule 1 of FIPPA contains the definitions of "personal information" and "contact information".
[10] See for examples, Order F21-17, 2021 BCIPC 22 (CanLII) at para. 12; Order F16-38, 2016 BCIPC 42 at para. 112; Order F13-04, 2013 BCIPC 4 at para. 23.
[11] Ministry's initial submission at para. 58.

[24] The Ministry says that s. 22(3)(i) applies to the disputed information.[12] The applicant does not discuss s. 22(3)(i).

Section 22(3)(i) – Racial or ethnic origin, sexual orientation or religious or political beliefs or associations

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

[26] The Ministry says that the disputed information reveals multiple categories of information that are contemplated by s. 22(3)(i), especially when combined with other publicly available information.[13]

[27] The Ministry openly argues that disclosure would indicate third parties' political beliefs and affiliations, but the Ministry's *in camera* submissions additionally refer to other categories of information contemplated by s. 22(3)(i). Therefore, my discussion of s. 22(3)(i) will be limited in order to avoid revealing the content of the *in camera* information.

[28] Based on my review of the information at issue, I can see that much of the disputed information is a discussion about political beliefs and affiliations of specific third parties. In some cases, the information indicates other categories of information contemplated by s. 22(3)(i). Although some of the withheld information is comprised of individuals' names, the surrounding context and unsevered information immediately reveal s. 22(3)(i) information about the individuals who have those names.

[29] I conclude that all of the disputed information plainly indicates the types of information contemplated by s. 22(3)(i). Therefore, disclosure of this information is presumed to be an unreasonable invasion of third parties' personal privacy under s. 22(3)(i).

Section 22(2) – Relevant circumstances

[30] The fourth step of the s. 22(1) analysis is to determine whether disclosing the disputed personal information would be an unreasonable invasion of personal privacy. This is done by considering all relevant circumstances, including those listed in s. 22(2).

[12] Ministry's initial submission at paras. 59-63.
[13] Ministry's initial submission at paras. 56 and 61-63.

[31] I determined that disclosure is presumptively an unreasonable invasion of personal privacy under s. 22(3)(i). Therefore, I will consider whether the applicant has rebutted this presumption at this stage.

[32] The parties' submissions raise the following s. 22(2) circumstances:

> **22(2)** In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,[14]
>
> …
>
> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of Indigenous peoples,[15]
>
> …
>
> (g) the personal information is likely to be inaccurate or unreliable,[16]

[33] I will consider each of these circumstances in the same order.

Section 22(2)(a) – Public scrutiny of a public body

[34] Section 22(2)(a) asks whether disclosure of the personal information is desirable for subjecting the activities of a public body to public scrutiny. The purpose of s. 22(2)(a) is to make public bodies more accountable, not to scrutinize individual third parties.[17]

[35] The Ministry says that disclosure would not subject the Ministry or its activities to public scrutiny. The Ministry explained how disclosing the disputed information would, at most, subject specific third parties to public scrutiny by disclosing which of them were present at certain events and the role that they played.[18] I cannot repeat the Ministry's extensive explanations without revealing *in camera* material.

[36] I fail to see which of the Ministry's activities could be subjected to further public scrutiny by disclosure. The disclosed parts of the records and the Ministry's open submissions already reveal that the Ministry collected third parties' personal information in the context of the Pipeline and related protest

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[14] Applicant's response submission at para. 40; Ministry's initial submission at paras. 65-66.
[15] Applicant's response submission at para. 40; Ministry's reply submission at paras. 23-28.
[16] Ministry's initial submission at paras. 67-69; Applicant's response submission at para. 41.
[17] Order F18-47, 2018 BCIPC 50 (CanLII) at para. 32; and Order F16-14, 2016 BCIPC 16 (CanLII) at para. 40.
[18] Ministry's initial submission at para. 65.

activity.[19] It is not apparent to me how disclosing the specific content of that personal information would clarify or enhance public scrutiny of the fact that the Ministry collected it.

[37] I am not satisfied that disclosing the disputed information is desirable for the purpose of subjecting the Ministry's activities to public scrutiny. Having considered this factor, I find that it does not weigh in favour of disclosure.

Section 22(2)(d) – Disclosure assists in researching or validating claims, disputes or grievances of Indigenous peoples

[38] Section 22(2)(d) identifies as a relevant circumstance whether the disclosure will assist in researching or validating the claims, disputes or grievances of Indigenous peoples. The reference to "Indigenous peoples" is a collective reference in the sense of a First Nation, a band, or other distinct Indigenous people, as opposed to an individual with Indigenous heritage.[20]

[39] Given that the applicant does not know the content of the withheld personal information, the applicant asks that I give special consideration to s. 22(2)(d).[21] In reply, the Ministry says that s. 22(2)(d) is not applicable because the nature of the disputed information is too limited to be of assistance for the purposes contemplated by s. 22(2)(d).[22]

[40] Based on my review of the records at issue, it is apparent that the Pipeline and its construction relate to claims, disputes, and grievances of Indigenous peoples, primarily in relation to construction activity in their traditional territories. I can see that the Ministry attempted to stay informed about these issues by collecting the disputed personal information. However, it is not clear to me how the disputed information would be of any assistance in researching or validating those broader claims, disputes, or grievances of Indigenous peoples.

[41] The disputed information in this matter is about a relatively small number of identifiable individuals. It is highly specific to those individuals and their actions at discrete events. While this information indicates some individuals' political positions, the information is not in substance about the claims, disputes, or grievances that motivated the individuals to adopt those political positions.

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[19] The records at pp. 1, 3, and 5; The Ministry's initial submission at paras. 10, 27, 72, and 75.
[20] Section 22(2)(d) of FIPPA was amended on November 25, 2021 by the *Freedom of Information and Protection of Privacy Amendment Act*, SBC 2021 c 39 s. 11(a), and the term "aboriginal people" was replaced with "Indigenous peoples". I find the past OIPC treatment of "aboriginal people" as a collective reference to be equally applicable to "Indigenous peoples" in this matter. See also: Order F23-41, 2023 BCIPC 49 (CanLII) at paras. 173-174; Order 01-37, 2001 CanLII 21591 (BC IPC), at para. 38.
[21] Applicant's response submission at para. 41.
[22] Ministry's reply submission at paras. 27-28.

[42] I find that disclosure would not assist in researching or validating claims, disputes or grievances of Indigenous peoples. Therefore, s. 22(2)(d) is not a factor that supports disclosure in this matter.

Section 22(2)(g) – inaccurate or unreliable information

[43] Section 22(2)(g) requires a public body to consider whether the personal information is likely to be inaccurate or unreliable. Section 22(2)(g) weighs against disclosure if the withheld personal information is likely to be inaccurate or unreliable, or where its disclosure could result in third parties being misrepresented in a public way.[23]

[44] The Ministry says that at least some of the disputed personal information is likely inaccurate or unreliable because it was collected from an unreliable source that can be easily manipulated.[24] The Ministry describes this source in its *in camera* material, so I cannot elaborate further.

[45] In response, the applicant says that the unreliability of the information sources is the very thing that weighs in favour of disclosure.[25] I understand the applicant's argument to be that disclosure will reveal the extent to which the Ministry used unreliable sources to inform its opinion of the Pipeline's associated protest activity. The applicant also argues that the passage of time is not enough to render internet-sourced information inaccurate, because old information remains accurate when it can be considered alongside the context of the time in which it was recorded.[26]

[46] I am not persuaded that the disputed information in this matter is *likely* to be inaccurate or unreliable. In most cases, the original sources of the severed personal information are embedded and visible alongside the severed personal information in the records. These sources are sufficiently near to the relevant identifiable individuals that I have no reason to suspect the information was manipulated by anyone before the Ministry created the records containing that information.

[47] Having considered these circumstances, I conclude that s. 22(2)(g) does not weigh against disclosure because the personal information at issue is not likely to be inaccurate or unreliable.

[23] Order F23-102, 2023 BCIPC 118 at para. 33; F24-09, 2024 BCIPC 12 (CanLII) at para. 64.
[24] Ministry's initial submission at paras. 67-68; Affidavit #1 of RS at paras. 59-60.
[25] Applicant's submission at paras. 41-42.
[26] Applicant's submission at paras. 43-44.

Conclusion, s. 22(1)

[48] All of the disputed information is "personal information" of third parties. For all of this information, disclosure is presumptively an unreasonable invasion of a third party's personal privacy under s. 22(3)(i).

[49] Disclosing any of the disputed personal information would not assist in researching or validating the claims, disputes or grievances of Indigenous peoples, nor is disclosure desirable for the purpose of subjecting the Ministry's activities to public scrutiny. Finally, nothing in the material before me establishes that the information is likely inaccurate or unreliable.

[50] After weighing the factors and circumstances discussed above, I conclude that the applicant has failed to rebut the presumption created by s. 22(3)(i) for nearly all of the information at issue. Consequently, disclosure would be an unreasonable invasion of third parties' personal privacy so the Ministry must refuse to disclose this information under s. 22(1).

[51] The exception to this finding is a partial sentence that reveals an individual's recent passing and the fact that their community mourned them. The content of the records satisfies me that the broader public knew of this individual's position in their community and of their death. Furthermore, the type of personal information indicated by this partial sentence is limited and non-political in nature. I find that these circumstances overcome the presumption that disclosure would unreasonably invade that individual's personal privacy. I conclude that the Ministry is not required to refuse to disclose this partial sentence under s. 22(1).

Section 16(1) - Harm to intergovernmental relations

[52] Section 16(1)(a)(iii) says that a public body may refuse to disclose information if disclosure could reasonably be expected to harm the conduct of relations by the government of BC between itself and an Indigenous governing entity.

[53] The relevant parts of s. 16(1) are as follows:

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

[54] The Ministry applied both s. 22(1) and s. 16(1)(a)(iii) to all of the information it withheld. I determined that s. 22(1) requires the Ministry to refuse to disclose nearly all of this information. Therefore, I will only consider whether s. 16(1)(a)(iii) applies to the partial sentence that I determined the Ministry is not required to refuse to disclose under s. 22(1).

Indigenous Governing Entity

[55] Section 16(1)(a)(iii) applies where disclosure could reasonably be expected to harm the conduct by the government of BC of its relations with an "Indigenous governing entity".

[56] The Ministry refers to its conduct of relations with the Wet'suwet'en Nation, which the Ministry says includes both a hereditary chief system and an elected leadership structure established under the *Indian Act* framework.[27] Therefore, the first step in the s. 16(1)(a)(iii) analysis is to determine whether the Wet'suwet'en Nation, when characterized as including both the elected band council and hereditary chiefs, is an "Indigenous governing entity".

[57] Schedule 1 of FIPPA defines "Indigenous governing entity" as "an Indigenous entity that exercises governmental functions, and includes an "Indigenous governing body" as defined in the *Declaration on the Rights of Indigenous Peoples Act*"[28] (the Declaration Act). The Declaration Act defines an "Indigenous governing body" as "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*". Finally, s. 35(1) of the *Constitution Act, 1982* recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", who are defined under ss. 35(2) to include "the Indian, Inuit and Métis peoples of Canada."[29]

[58] The Ministry provided an extensive history of its recent dealings with the Wet'suwet'en Nation. Both the elected Wet'suwet'en leadership and the hereditary Wet'suwet'en leadership have negotiated with the provincial government and natural resource industry stakeholders on behalf of their members. Additionally, both leadership structures have executed legal documents on behalf of their members, such as memorandums of understanding.[30]

[59] These representative activities demonstrate that both leadership structures of the Wet'suwet'en Nation exercise government functions. Therefore, I find that the Wet'suwet'en Nation, as represented by both its elected and

[27] *Indian Act*, RSC 1985, c I-5, at ss. 74-80.
[28] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s. 1.
[29] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 35.
[30] Ministry's initial submission at paras. 28, and 30-42; Affidavit #1 of RS at paras. 6-30.

hereditary leadership structures, is an "Indigenous governing entity" under s. 16(1)(a)(iii). Consequently, the relevant intergovernmental relationship in this matter is between the government of BC and an Indigenous governing entity.

Reasonable Expectation of Probable Harm

[60] Having determined that Wet'suwet'en Nation is an Indigenous governing entity, I must now determine whether disclosing the information at issue could reasonably be expected to harm the conduct by the government of BC of its relations with the Wet'suwet'en Nation.

[61] Section 16(1)(a) uses the language "could reasonably be expected to harm". Past orders and court decisions have established that this language requires public bodies to prove that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative", which is "a middle ground between that which is probable and that which is merely possible."[31] Additionally, there must be "a clear and direct connection between the disclosure of specific information and the harm" raised.[32]

[62] In their submissions, neither the Ministry nor the applicant specifically discussed the application of s. 16(1)(a)(iii) to the partial sentence that reveals an individual's recent passing and the fact that their community mourned them. Generally, the Ministry says that its ability to conduct relations with the Wet'suwet'en Nation will be harmed by disclosure because the information it withheld "would likely be viewed as controversial or in bad faith", and as "breaching the trust and confidence necessary to engage in meaningful and successful reconciliation discussions and negotiations."[33] I cannot discuss this argument further without revealing the content of the *in camera* material.

[63] The applicant says that the purpose of s. 16(1)(a)(iii) is to "[protect] important relationships between B.C. and First Nation governments", but not "to shield government from releasing communications that could be construed as bad faith." The applicant says the Ministry is using s. 16(1)(a)(iii) for the latter purpose.[34]

[64] Nothing in the material before me establishes controversy or bad faith in the provincial government recording and communicating the death of a prominent member of an Indigenous community. I do not understand, nor does the Ministry explain, how the act of recording and internally disseminating this specific type of

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[31] *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, at para. 206; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 54 (CanLII), 2014 SCC, at para. 54.
[32] Order 02-50, 2002 BCIPC 42486 (CanLII), at para. 137; Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 27.
[33] Ministry's initial submission at para. 124; Affidavit #1 of RS at paras. 53-54.
[34] Applicant's submission at p. 1 (introduction), and para. 52.

information could possibly be viewed as being in bad faith. Finally, I do not see any other circumstances establishing a reasonable expectation of harm to the provincial government's ability to conduct relations with the Wet'suwet'en Nation if this partial sentence is disclosed.

Conclusion, s. 16(1)

[65] Regarding the partial sentence I am considering under s. 16(1)(a)(iii), I find that disclosure cannot be reasonably expected to harm the conduct by the government of BC of its relations with an Indigenous governing entity. I conclude that s. 16(1)(a)(iii) does not permit the Ministry to refuse to disclose this partial sentence.

CONCLUSION

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

1. Subject to items 2 and 3 below, the Ministry is required under s. 22(1) to refuse to disclose all of the information in dispute.

2. The Ministry is not authorized or required by ss. 16(1)(a)(iii) or 22(1) to refuse to disclose the partial sentence, which I have highlighted in green in a copy of the records that will be provided to the Ministry with this order.

3. The Ministry must give the applicant access to the highlighted information described in item 2 above.

4. When the Ministry complies with item 3 above, it must concurrently provide the OIPC registrar of inquires with a copy of the records and any accompanying cover letter sent to the applicant.

Pursuant to s. 59(1) of FIPPA, the Ministry is required to give the applicant access to the information it is not required or authorized to withhold by August 15, 2024.

July 3, 2024

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

OIPC File No.: F22-89205