Order F24-59

MINISTRY OF EDUCATION AND CHILD CARE

Rene Kimmett
Adjudicator

July 8, 2024

CanLII Cite: 2024 BCIPC 69
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 69

Summary: An applicant made a request to the Ministry of Education and Child Care (Ministry) for access to records related to the Ministry's investigation into the applicant's employment. The Ministry refused access to some information on the basis that FIPPA did not apply to this information or that it fell under one or more of FIPPA's exceptions to disclosure. The adjudicator found that s. 61(2)(a) of the *Administrative Tribunals Act* (personal note, communication or draft decision of a decision-maker) applied to some information and, therefore, that FIPPA did not apply. The adjudicator also found that the Ministry had properly applied ss. 14 (solicitor-client privilege) and 22(1) (harm to third-party personal privacy) to withhold some of the information in dispute. However, she found that the Ministry was not authorized to withhold any information under s. 13(1). The adjudicator ordered the Ministry to give the applicant access to the information it was not authorized or required to refuse to disclose.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165, ss. 3(1)(b), 3(3)(e), 13(1), 14, 22(1), 22(2)(a), 22(2)(c), 22(2)(f), 22(3)(d), and 22(4)(e); *Administrative Tribunals Act,* SBC 2004, c. 45, ss. 61(1) and 61(2)(a); *Teachers Act*, SBC 2011, c. 19, ss. 41(1)(f) and 41(2)(c).

INTRODUCTION

[1] A teacher (applicant) made a request under the *Freedom of Information and Protection of Privacy Act*[1] (FIPPA) to the Ministry of Education and Child Care (Ministry) for access to information related to its investigation into her employment. The investigation flowed from a school district (School District) terminating the applicant's employment. The investigation was conducted by Ministry staff on behalf of the Commissioner for Teacher Regulation (Teachers' Commissioner).

[1] RSBC 1996, c. 165.

[2] The Ministry disclosed some information to the applicant but withheld other information under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), and 22(1) (harm to third-party personal privacy). The Ministry also refused access to information in several other records on the basis that they were outside the scope of FIPPA[2] under s. 3(1)(b) and s. 61(2)(a) of the *Administrative Tribunals Act*[3] (ATA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

PRELIMINARY MATTER

Inadvertent disclosure and adjournment

[4] During the inquiry, the Ministry mistakenly gave the applicant access to a largely unredacted copy of the records (unredacted records) that was intended to be provided only to the OIPC. In doing so, the Ministry mistakenly disclosed to the applicant all the information in dispute under ss. 3(1)(b) and 13(1) and most of the information in dispute under s. 22(1).

[5] At the Ministry's request, I adjourned the inquiry to give it the opportunity to seek the return or destruction of the mistakenly disclosed information. The applicant informed the Ministry that she had destroyed her copy of the unredacted records. The Ministry asked further questions about how the applicant had destroyed her copy and whether she had distributed the unredacted records to anyone else. The Ministry was ultimately unsatisfied with the applicant's responses to its questions and asked me to cancel the inquiry on the basis that the applicant engaged in improper conduct or abused the inquiry process. I found that the Ministry had not met its burden to prove that the inquiry should be cancelled and that it was appropriate to continue the inquiry.[4] I encouraged the parties to continue to work, outside the context of the inquiry, to contain the mistaken disclosure of the unredacted records.

[6] In their communications about the unredacted records, the parties included comments about the issues to be adjudicated in this inquiry. For example, the applicant frequently gave reasons for why she believes she is entitled to access the information in dispute under ss. 3(1)(b) and 22(1) of FIPPA. These are issues to be decided in this inquiry and the appropriate time for the parties to make submissions on these issues was during the written submission period. I did not ask the parties to provide further submissions on these issues

[2] From this point forward, whenever I refer to section numbers, I am referring to sections of FIPPA unless otherwise specified.
[3] SBC 2004, c. 45.
[4] Adjudicator's decision letter dated May 17, 2024.

and the parties' communications should have been limited to the issues relevant to the mistaken disclosure. Based on this context, I have determined it is not appropriate to consider these communications when making findings in this order.[5] From this point forward, I only consider the submissions the parties made before the Ministry notified the OIPC and applicant about the mistaken disclosure.[6]

Issues outside the scope of this inquiry

[7] The applicant submits that the Ministry failed to produce all records and should be ordered to conduct another search.[7] This argument relates to s. 6(1) of FIPPA, which says a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[8] The applicant also submits that disclosure of the disputed information is in the public interest under s. 25(1).[8] Section 25(1) imposes a duty on a public body to disclose information, without delay, when it is clearly in the public interest to do so.

[9] The applicant raised these issues earlier in the OIPC's review process and was referred back to the Ministry as the first step in the complaints process.[9] Neither the OIPC Investigator's Fact Report nor the Notice of Inquiry includes ss. 6(1) or 25(1) as issues to be decided in this inquiry. The Notice of Inquiry, which was provided to both parties at the start of this inquiry, states parties may not add new issues without the OIPC's prior consent.[10] The applicant did not request permission to add ss. 6(1) or 25(1) nor point to any exceptional circumstances that would justify doing so at this stage. As a result, I will not add ss. 6(1) or 25(1) to this inquiry.[11]

[10] The applicant also raises several other issues related to the Ministry and Teachers' Commissioner's conduct during the investigation following the School District's termination of her employment.[12] It is clear from the applicant's submission that she has strong objections to the way this investigation was carried out. However, my task in this inquiry is to determine whether the

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[5] For a similar procedural remedy, see Order No. 291-1999, 1999 CanLII 2725 (BC IPC) at page 13.
[6] For clarity, in this order, I only considered the Ministry's submissions dated March 8, 2023, May 31, 2023, and December 6, 2023 and the applicant's submissions dated May 15, 2023 and December 15, 2023.
[7] Applicant's submission at paras 67-68.
[8] *Ibid* at paras 69-72 and 97-103.
[9] OIPC Investigator's Fact Report at paras 6 and 8.
[10] Notice of Inquiry dated February 8, 2023.
[11] Order F15-15, 2015 BCIPC 16 at paras 10-11.
[12] Applicant's submission at paras 73-96.

information in dispute falls outside the scope of FIPPA or under one of FIPPA's exceptions to disclosure. The applicant's allegations are not relevant to these determinations and, therefore, I do not consider them further.

ISSUES AND BURDEN OF PROOF

[11] At this inquiry, I must decide the following issues:

1) Are the records in dispute outside the scope of FIPPA due to s. 61(2)(a) of the ATA or s. 3(1)(b) of FIPPA?[13]

2) Is the Ministry authorized to withhold the information in dispute under ss. 13(1) or 14?

3) Is the Ministry required to withhold the information in dispute under s. 22(1)?

[12] Under s. 57(1), the Ministry has the burden of proving that the applicant has no right of access to the information it withheld under ss. 13(1) and 14.

[13] Under s. 57(2), the applicant has the burden of proving that disclosure of the information in dispute under s. 22(1) 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 qualifies as personal information.[14]

[14] Section 57 is silent regarding the burden of proof in cases where a public body claims responsive records are outside the scope of FIPPA. However, I agree with previous OIPC orders that have said the public body bears the burden of proving its claim in these cases.[15]

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[13] Section 3(1)(b) of FIPPA was repealed and replaced by s. 3(3)(e) on November 25, 2021. The Ministry submits that, following the November 2021 amendments to FIPPA, section 3(3)(e) is now the section relevant to this inquiry. I do not agree with the Ministry on this point. In this inquiry, I am reviewing the Ministry's January 6, 2021 response to the applicant's request for information in which it withheld information pursuant to s. 3(1)(b) of FIPPA. Accordingly, s. 3(1)(b) remains the relevant section for the purpose of this inquiry. That said, the substance of ss. 3(1)(b) and 3(3)(e) is the same and my analysis is relevant to both provisions.

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

[15] Order 03-06, 2003 CanLII 49170 (BC IPC) at para. 6. Order No. 170-1997, 1997 CanLII 1485 (BCIPC); Order 03-14, 2003 CanLII 49183 (BC IPC); Order F13-23, 2013 BCIPC 30 (CanLII); Order F15-49, 2015 BCIPC 52.

DISCUSSION

Background

[15] In 2009, the School District began an internal inquiry into the applicant's work performance[16] and placed the applicant on medical leave beginning in 2012.[17] In May 2016, the School District terminated the applicant's employment and notified the Ministry that it had done so.

[16] In August 2016, the Ministry informed the applicant that the Teachers' Commissioner would conduct an investigation, under the *Teachers Act,*[18] into the allegations against the applicant.[19] Ministry investigators conducted the investigation under the delegated authority and direction of the Teachers' Commissioner.[20]

[17] In 2017, the Teachers' Commissioner deferred the applicant's matter pending the outcome of a complaint the applicant made to the BC Human Rights Tribunal (BCHRT) about the School District and one of its employees.[21]

[18] In 2018, the Teachers' Commissioner notified the applicant that he had concluded his investigation and decided to take no further action as permitted by the *Teachers Act.*[22]

Information at issue

[19] The Ministry has provided 1,770 pages of responsive records and has completely or partially withheld information in many of these records. The Ministry has also entirely withheld an audio recording.

[20] The records package include records created by the Ministry, such as call logs, meeting minutes, memoranda, and the audio recording, as well as records sent to the Ministry by the applicant or her former employers.[23]

[21] The Ministry states that some of the responsive records came from the School District via the School District's lawyer. These records contain both information that the Ministry chose to withhold from the applicant, which I can see, and blacked-out information, which I cannot see. The Ministry provides

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[16] Investigator's affidavit at para 15.
[17] *Ibid* at para 15; Records at pages 957-964.
[18] SBC 2011, c. 19,
[19] Records at pages 122-123.
[20] Investigator's affidavit at paras 12 and 22.
[21] *Ibid* at para 19.
[22] Ministry's initial submission at para 41 and Records at page 1763.
[23] The applicant's former employers include the School District, which is a public body, and independent schools, which are not public bodies under FIPPA.

evidence that the blacked-out portions were made by the School District's lawyer, who redacted some information identifying witnesses before sending these records to the Ministry.[24] I accept the Ministry's evidence that it received these records with these redactions already made. This inquiry is only about the Ministry's decision to withhold information from the version of the records it had in its custody or under its control. Therefore, I only make findings about the information the Ministry chose to withhold, and do not make findings about the information the School District blacked-out.

[22] Similarly, some of the records were provided by the applicant to the Ministry during the course of its investigation and contain redactions that appear to have been made by the applicant or her agent. Again, I do not make findings about this blacked-out information because the Ministry did not choose to withhold this information and instead received these records with this information already blacked-out.

Records outside the scope of FIPPA

[23] The Ministry submits that some of the responsive records are outside the scope of FIPPA because they fall under s. 61(2)(a) of the ATA and s. 3(1)(b) of FIPPA.[25]

[24] For organizational purposes, I have placed the records the Ministry withheld under s. 61(2)(a) of the ATA and s. 3(1)(b) into two groups:

Group A Records

- Three documents that the Ministry claims are outside the scope of FIPPA and are also protected by solicitor-client privilege.[26]

Group B Records

- Nine forms, signed by the Teachers' Commissioner, that detail the progress of the applicant's matter.[27]

- Two memoranda to the Teachers' Commissioner signed by a Ministry investigator.[28]

[24] Director of Professional Conduct's affidavit at para 8.
[25] Ministry's initial submission at paras 44-51.
[26] Records at pages 430-431, 438, and 1760-1762.
[27] Records at pages 120-121, 161-162, 376-377, 396-397, 428-429, 1248-1249, 1756-1757, 1758-1759, and 1764-1765.
[28] Records at pages 1256-1257 and 1752-1754.

- One letter that the applicant sent to a Ministry investigator.[29]
- Two "Case Management Meeting" documents dated October 2017 and February 2020, respectively.[30]

Section 61(2)(a) of the ATA

[25] The ATA governs certain administrative tribunals in British Columbia, including the Teachers' Commissioner. The relevant parts of s. 61 of the ATA read as follows:

> 61(1) In this section, "decision maker" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.
>
> (2) The *Freedom of Information and Protection of Privacy Act*, other than section 44(1)(b), (2), (2.1) and (3), does not apply to any of the following:
>
> > (a) a personal note, communication or draft decision of a decision maker;
> >
> > […]

[26] In Order F24-14, an OIPC adjudicator concluded that s. 61(2)(a) does not exclude all administrative tribunal records from the scope of FIPPA and, instead, excludes only those records to which deliberative secrecy applies.[31] I agree with this conclusion. Deliberative secrecy is meant to prevent disclosure of how and why decision makers make their decisions[32] and extends to the administrative aspects of the decision-making process insofar as they directly affect adjudication.[33]

Group A Records

[27] The Ministry is withholding three records on the basis that they are either outside the scope of FIPPA and are also subject to solicitor-client privilege and, therefore, can be excepted from disclosure under s. 14 of FIPPA.

[28] The Ministry did not provide me with a copy of these records. Instead, the Ministry relies on affidavit evidence from three Ministry employees and a lawyer

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[29] Records at page 1258.
[30] Records at pages 394 and 1755.
[31] Order F24-14, 2024 BCIPC 20 at paras 23-33.
[32] *Ibid* at para 30, citing *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37 at para 14.
[33] *Ibid*, citing *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796 per McLachlin J (as she then was) at pp. 831-833.

(Legal Counsel) employed by the Ministry of Attorney General (MAG) to support its claim that the information in these three records is privileged and outside the scope of FIPPA.

[29] As the Information and Privacy Commissioner's delegate, I have the power to order production of records for the purpose of conducting an inquiry.[34] However, where a party claims records are protected by solicitor-client privilege, I will only order production when it is absolutely necessary to fairly decide the issues in the inquiry.[35] This approach is intended to recognize the importance of solicitor-client privilege and minimally infringe on that privilege.[36]

[30] During the inquiry, I found I did not have an adequate description of several of the records the Ministry withheld on the basis of privilege. I asked the Ministry to provide additional information about these records and the Ministry did so in a second affidavit from Legal Counsel. Having received this additional information, I find that the Ministry has provided sufficient evidence about the records in dispute, from people directly involved in creating and receiving them, for me to fairly decide the issues. As a result, I do not need to order the Ministry to produce any records.

[31] The Ministry's evidence is that two of the Group A records are forms marked "Privileged and Confidential Instructions for Legal Counsel" sent on behalf of the Teachers' Commissioner to Legal Counsel and related to the investigation into the applicant.[37] A Ministry employee states that these forms were completed by Ministry staff on behalf of the Teachers' Commissioner, who signed, or otherwise reviewed and approved, the forms.[38]

[32] I find that the Teachers' Commissioner is a decision maker within the meaning of s. 61 of the ATA. I base this conclusion on the language in ss. 41(1)(f) and 41(2)(c) of the *Teachers Act*, which say that s. 61 of the ATA applies to the Teachers' Commissioner.[39]

[33] I am satisfied that these two records are communications of the Teachers' Commissioner. The applicant argues that records prepared by Ministry staff, rather than the Teachers' Commissioner, cannot be outside the scope of FIPPA.[40] I am not persuaded by this argument in relation to these two documents. Based on the Ministry's evidence, I am satisfied that, regardless of

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[34] Section 44(1)(b) of FIPPA.
[35] Order F19-21, 2019 BCIPC 23.
[36] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 34; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10.
[37] Legal Counsel's affidavit #1 at paras 21 and 23 and Exhibit A.
[38] Director of Professional Conduct's affidavit at para 19.
[39] This finding was also made in Order F18-02, 2018 BCIPC 2 at para 22.
[40] Applicant's submission at para 33.

who performed the administrative task of completing these forms, the communications in these two records came from the Teachers' Commissioner and not Ministry staff.

[34] I am also satisfied that these records are about how and why the Teachers' Commissioner made his decision about how to respond to the School District's report that it had dismissed the applicant. In other words, I am satisfied that deliberative secrecy applies to these records.

[35] In conclusion, I find that s. 61(2)(a) of the ATA applies to these two records and, therefore, FIPPA does not.

[36] Regarding the third Group A record, the Legal Counsel's evidence is that this record is a draft "Branch template" document sent by a Ministry investigator to Legal Counsel for review and to obtain legal advice.[41] The Legal Counsel states that her clients include the Teachers' Commissioner and Ministry employees.[42] She states that requests for legal advice or services come from Ministry employees either on behalf of the Teachers' Commissioner or directly from managerial staff or investigators.[43]

[37] I cannot conclude that the information in this record is a personal note, communication or draft decision of the Teachers' Commissioner. The Ministry's description of the document as a "Branch template" suggests the investigator was seeking legal advice on behalf of her branch within the Ministry and not the Teachers' Commissioner. As a result, I find this record is a communication of the investigator.

[38] I have, therefore, considered whether Ministry investigators are themselves decision makers within the meaning of s. 61 of the ATA and conclude that they are not. While the Ministry has provided evidence that its investigators are delegated the authority to conduct investigations on behalf of the Teachers' Commissioner,[44] there is nothing before me that indicates a Ministry investigator has delegated decision-making authority. Further, I find that a Ministry investigator is not, independently, "a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process".[45] As a result, I conclude the "Branch template" document does not fall under s. 61(2)(a) of the ATA.

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[41] Legal Counsel's affidavit #2 at para 9 and Exhibit A.
[42] Legal Counsel's affidavit #1 at paras 3-4.
[43] *Ibid* at para 5.
[44] Investigator's affidavit at para 20.
[45] ATA, s. 61(1).

Group B Records

[39] I have reviewed the Group B records the Ministry has withheld on the basis that they are outside the scope of FIPPA.

[40] I find that the nine forms, the two memoranda, and the "Case Management Meeting" document dated October 2017 are communications of a decision-maker within the meaning of s. 61(2)(a) of the ATA. These records contain instructions the Teachers' Commissioner communicated to Ministry staff so that they could investigate the applicant's matter. As above, even though Ministry staff performed the administrative task of documenting the communications, I am satisfied that the communications themselves came from the Teachers' Commissioner and form part of the decision-making process. I am also satisfied that deliberative secrecy applies to these records.

[41] However, I find that neither the letter from the applicant to a Ministry investigator nor the "Case Management Meeting" document dated February 2020 fall under s. 61(2)(a) of the ATA.

[42] The letter is a communication of the applicant and not the Teachers' Commissioner or other decision maker and, as a result, it is not the sort of information intended to be captured by s. 61(2)(a) of the ATA.

[43] The February 2020 "Case Management Meeting" document is not a personal note, communication, or draft decision of the Teachers' Commissioner. In contrast to the records I found fall under s. 61(2)(a), this document is not signed by the Teachers' Commissioner and does not contain the Teachers' Commissioner's instructions or other communications. Instead, I find the record is a communication of the Ministry investigator that created the document. As stated above, there is nothing before me to indicate that Ministry investigators are decision makers within the meaning of s. 61(1) and, as a result, I find that s. 61(2)(a) does not apply to this record.

Section 3(1)(b) of FIPPA

[44] I found above that s. 61(2)(a) does not apply to some of the records in dispute, specifically the letter the applicant sent to a Ministry investigator, the "Case Management Meeting" document dated February 2020, and the draft "Branch Template" sent from a Ministry investigator to Legal Counsel. I will now consider whether these records fall under s. 3(1)(b) of FIPPA.

[45] Section 3(1)(b) said that FIPPA applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to "a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity". Previous OIPC orders have

recognized that s. 3(1)(b) does not capture every record created by a person who acts in a quasi-judicial capacity. Commissioner Loukidelis wrote in Order 00-16:

> I stress that s. 3(1)(b) is only triggered when a person is actually "acting" in a judicial or quasi judicial capacity in respect of the record in issue. The section recognizes that employees of public bodies - including members of administrative tribunals - may discharge multiple functions, only some of which could be termed functions of a judicial or quasi judicial nature.[46]

[46] The courts have formulated a non-exhaustive list of criteria for determining whether an individual is acting in a judicial or quasi-judicial capacity, which includes considering the following circumstances:

1. Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?

2. Does the decision or order directly or indirectly affect the rights and obligations of persons?

3. Is the adversary process involved?

4. Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense? [47]

[47] The Ministry submits that "the [Teachers'] Commissioner's role is clearly quasi - judicial in capacity".[48] The Ministry describes the Teacher's Commissioner's role as follows:

> The Commissioner does not decide the merits of a case, nor does he make any determination of guilt or innocence. The Commissioner is responsible for receiving and reviewing reports and complaints about the conduct or competence of certificate holders and deciding which process in the *Teachers Act* is appropriate to address the matter.

[48] Section 51 of the *Teachers Act* states that after completing an investigation, the Teachers' Commissioner must take one of the following actions:

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[46] Order 00-16, 2000 CanLII 7714 (BC IPC) at page 7.
[47] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al.*, 2004 BCSC 1597 at para 51; Order F10-12, 2010 BCIPC 20 at paras 19-21, citing *Minister of National Revenue v. Coopers and Lybrand*, 1978 CanLII 13 (SCC), [1979] 1 S.C.R. 495.
[48] Ministry's initial submission at para 47 and Ministry's reply submission at para 30.

a) take no further action;

b) make or accept a proposal for a consent resolution agreement; or

c) issue a citation.

[49] If the Teachers' Commissioner issues a citation, he must also establish a disciplinary panel, which has the power to make findings and issue orders following a hearing.[49]

[50] Based on this context, I conclude that the Teachers' Commissioner does not contemplate a hearing before making a decision nor do his decisions take place in an adversarial context. On the other hand, he does appear to consider individual cases, rather than implementing policy. I also note that the Teachers' Commissioner's decisions may directly or indirectly affect a certificate holder's privileges; for example, if he convenes a disciplinary panel and the panel, in turn, decides to suspend, cancel, not issue, or place conditions on a certificate of qualification.[50] Taken together, it is not clear that the Teacher's Commissioner was working in a quasi-judicial process or acting in a quasi-judicial capacity when the records were created. I find that the Ministry has not met its burden of prove this point.

[51] Further, and significantly, the records I am considering under s. 3(1)(b) are not a personal note, communication, or draft decision of the Teachers' Commissioner.

[52] The letter from the applicant to the Ministry investigator is a communication of the applicant. The applicant was the subject of the Ministry's investigation and, therefore, was clearly not acting in a quasi-judicial capacity.

[53] I found in paragraphs 37 and 43, above, that the other two records are communications of a Ministry investigator.

[54] In the judicial review of Order F09-07, *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931, Justice Pitfield concluded that an investigator was acting in a quasi-judicial capacity within a quasi-judicial process.[51] He held that all steps in the deliberative process must be protected, so that "those charged with the responsibility of formulating opinions which are essential to the eventual disposition of

[49] *Teachers Act*, ss. 56-67.
[50] *Ibid*, ss. 64.
[51] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931 [*Provincial Health Services Authority*] at para 41.

a complaint will be able to formulate their opinions free from concerns about inquiries into their thought-making processes."[52] Justice Pitfield held that:

> […] the investigator was charged with more than the mere accumulation of evidence and findings of fact. The investigator was required to look at the evidence available to her from a number of sources, assess and weigh the evidence, and formulate an opinion as to whether or not the facts as she found them supported the conclusion [that the doctor contravened the relevant policy]. It was most improbable that any other person involved in the discipline process would alter or reverse her determination in that regard. Rather, the responsibilities of others involved in the disciplinary process was to assess the consequences that should flow from the contraventions which had been identified by the investigator.[53]

[55] I distinguish these facts from the facts in this inquiry. The Ministry describes its investigators' role as follows:

> [Investigators] investigate pursuant to the Commissioner's instructions by collecting pertinent information to the […] investigation. The information is presented to the Commissioner, who then determines if and what further action is necessary in the investigation.[54]

[56] Based on this description, I understand the Ministry's investigators have a narrow role and do not formulate opinions about the ultimate decision to be reached by the Teachers' Commissioner. Further, as explained above, the Ministry has not established that the process the Teachers' Commissioner and, by extension the investigator, used to investigate the School District's report was quasi-judicial. As a result, I find that the investigator was not acting in a quasi-judicial capacity.

[57] In conclusion, I find that none of these three records fall under s. 3(1)(b) of FIPPA.

[58] The Ministry has not claimed that the information in the letter, or "Case Management Meeting" document falls under any of FIPPA's exceptions to disclosure and, therefore, the Ministry must give the applicant access to this information.

[59] The Ministry submits that the draft "Branch Template" is either outside of the scope of FIPPA or that it can be withheld under s. 14 of FIPPA. I consider the Ministry's claim that information in the "Branch Template" can be withheld under s. 14 in my analysis that follows.

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[52] *Ibid* at para 33.
[53] *Ibid* at para 34.
[54] Ministry's initial submission at para 26.

Solicitor-client privilege – s. 14

[60] The test for solicitor-client privilege has been expressed in various ways.[55] For the purpose of this order, I adopt the test as expressed by the Supreme Court of Canada in *Pritchard v Ontario (Human Rights Commission)*,[56] which states that for solicitor-client privilege to apply there must be:

1. a communication between a solicitor and a client;

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

3. which is intended to be confidential by the parties.[57]

[61] Not every communication between a solicitor and their client is privileged; however, if the conditions above are satisfied, then solicitor-client privilege applies.[58]

[62] Further, a communication does not need to specifically seek or give legal advice to be privileged, so as long as it can be placed in the "continuum of communications" in which the solicitor tenders advice.[59] The continuum of communications involves the necessary exchange of information between a lawyer and their client for the purpose of obtaining and providing legal advice such as history and background information provided by a client or communications to clarify or refine the issues or facts.[60]

[63] An attachment to an email may be privileged on its own, independently of its being attached to another privileged record. Additionally, an attachment may be privileged if it is an integral part of the communication to which it is attached and its disclosure would reveal the communications protected by solicitor-client privilege, either directly or by inference.[61]

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[55] For example, *R. v B.*, 1995 CanLII 2007 (BCSC) sets out a four-part test for legal advice privilege. See also: *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 [*British Columbia (Minister of Finance)*] at paras 70-75.
[56] *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31.
[57] *Ibid* at para 15, citing *Solosky v. The Queen,* 1979 CanLII 9 (SCC) at 837.
[58] *Solosky, supra* note 57.
[59] *Samson Indian Band v Canada*, 1995 CanLII 3602 (FCA), [1995] 2 FC 762 at para 8.
[60] *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp*] at para 40.
[61] See e.g., Order F18-19, 2018 BCIPC 22 at paras 36-40 and the authorities cited therein.

Parties' positions on s. 14

[64] The Ministry has withheld eight sets of emails[62] and eight email attachments[63] under s. 14. The Ministry describes the attachments to the emails as follows:

- a document called "Summary of Evidence" from Legal Counsel to the Teachers' Commissioner;
- a memorandum from the Legal Counsel to the Teachers' Commissioner;
- a document called "Privileged and Confidential Instructions for Legal Counsel" from the Teachers' Commissioner to Legal Counsel;
- a draft "Branch" template from a Ministry investigator to Legal Counsel; and
- four documents prepared by Legal Counsel and sent to the Ministry investigator, which incorporate the Legal Counsel's legal advice.[64]

[65] The Legal Counsel states that she has reviewed the records the Ministry has withheld under s. 14[65] and that all these records "were created, sent or received for the purpose of formulating or providing legal advice, or fall within the continuum of communications for the purposes of doing so."[66]

[66] The Ministry submits that these records are communications and attachments sent between the Legal Counsel and her clients.[67] The Legal Counsel states that both the Teachers' Commissioner and Ministry employees are her clients.[68]

[67] The Legal Counsel states that at all times she understood the Ministry's staff to be providing information and seeking legal advice on a confidential basis and that there has been no waiver of privilege with respect to the records withheld under s. 14.[69]

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[62] Records at pages 409-413, 430-431, 437 and 439, 448, 454-458 and 461-462, 1261-1263, 1760-1761, 1768-1770.
[63] Records at pages 414-419, 420-427, 438, 440, 449-451, 459-460, 463-464, 1762.
[64] Legal Counsel's affidavit #1 at Exhibit A and Legal Counsel's affidavit #2 at Exhibit A.
[65] Legal Counsel's affidavit #1 at paras 15-16.
[66] *Ibid* at para 25.
[67] Ministry's initial submission at paras 94.
[68] Legal Counsel's affidavit #1 at para 3.
[69] *Ibid* at paras 27-28.

[68] The Ministry's other affidavit evidence echoes the points made by the Legal Counsel.

[69] The applicant submits that the Ministry has not provided sufficient information to determine pertinent information about the records and that it is likely that much of this information does not meet the test for solicitor-client privilege.[70]

Analysis

[70] As noted above, the Ministry did not provide me with a copy of the records it claims are protected by solicitor-client privilege. The Ministry relies on affidavit evidence from three Ministry employees and the Legal Counsel to support its claim that these records are protected by solicitor-client privilege. As explained in paragraphs 28-30 of this order, I have determined that this information is sufficient for me to determine whether these records are subject to solicitor-client privilege and I do not need to order production of the records for my review.

[71] I accept, based on the Ministry's evidence, that the Ministry and the Teachers' Commissioner were the Legal Counsel's clients when the withheld records were exchanged. I am satisfied that the contents of the withheld emails are communications between the Legal Counsel and the Ministry's employees that entail seeking or giving legal advice. The Legal Counsel's evidence explains that these emails were sent through a shared email account that can only be accessed by a small number of Ministry staff. More specifically, she states the inbox has consistently only been accessible to a group of between four and seven management staff and persons employed to assist in records management.[71] Based on this evidence, I accept that these communications were confidential. I conclude that, with one exception, which I discuss in the next paragraph, all the information in the emails the Ministry withheld under s. 14 are subject to solicitor-client privilege.

[72] The exception is in an email chain in which the Ministry withheld the Legal Counsel's email address and the name, email address, and other contact information of a Legal Assistant with the MAG.[72] I will refer to this information, collectively, as the "MAG employee information". The MAG employee information is contained in the "To", "From", and "Cc" lines at the top of emails, salutations and signoffs in the body of the emails, and in the Legal Assistant's signature block. I find that this information is about the MAG employees and is not a communication that entails seeking or giving legal advice.[73] As a result, I

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[70] Applicant's submission at para 51 and applicant's supplemental submission dated December 15, 2023 at para 12.
[71] Legal Counsel's affidavit #2 at paras 4-8.
[72] *Ibid* at para 10 and Exhibit A; Records at pages 1768-1770.
[73] *632738 Alberta Ltd. v. The King*, 2023 TCC 117 at paras 123-126; *British Columbia (Minister of Finance), supra* note 55 at para 81.

conclude the Ministry has not met its burden to prove s. 14 applies to this information.

[73] I acknowledge that courts have found that disclosing portions of otherwise privileged documents should only be considered when disclosure can be accomplished without any risk that the privileged legal advice in the document will be revealed or ascertained.[74] Here, the Legal Counsel has already openly said that these emails involve herself and her legal assistant.[75] I do not see how additional details about these MAG employees would assist an individual in ascertaining privileged communications. I am satisfied that the Ministry can disclose the MAG employee information without risk that it will reveal or allow someone to ascertain privileged communications.

[74] Lastly, I find that the Ministry has established that the attachments to the emails are privileged because they were exchanged only between the Legal Counsel and Ministry employees and they either incorporate the Legal Counsel's legal advice or their disclosure would reveal the contents of the privileged emails to which they are attached.

[75] In summary, I find, with the exception of the MAG employee information, that all of the information the Ministry withheld under s. 14 is subject to solicitor-client privilege.

Advice or recommendations – s. 13(1)

[76] 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 a minister.

[77] 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 a 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.[76] The term "advice" has a broader meaning than "recommendations."[77] "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.[78]

[78] If I find the information in dispute would reveal advice or recommendations developed by or for a public body, I will then consider if any of the categories

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[74] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras 36-51.
[75] Legal Counsel's affidavit #1 at para 24 and Exhibit A
[76] *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 23-24.
[77] *Ibid* at para 24.
[78] *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para 113

listed in ss. 13(2) or (3) apply. Section 13(2) identifies certain types of records and information that may not be withheld under s. 13(1). Section 13(3) says that a public body cannot use s. 13(1) to withhold information in a record that has been in existence for 10 or more years.

[79] The Ministry has withheld information under s. 13 that I found above is excluded from FIPPA, pursuant to s. 61(2)(a) of the ATA,[79] or is subject to solicitor-client privilege.[80] Having determined the Ministry can refuse to disclose this information, I do not consider whether s. 13(1) also applies to this information.

[80] The remaining information in dispute under s. 13(1) is contained in handwritten notes on two emails. The Ministry submits these notes were made during a meeting between School District employees about the School District's inquiry into the applicant.[81] The Ministry submits these notes "include an opinion about an existing set of circumstances."[82]

[81] The applicant submits these notes are statements of fact, even if false, and not opinions.[83]

[82] I agree with the applicant that the handwritten notes are statements of fact. I find that the Ministry has not adequately explained its position that the information in dispute would reveal, or allow accurate inferences to be made about, advice or recommendations developed by or for a public body. I conclude the Ministry has not established that disclosing this information would reveal advice or recommendations.

[83] The Ministry is not authorized to withhold this information under s. 13(1). I do not need to consider ss. 13(2) or 13(3).

Harm to third-party personal privacy – s. 22(1)

[84] Section 22(1) requires a public body to refuse to disclose personal information if its disclosure would unreasonably invade a third party's personal privacy.

[85] There is some overlap between the Ministry's application of ss. 14 and 22(1) to the records. In this section, I will only consider information that I have not already found the Ministry may withhold under s. 14.

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[79] Records at page 428.
[80] Records at pages 459-460 and 1762.
[81] Records at pages 532 and 546.
[82] Ministry's initial submission at para 71.
[83] Applicant's submission at para 42.

[86] There are four steps in the s. 22(1) analysis,[84] and I will apply each step in this analysis under the headings that follow.

Is the withheld information "personal information"?

[87] The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[85] 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.[86]

[88] 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." Whether information is "contact information" depends on the context in which it appears.[87]

[89] The information in dispute under s. 22(1) is contained in:

- documents created by the Ministry, including call logs and a memorandum, as well as the audio recording;
- documents sent from the applicant to the Ministry; and
- documents sent from the applicant's former employers to the Ministry. The applicant's former employers include the School District, which is a public body, as well as several independent schools, which are not public bodies under FIPPA.

[90] I find that most of the withheld information is personal information of the applicant or third parties. This includes these individuals' names and opinions. Even where individuals are not explicitly identified by name, I am satisfied the applicant would still be able to accurately infer their identities.

[91] However, I find there is some descriptive information, such as dates and document headings, that is not information about an identifiable individual and, therefore, is not personal information. Therefore, the Ministry is not authorized or required to refuse to disclose it under s. 22(1).

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[84] Order F15-03, 2015 BCIPC 3 at para 58.
[85] The definitions are in Schedule 1 of FIPPA.
[86] Order F05-30, 2005 CanLII 32547 (BC IPC) at para 35.
[87] Order F20-13, 2020 BCIPC 15 at para 42.

[92] There is also one instance where the Ministry has withheld an individual's signature block, including this person's name, job title, business phone number, fax number, and the name and address of their workplace.[88] I find that this information is intended to enable this individual to be contacted at their place of business or in their business capacity. This information is contact information and, therefore, not personal information. As a result, s. 22(1) does not apply to this information.

Is disclosure not an unreasonable invasion of a third party's personal privacy under s. 22(4)?

[93] The second step in the s. 22 analysis is to determine if the personal information falls into any of the categories of information listed in s. 22(4). Section 22(4) sets out circumstances where disclosure of personal information is not an unreasonable invasion of third-party personal privacy. If s. 22(4) applies to the information in dispute, then its disclosure would not be an unreasonable invasion of a third party's personal privacy.

[94] The Ministry submits that none of the situations described in section 22(4) apply.[89] The applicant does not make submissions on s. 22(4).

[95] I conclude that none of the categories under s. 22(4) apply to the information in dispute.

Is disclosure presumed to be an unreasonable invasion of a third party's personal privacy under s. 22(3)?

[96] The third step in the s. 22 analysis is to determine whether any of the presumptions listed under s. 22(3) apply to the personal information. If one or more apply, then disclosure of that personal information is presumed to be an unreasonable invasion of third-party personal privacy.

[97] The Ministry submits that ss. 22(3)(a) (medical history) and (d) (employment or educational history) are relevant to the information in dispute. The applicant does not make submissions about s. 22(3).

Medical history – 22(3)(a)

[98] Section 22(3)(a) states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[88] Records at pages 146-147
[89] Ministry's initial submission at para 132.

[99] The Ministry submits that this presumption applies to a small number of records.[90] The Ministry describes the relevant records as "handwritten notes".[91] These notes appear to document a discussion between a School District employee and a doctor retained by the School District to review the applicant's previous medical evaluations. The Ministry does not adequately explain how it concluded that the disclosure of this information, which is about the applicant's medical history and not a third party's, is presumptively an unreasonable invasion of a third party's personal privacy.

[100] Based on the evidence before me, I cannot conclude that s. 22(3)(a) applies to any of the personal information in dispute.

Employment or educational history – 22(3)(d)

[101] Section 22(3)(d) states that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

[102] The Ministry submits that s. 22(3)(d) applies to information in the records that is about individuals in their personal, rather than professional capacity.[92] This description of these records indicates this information does not relate to these individuals' work. As a result, I find this personal information does not form part of these third parties' employment history.

[103] The Ministry also submits that s. 22(3)(d) applies to the information gathered during the Ministry's investigation into the applicant because it was collected "in relation to [the third parties'] employment roles and [in] the course of an investigation".[93] I am largely unpersuaded by the Ministry's submission and evidence on this subject. The OIPC orders that the Ministry cites in support of this point – Order 01-53, Order F10-36, Order F15-12, and Order F10-11[94] – deal with workplace investigations into the actions of third parties and not solely an applicant. Here, the Ministry has withheld third parties' descriptions, comments, and opinions about the applicant's workplace behaviour collected during the School District's internal inquiry and the Ministry's investigation. Only the applicant was subject to these proceedings and, as a result, I find that most of the personal information in dispute relates only to the applicant's employment history and not the third parties' employment history.[95]

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[90] Ministry's initial submission at para 134, citing Records at pages 740-743 and 909-914, Director of Professional Conduct's affidavit at para 36; Investigator's affidavit at para 52.
[91] These records are dated June 8, 2011 and December 1, 2011, Table of Records.
[92] Ministry's initial submission at para 144.
[93] *Ibid* at paras 136.
[94] Order 01-53, 2001 CanLII 21607 (BC IPC); Order F10-36, 2010 BCIPC 54; Order F15-12, 2015 BCIPC 12; Order F10-11, 2010 BCIPC 18.
[95] See e.g., Order F20-13, 2020 BCIPC 15 at para 55; Order F22-56, 2022 BCIPC 63 at paras 56-57.

[104] However, I find the following information in dispute does relate to third parties' employment history:

- information about the outcome of a workplace investigation into a third party that was unrelated to the investigation into the applicant;[96]
- information contained in a third party's resume;[97] and
- information about employees taking leave.[98]

[105] The Ministry has also withheld the names and educational progress of students[99] and I find this information forms part of these students' educational history.[100]

[106] Disclosing each of these four types of information is presumptively an unreasonable invasion of these third parties' personal privacy under s. 22(3)(d).

Considering all relevant circumstances, including those listed in s. 22(2), would disclosure be an unreasonable invasion of a third party's personal privacy?

[107] The final step in the s. 22 analysis is to consider all relevant circumstances, including those listed in s. 22(2), before determining whether the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. It is at this step that any applicable s. 22(3) presumptions may be rebutted.

[108] The parties raise the following parts of s. 22(2):

> (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
>
> (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,
>
> […]

[96] Records at page 373.
[97] Records at pages 1293-1301; See e.g. Order F14-41, 2014 BCIPC 44 at para. 47; Order F17-02, 2017 BCIPC 2 at para. 21.
[98] Records at pages 684 and 796; See e.g., Order 00-53, 2000 BCIPC 57 (CanLII) pp. 18-19; Order F15-17, 2015 BCIPC 18 (CanLII) para. 36.
[99] Records at page 150.
[100] See Order 23-49, 2023 BCIPC 57 at para 45.

> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> […]
>
> (e) the personal information has been supplied in confidence,
>
> […]

[109] The parties also submit there are other circumstances, not listed in s. 22(2), that are relevant to the question of whether disclosure of the personal information in dispute would be an unreasonable invasion of a third party's personal privacy. The Ministry submits that disclosure would negatively impact the ability of the Ministry to carry out investigations and that this is a relevant circumstance that weighs against disclosure.[101] The applicant submits that the personal information in dispute is her own and that this weighs in favour of disclosure.[102] She also submits that she already knows the contents of many records in dispute, either because the School District already disclosed them to her or because she provided them to the Ministry, and that this factor also favours disclosure.[103]

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

[110] 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.[104]

[111] The Ministry submits that disclosure of the information in dispute would not subject the Ministry to public scrutiny.[105] The applicant does not explicitly make a submission about s. 22(2)(a). However, I understand, based on the applicant's allegations of wrongdoing and arguments that the public interest requires disclosure of the information in dispute, that the applicant believes disclosure of the information would subject the School District, Ministry, or Teachers' Commissioner's activities to public scrutiny.

[112] I recognize that the applicant has several concerns about the way the School District, Ministry, and Teachers' Commissioner acted throughout the course of the Ministry's investigation. However, the applicant has not persuaded me that there is public interest concerning her specific investigation nor adequately explained how disclosing the personal information in dispute would

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[101] Ministry's initial submission at para 153.
[102] Applicant's submission at paras 54 and 55.
[103] *Ibid* at paras 13, 21, and 27-30.
[104] Order F05-18, 2005 CanLII 24734 at para. 49.
[105] Ministry's initial submission at paras 147-148.

foster accountability. In the circumstances, I am not persuaded that revealing the personal information of third parties, some of which are not employees of public bodies, is desirable for subjecting any public body to public scrutiny.

[113] As a result, I conclude s. 22(2)(a) is not a circumstance that weighs in favour of disclosing the personal information in dispute.

Fair determination of the applicant's rights – s. 22(2)(c)

[114] Section 22(2)(c) requires a public body to consider whether the personal information in dispute is relevant to a fair determination of the applicant's rights. If yes, this is a circumstance that may weigh in favour of disclosure.

[115] Previous OIPC orders have said that all four parts of the following test must be met in order for s. 22(2)(c) to apply:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;

2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;

3. The personal information sought by the applicant must have some bearing on, or significance for, the determination of the right in question; and

4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[106]

[116] The applicant submits that the information in dispute has some bearing and significance on her BCHRT proceeding and that the personal information in these records is necessary to prepare for the proceedings and ensure a fair hearing.[107]

[117] The Ministry did not make submissions on s. 22(2)(c).

[118] For the reasons that follow, I conclude that the applicant has met all four parts of the test regarding the personal information in the communications and documents exchanged by the Ministry and the School District.

[119] First, the applicant has filed a complaint with the BCHRT against the School District and one of its employees, alleging discrimination and retaliation.

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[106] Order 01-07, 2001 CanLII 21561 (BCIPC) at para 31; Order F15-11, 2015 BCIPC 11 (CanLII) at para 24.
[107] Applicant's submission at paras 63-66.

Filing a complaint with the BCHRT is a statutory right under the *Human Rights Code.*[108]

[120] Second, there is nothing in the parties' submissions or evidence that leads me to believe that the applicant's complaint to the BCHRT has been concluded or resolved. As a result, I find that the applicant's complaint proceedings have not been completed.

[121] Third, the applicant provided a BCHRT conference call summary prepared by a BCHRT Member, which states, in part, that communications between the School District and the Ministry from 2016-2018 are arguably relevant to the applicant's complaint.[109] I can see that many of the records in dispute are communication between the School District and the Ministry and documents attached to those communications. I am satisfied that the personal information in these records has some bearing on the determination of the applicant's complaint.

[122] Fourth, the applicant submits that the School District failed to provide all the communications between the Ministry and the School District during the BCHRT disclosure process. She specifically states she did not receive the records at pages 468-1195 of the records package.[110] To support this submission, she provides a letter from the School District's council to the BCHRT stating that the School District's search for communications between 2016 and 2018 produced only one document.[111] Based on this context, I am satisfied that the applicant needs the personal information in these records to prepare for the proceeding or to ensure a fair hearing.

[123] Based on the above, I find that s. 22(2)(c) weighs in favour of disclosing the personal information in the records exchanged between the School District and the Ministry that have not previously been disclosed to the applicant.

[124] The applicant has not, however, established that s. 22(2)(c) weighs in favour of the Ministry disclosing information that the applicant has already received from the School District.[112] Given that the applicant already has this information, I cannot conclude that she needs the Ministry to disclose this information in order to prepare for her proceeding or ensure a fair hearing.

[125] The applicant has also not established that s. 22(2)(c) weighs in favour of disclosing personal information related to the Ministry's communications with

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[108] RSBC 1996, c. 210
[109] Applicant's submission at para 21 and Exhibit 2.
[110] *Ibid* at paras 22-24.
[111] *Ibid* at Exhibit 3.
[112] Applicant's submission at para 13. The applicant submits the School District sent her pages 263-371 of the records package. The information on these pages is repeated on pages 5-111 and 1082-1188 of the records package.

independent school employees. The applicant has not persuaded me that this personal information, which is not related to the applicant's termination from the School District, has some bearing on, or significance for, the determination of her human rights complaint.

Supplied in confidence – s. 22(2)(f)

[126] Section 22(2)(f) requires a public body to consider whether the personal information was supplied in confidence. Where personal information has been supplied in confidence, it is more likely that disclosure of this information would be an unreasonable invasion of a third party's personal privacy. For s. 22(2)(f) to apply, there must be evidence that a third party supplied personal information to another person and, that, when they did so, the third party had an objectively reasonable expectation of confidentiality.[113]

[127] I am satisfied that most of the information in dispute was supplied to the Ministry during its investigation into the applicant. However, I cannot conclude, based on the Ministry's evidence, that the information provided to the Ministry was supplied with an objectively reasonable expectation of confidentiality.

[128] The Ministry's evidence about confidentiality says that investigations under the *Teachers Act* are confidential in nature and that the Ministry treats all correspondence, interviews and materials used as evidence as confidential.[114]

[129] However, the Ministry's evidence also says that information supplied to the Ministry during an investigation may be disclosed to the person being investigated at the discretion of the Teachers' Commissioner and when doing so will advance the investigation.[115] The Ministry's evidence also states that some witnesses refuse to participate because they are concerned that the information they provide will be shared with others.[116]

[130] The Ministry's evidence is largely about how it treats information it receives rather than the expectations of the individuals that supplied the information. For example, the Ministry does not submit that it provided the applicant's former employers with assurances of confidentiality and such assurances do not appear in the records package.

[131] I find that the Ministry has not establish that the third parties supplying it with information, in the context of its investigation, did so with an objectively reasonable expectation of confidentiality.

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[113] Order F11-05, 2011 BCIPC 5 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).
[114] Director of Professional Conduct's affidavit at para 38.
[115] *Ibid* at para 39.
[116] *Ibid* at para 40.

[132] However, some of the records provided to the Ministry from the School District are interview notes and witness statements created as part of the School District's inquiry into the applicant's workplace performance. Based on what I can see in these records, the interviewees were provided with assurances of confidentiality during the interview process.

[133] The applicant submits that the information in these records was not supplied in confidence because the School District's disciplinary proceedings can be subject to grievances, arbitration, court review, and BCHRT proceedings, which may require disclosure of this information.[117] I am not persuaded by the applicant's argument on this point. Even if this information was later disclosed to the Ministry or applicant, it is clear to me that it was originally supplied by the interviewees to the School District with the reasonable expectation of confidence.

[134] I find that School District's interviewees had an objectively reasonable expectation of confidentiality when they supplied information to the School District and that this factor weighs in favour of withholding their personal information.

Impact on future Ministry investigations

[135] The Ministry submits that disclosure would make future witnesses less willing to participate in its investigations, thereby impacting the Ministry's ability to carry out effective investigations and undermining public trust and confidence in the Ministry and the education system.[118]

[136] This type of "chilling effect" argument has been considered and rejected in numerous OIPC orders.[119] I am similarly not persuaded by the argument in this case as the Ministry has provided no further explanation or evidence supporting its speculative assertion.

[137] Moreover, the potential future impact of disclosure is not a relevant circumstance under the s. 22(1) analysis. The question I must answer is whether disclosure of the specific information in dispute would be an unreasonable invasion of a third party's personal privacy. The potential impact on future participation in investigations does not relate to the privacy impacts for the individuals whose personal information is contained in the records at issue.

Applicant's personal information

[138] One of the purposes of FIPPA is to give individuals a right of access to personal information about themselves. Previous orders have considered, as a

[117] Applicant's submission at para 59.
[118] Ministry's initial submission at para 153.
[119] For example, Order 01-26, 2001 CanLII 21580 (BC IPC) at paras 42-44; Order 03-34, 2003 CanLII 49213 (BC IPC) at para 42; Order F23-02, 2023 BCIPC 3 at paras 53-56.

relevant circumstance under s. 22(2), whether the information in dispute is the applicant's personal information.[120] In general, an applicant is entitled to their own personal information.[121]

[139] I have considered that some of the personal information at issue is the applicant's personal information, albeit intertwined with third parties' personal information. I conclude that the fact that some of the information in dispute is the applicant's personal information is a factor that weighs in favour of disclosure of that information.[122]

Applicant's knowledge

[140] Previous OIPC orders have found that the applicant's knowledge of the personal information in dispute may weigh in favour of disclosure.[123] As with all factors under s. 22(1), an applicant's knowledge of the information in dispute is only one consideration and is not determinative of whether disclosure of that personal information would be an unreasonable invasion of a third party's personal privacy.

[141] As explained at paragraphs 4-5 of this order, the Ministry mistakenly gave the applicant access to an unredacted copy of the records, thereby disclosing most of the information in dispute under s. 22(1). Since this disclosure of personal information was made in error, I do not consider the knowledge the applicant gained from this mistaken disclosure to be a relevant circumstance weighing in favour of disclosure under s. 22(2).

[142] However, the applicant's knowledge of the personal information in dispute, gained prior to the Ministry's mistaken disclosure of the unredacted copy of the records, is a relevant circumstance under s. 22(2).

[143] The Ministry has withheld some information, including a third party's resume and a third party's comments to a doctor retained by the School District, that the applicant herself supplied to the Ministry. I am satisfied the applicant knows the contents of these records.[124]

[144] The applicant submits that she knows much of the information in dispute because she has already received many of the records from the School District.[125] I can see from the records that the School District sent the applicant

[120] Order F18-30, 2018 BCIPC 33 at para 41; Order F20-13, 2020 BCIPC 15 at para 73.
[121] Order F14-47, 2014 BCIPC 51 at para 36, citing Order F10-10, 2010 BCIPC 17 at para 37 and Order F06-11, 2006 CanLII 25571 (BC IPC) at para 77.
[122] Order F23-56, 2023 BCIPC 65 (CanLII) at para 90.
[123] Order F18-48, 2018 BCIPC 51 at para. 27; Order F20-22, 2020 BCIPC 26 at para. 51.
[124] Records at pages 1293-1301, 1412, 1453-1455, and 1707-1709. This information is duplicated on pages 196-198, 225, 602, 610, 836-857, and 923-949.
[125] Applicant's submission at para 13.

many of the records in dispute and I accept that she has knowledge of the information in these records.[126]

[145] As a specific example, the records indicate the applicant requested and received information from the School District as a result of an access to information request in 2011.[127] In response to this request, the School District withheld some of the applicant's personal information that was provided by third parties in confidence. The School District created a summary of the applicant's withheld personal information and provided it to the applicant in compliance with s. 22(5) of FIPPA.[128] The Ministry has entirely withheld this summary from the applicant. Not only does it appear that the applicant has already received this information in response to her 2011 access request, but this summary, by design, contains only the applicant's personal information and not the personal information of third parties.

[146] There are also instances where the Ministry has withheld the names of third parties in the records themselves, but has disclosed this information to the applicant in its descriptions of the records.

[147] In conclusion, I find that the applicant's knowledge of some of the information in dispute weighs in favour of disclosure of that information.

Conclusions on s. 22(1)

[148] I find that most of the information withheld under s. 22(1) qualifies as the personal information of multiple third parties and the applicant. I also find that s. 22(4) does not apply to the information in dispute.

[149] I find s. 22(3)(d) applies to a small amount of personal information in dispute as it relates to third parties' employment or educational histories. As a result, its disclosure is presumed to be an unreasonable invasion of these third parties' personal privacy under s. 22(3)(d).

[150] I find that the applicant has successfully rebutted the s. 22(3)(d) presumption that applies to the personal information in the third party's resume. The third party's resume was supplied to the Ministry by the applicant. It was attached to a letter authored by the third party, in which the third party says he understands that the letter may be used in legal or judicial proceedings. I find the applicant's knowledge of this information and the third party's written acknowledgement that it may be shared as part of adversarial proceedings are

[126] Records at pages 263-371. This information is duplicated on pages 5-111 and 1079-1171.
[127] Records at pages 820-821, 829, 862-863, 890-892.
[128] Section 22(5) requires a public body that is withholding an applicant's personal information, which was supplied in confidence, to provide the applicant with a summary of their personal information, subject to exceptions.

sufficient to rebut the presumption that disclosure of this personal information would be an unreasonable invasion of this third party's personal privacy.

[151] However, I find the applicant has not successfully rebutted the s. 22(3)(d) presumption that applies to the students' personal information or the personal information about the outcome of the workplace conflict or about employees taking leave. None of this is the applicant's personal information nor does it appear the applicant has knowledge of this information. Further, I do not see how this personal information has any bearing on the applicant's rights in relation to her BCHRT complaints. Most of this information is contained in communications between the Ministry and the applicant's other former employers, not the School District. The information that is contained in communications between the Ministry and the School District is about employees' taking leave and is not about the applicant. I find the applicant has not successfully rebutted the presumption that disclosure of this personal information would be an unreasonable invasion of these third parties' personal privacy.

[152] Turning to the rest of the information in dispute under s. 22(1), I first consider the information exchanged between the Ministry and the School District before considering the information exchanged between the Ministry and the applicant's other former employers.

[153] I find the applicant has met her burden to prove that disclosure of the personal information in the records exchanged by the Ministry and the School District would not be an unreasonable invasion of a third party's personal privacy. Much of the personal information in these records: is relevant to a fair determination of the applicant's rights; is the applicant's personal information; and, in some instances, is known to the applicant. Some of this information is contained in interview notes and witness statements taken during the School District's inquiry into the applicant's workplace performance. While I found this information was initially supplied to the School District in confidence, I am satisfied that the other relevant circumstances raised by the applicant are sufficient to outweigh this consideration.

[154] However, I find the applicant has not met her burden regarding the personal information exchanged between the Ministry and independent school employees. The applicant has not established that disclosing this personal information is desirable for subjecting a public body to public scrutiny or relevant to a fair determination of her rights. There is nothing before me that indicates she has knowledge of this personal information. While the Ministry has not established that this personal information was supplied in confidence, the ultimate burden of proof under s. 22(1) lies with the applicant and not the Ministry. Overall, the applicant has not satisfied me that disclosing the personal information in these records would not unreasonably invade the personal privacy

of the independent school employees and students, whose personal information is at issue.

[155] I can see from the records that, with two exceptions, the information sent between the Ministry and the independent school employees is not the applicant's personal information. The two records that contain the applicant's personal information are an email sent from an independent school employee to the Ministry and the audio recording. I have considered whether these records can reasonably be severed to give the applicant access to the remainder of the record that contains her personal information. I find that it is not possible to do so without revealing third party personal information.

Section 22(5) – summary of personal information supplied in confidence

[156] The applicant submits that "[a]nytime the Ministry withholds information under s. 22, the Ministry 'must give the applicant a summary of the information'".[129] I understand the applicant to be referencing s. 22(5) of FIPPA, which says, in part,

> On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information

[157] I found above that the information the Ministry must withhold under s. 22(1) was not supplied to the Ministry in confidence. As a result, section 22(5) does not apply to this information and the Ministry is not required to give the applicant a summary of her withheld personal information.

CONCLUSION

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

1. Section 61(2)(a) of the ATA and s. 3(1)(b) of FIPPA do not apply to pages 1258 and 1755 of the records package. The Ministry is required to give the applicant access to these records.

2. Subject to item 3 below, I confirm, in part, the Ministry's decision to refuse access to the information in dispute under s. 14.

3. The Ministry is required to give the applicant access to the information I have described in this order as the "MAG employee information", which appears on pages 1768, 1769, and 1770 of the records package.

[129] Applicant's submission at para 52.

4. The Ministry is not authorized to refuse access to the information it withheld under s. 13(1) on pages 532 and 546 of the records package and is required to give the applicant access to this information.

5. Subject to item 6 below, the Ministry is required to refuse access to the information in dispute under s. 22(1).

6. The Ministry is required to give the applicant access to all the information on pages 1-111, 147, 168, 170-193, 222-227, 265-371, 378, 406, 468-485, 489-494, 500-503, 506, 508-509, 516, 523-527, 530, 534-535, 545, 557, 564-565, 591, 597, 600-604, 608-612, 627-649, 740-743, 836-857, 877-881, 888-892, 909-914, 923-949, 1045, 1069, 1082-1188, 1293-1301, 1409-1414, 1451-1478, 1479-1483, 1504-1509, and 1705-1725, and the contact information at the bottom of page 146 of the records package.

7. The Ministry must concurrently provide the OIPC registrar of inquiries and the applicant with a copy of its cover letter and the records it provides access to in compliance with items 1, 3, 4, and 6 above.

[159] Pursuant to s. 59(1) of FIPPA, the Ministry is required to comply with this order by August 20, 2024.

July 8, 2024

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F21-85537