Order F24-78

MINISTRY OF FORESTS

Emily Kraft
Adjudicator

August 27, 2024

CanLII Cite: 2024 BCIPC 89
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 89

Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Forests (Ministry) for records related to the Ministry's inspection of the applicant's property. The Ministry responded to the applicant and withheld some records and information under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), and 22(1) (unreasonable invasion of third-party personal privacy). The adjudicator determined that the Ministry is authorized to refuse to disclose all of the information and records it withheld under s. 14 and required to refuse to disclose some of the information it withheld under s. 22(1). The adjudicator ordered the Ministry to disclose the information it was not required to withhold under s. 22(1). It was not necessary to consider s. 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 14, 22(1), 22(2), 22(2)(a), 22(2)(f), 22(3)(b), 22(3)(i), and 22(4)(e).

INTRODUCTION

[1] The applicant requested that the Ministry of Forests (Ministry) provide him with access to records related to the Ministry's inspection of his property in Abbotsford, BC.

[2] The Ministry provided the applicant with the responsive records but withheld some information under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege), 15 (harm to law enforcement), and 22(1) (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. During mediation by the OIPC, the Ministry reconsidered its severing decision and released additional

information to the applicant. Mediation did not resolve the remaining issues in dispute, and they proceeded to inquiry.

[4] During the inquiry, the applicant stated that he does not dispute the Ministry's application of s. 15(1) to the information withheld under that section. As a result, s. 15(1) is no longer an issue in this inquiry. The applicant also stated that he does not dispute the Ministry's application of s. 22(1) to the information on pages 57 and 58 of the records in dispute.[1] As a result, I conclude that information is no longer in dispute.

PRELIMINARY MATTER

[5] In his response submission, the applicant says that he believes there is video footage that is responsive to his access request and that should be released to him.[2]

[6] There are no video recordings in dispute in this inquiry. The records package before me does not contain any video recordings, and the investigator's fact report, which identifies the types of records in dispute and was provided to both parties at the beginning of this inquiry, does not mention any video recordings.

[7] Although not directly addressed by the parties, I find the applicant's assertion that there are additional responsive records raises the issue of whether the Ministry conducted an adequate search for records under s. 6(1) of FIPPA.

[8] Section 6(1) was not listed as an issue in the investigator's fact report or notice of inquiry. Past OIPC orders have said that parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so.[3] The notice of inquiry, which was provided to both parties at the start of this inquiry, also states that parties may not add new issues into the inquiry without the OIPC's prior consent.[4]

[9] The applicant did not request permission from the OIPC to add this issue or explain why he did not raise this issue at an earlier stage. Therefore, I decline to add the issue of whether the Ministry conducted an adequate search for records.

ISSUES

[10] The issues I must decide in this inquiry are as follows:

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[1] This was confirmed by the applicant in his response submission at para 9.
[2] Applicant's response submission at p 7.
[3] Order F16-34, 2016 BCIPC 38 at para 9.
[4] Notice of Written Inquiry, dated March 22, 2024.

1. Is the Ministry authorized to refuse to disclose the information in dispute under ss. 13(1) and 14?
2. Is the Ministry required to refuse to disclose the information in dispute under s. 22(1)?

[11] Under s. 57(1), the Ministry has the burden of proving that it is authorized to refuse to disclose the information in dispute under ss. 13(1) and 14. Under s. 57(2), the applicant has the burden of proving that disclosing any personal information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).[5] However, the Ministry has the initial burden of proving the information it is withholding under s. 22(1) is personal information.[6]

DISCUSSION

Background

[12] The applicant and his family own a property in Abbotsford (Property). The Property experiences recurrent flooding, which the applicant says has significantly harmed his family and his livelihood since their purchase of the Property in 2015. The applicant says that he has tried to find solutions to the flooding, but that the Ministry has obstructed all potential solutions.

[13] In 2019, the applicant placed sandbags in a watercourse that ran through the Property in order to alleviate the flooding.[7] City of Abbotsford employees informed the Ministry about the sandbags, and in response, the Ministry sent a Surface Water Protection Officer (Protection Officer) to conduct an inspection of the Property. The Protection Officer observed that sandbags had been placed in the watercourse, which he determined was a "stream" under the *Water Sustainability Act*[8] (WSA). He determined that the placement of the sandbags in the stream was a contravention of the WSA.

[14] The Protection Officer reported his findings to the Manager of Streams and Floods (Manager), and in December 2019, the Manager issued an order under s. 93 of the WSA which required the owners of the Property to remove the sandbags from the stream (2019 Order).

[15] The owners of the Property appealed the 2019 Order to the Environmental Appeal Board (EAB) (First Appeal or First EAB Appeal).

[16] While gathering evidence for the First Appeal, the Manager discovered a designation letter that limited her authority to make decisions under s. 93 of the

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[5] Schedule 1 of FIPPA says that a "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] Order 03-41, 2003 CanLII 49220 (BCIPC) at para 10.
[7] Records at p 73.
[8] SBC 2014, c 15.

WSA. As a result, the Manager rescinded the 2019 Order in February 2020. Upon the rescindment, the issues in the First Appeal became moot. However, the parties still requested that the EAB provide a decision on whether the stream on the Property was in fact a "steam" as defined in the WSA. In May 2020, the EAB issued a decision finding that the stream was a "stream" as defined in the WSA.

[17] At some point between February and May 2020, the Manager received a new designation letter that gave her authority to make decisions under s. 93 of the WSA. In late May 2020, the Manager issued a new order under s. 93 of the WSA requiring the owners of the Property to remove the sandbags from the stream (2020 Order).

[18] In June 2020, the owners of the Property appealed the 2020 Order (Second Appeal or Second EAB Appeal).

[19] In September 2020, the owners of the Property voluntarily complied with the 2020 Order by removing the sandbags from the stream. Consequently, the Manager rescinded the 2020 Order.

[20] In November 2020, a Natural Resource Officer from the Ministry inspected the Property to confirm whether any unauthorized materials remained in or around the stream. The Natural Resource Officer produced an inspection report that confirmed that the unauthorized materials had been removed.

[21] On March 31, 2021, the EAB dismissed the Second Appeal.

[22] The applicant requested access to all records concerning himself and the Property, including all records related to the Natural Resource Officer's inspection of the Property in November 2020. The applicant says that, according to a conversation he had with the Natural Resource Officer, the Natural Resource Officer provided the Manager with details about the flooding issues at the Property and advised her to "revisit [the applicant's] case" due to the seriousness of the issues.[9] The applicant says he is seeking access to the withheld information so that he can better understand those details and why the Ministry has been unresponsive to the flooding issues on the Property.[10] His response submission also says that the purpose of his access request is to understand the process and tools used to issue the 2019 and 2020 Orders.[11]

Records

[9] Applicant's response submission at p 7.
[10] Applicant's response submission at pp 6 and 7.
[11] Affidavit of DB at para 3.

[23] The responsive records total 810 pages, most of which have been disclosed in full or in part to the applicant. Based on my review of the records and the Ministry's evidence, I find that the records in dispute are:

- emails, some of which include attachments;
- drafts of documents that were prepared for submission in the First and Second EAB Appeals;
- inspection and continuation reports prepared by the Natural Resource Officer; and
- handwritten notes taken by the Natural Resource Officer.

[24] The applicant's submission focuses on the history of issues he has had with the Ministry in relation to the flooding on the Property. He does not make specific submissions about the application of ss. 13(1), 14, or 22(1) to the information in dispute. However, it is clear that he is seeking full disclosure of the information in dispute. I will outline the Ministry's submissions below.

Section 14 – solicitor-client privilege

[25] The Ministry withheld most of the records in dispute under s. 14 of FIPPA. Section 14 permits a public body to refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice privilege and litigation privilege.[12] The Ministry is only claiming legal advice privilege.

[26] Legal advice privilege applies to applies to communications that:

1. are between solicitor and client (or their agent);
2. entail the seeking or giving of legal advice; and
3. are intended by the solicitor and client to be confidential.[13]

[27] Courts have found that legal advice privilege extends beyond the actual requesting or giving of legal advice to the "continuum of communications" between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.[14]

[28] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For instance, legal advice privilege applies to internal client communications that relate to the legal advice received and discuss its implications.[15]

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[12] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26.
[13] *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at p 837.
[14] *Huang v Silvercorp Metals Inc*., 2017 BCSC 795 at para 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority,* 2011 BCSC 88 at para 42.
[15] *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at para 24.

[29] Further, legal advice privilege applies to communications involving a lawyer's support staff and communications dealing with administrative matters if the communications were made with a view to obtaining legal advice.[16]

Evidentiary basis for s. 14

[30] The Ministry did not provide me with a copy of the records it withheld under s. 14. Instead, it provided affidavits sworn by two lawyers from the Ministry of Attorney General Legal Services Branch (LSB) whom I will refer to as Lawyer 1[17] and Lawyer 2[18] (together, the Lawyers). Each of the Lawyers say that they have reviewed the records that are the subject of their respective affidavits. Lawyer 1's affidavit includes a table of records that briefly describes each record, the date and page numbers of each record, and the names of the people involved in the communication.

[31] The Commissioner has the power under s. 44(1) of FIPPA to order production of records for which solicitor-client privilege is claimed. However, given the importance of solicitor-client privilege to the operation of the legal system, the Commissioner will only do so when necessary to fairly adjudicate the issues in an inquiry.[19] In this case, I have decided that the Lawyers' affidavit evidence is sufficient for me to decide if s. 14 applies. As a result, I conclude it is not necessary for me to order production of the records. I take this approach recognizing that my task "is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege."[20]

Analysis and findings

[32] Lawyer 1 deposes that in January 2020, LSB was engaged to provide legal services to the Ministry with respect to the First EAB Appeal. Lawyer 1 says that he assumed conduct of the file and provided ongoing legal services to the Ministry.[21] He says that, in preparing for and during legal proceedings related to the First EAB Appeal, he frequently communicated with Ministry employees who were the instructing client representatives.[22]

[33] Lawyer 2 says that in June 2020, she and Lawyer 1 assumed conduct of the Second EAB Appeal in respect of which they provided legal services to the Ministry.[23] She says that she provided legal advice and legal services to the

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[16] *Descôteaux et al v Mierzwinski,* 1982 CanLII 22 (SCC) at p 893 [*Descôteaux*].
[17] Deputy Supervisor, Litigation Group, LSB.
[18] Legal Counsel, Justice, Health and Revenue Group, LSB (previously Legal Counsel for Litigation Group).
[19] Order F22-34, 2022 BCIPC 38 at para 85.
[20] *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 at para 86.
[21] Affidavit of Lawyer 1 at paras 7-8.
[22] Affidavit of Lawyer 1 at para 9.
[23] Affidavit of Lawyer 2 at para 8.

Ministry in relation to the Second Appeal between June 2020 and March 2021.[24] Lawyer 2 says that she frequently communicated with Ministry employees who were the instructing client representatives.[25]

[34] The Lawyers' evidence, which I accept, is that the records in dispute under s. 14 are as follows:

- Email communications dated from March 2, 2020, to March 31, 2021, between the Lawyers, LSB paralegals, and Ministry employees (LSB-Ministry Emails).
- Attachments to the LSB-Ministry Emails (Attachments).
- Email communications dated May 29, 2020, and June 10, 2020, between Ministry employees (Internal Emails).
- Draft affidavits of two Ministry employees that were prepared for the First Appeal (Draft Affidavits).
- A draft written argument that was prepared for submission for the First Appeal (Draft Argument).[26]

[35] I will consider the application of legal advice privilege to each category of record below.

LSB-Ministry Emails

[36] The Lawyers depose that the LSB-Ministry Emails can be categorized as follows:

- single emails between Lawyer 1 or Lawyer 2 and Ministry employees in which legal advice is expressly sought, formulated or given;
- email chains ending in emails between Lawyer 1 or Lawyer 2 and Ministry employees in which legal advice is expressly sought, formulated or given;
- an email chain ending in an email between Lawyer 1 and a Ministry employee in which the Ministry employee confirms her instructions to counsel;
- an email from an LSB paralegal to Ministry employees and copied to Lawyer 1 for the purpose of keeping them apprised of information to facilitate the provision of legal advice; and

[24] Affidavit of Lawyer 2 at paras 8 and 11.
[25] Affidavit of Lawyer 2 at para 9.
[26] Affidavit of Lawyer 1 at paras 12, 14 and Exhibit B; Affidavit of Lawyer 2 at para 12.

- an email chain ending in an email from a Ministry employee to Lawyer 1 and an LSB paralegal to keep them apprised of information to facilitate the provision of legal advice

[37] The Lawyers depose that the LSB-Ministry Emails would reveal the substance and subject matter of their legal advice or would allow for accurate inferences to be made about the subject matter of their legal advice.[27] They depose that their legal advice was provided in confidence and that all of their emails contained a standard confidentiality notice.[28] The table of records attached to Lawyer 1's affidavit indicates that the only persons included in the LSB-Ministry Emails were Ministry employees, LSB lawyers, and LSB paralegals.

[38] For the reasons that follow, I find that legal advice privilege applies to the LSB-Ministry Emails.

[39] First, I accept the Lawyers' evidence that they were engaged by the Ministry to provide, and did provide, legal advice in relation to the First and Second Appeals. Therefore, I find that there was a solicitor-client relationship between the Lawyers and the Ministry at all relevant times.

[40] Second, based on the Lawyers' evidence, I am satisfied that all of the LSB-Ministry Emails involve the actual requesting or giving of legal advice or fall within the continuum of communications between lawyer and client.

[41] Finally, I accept the Lawyers' evidence that the LSB-Ministry Emails were intended to be confidential. Based on the table of records, I am satisfied that no one outside of the solicitor-client relationship was included in these communications.

[42] I conclude that the LSB-Ministry Emails were confidential communications between solicitor and client for the purpose of seeking or giving legal advice, so legal advice privilege applies.

[43] I note that one of the LSB-Ministry Emails is from an LSB paralegal to Ministry employees, with Lawyer 1 copied. While this email is not directly between solicitor and client, the courts have held that legal advice privilege also applies to communications between a lawyer's employees and the lawyer's client if they were made for the purpose of obtaining legal advice.[29] Lawyer 1's evidence is that this communication was made in order to facilitate the provision of legal advice. Therefore, I find that this email is also protected by legal advice privilege.

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[27] Affidavit of Lawyer 1 at para 18; Affidavit of Lawyer 2 at para 15.
[28] Affidavit of Lawyer 1 at paras 17, 28, and 30; Affidavit of Lawyer 2 at paras 14, and 17-18.
[29] *Descôteaux, supra* note 15 at p 893.

Attachments

[44] The Lawyers depose that the Attachments to the LSB-Ministry Emails were either required to inform their legal advice, the subject of their legal advice, or fall within the continuum of communications related to their advice. They say that disclosing the Attachments would allow for accurate inferences to be made about the substance or subject matter of their legal advice.[30] They depose that they cannot be more specific about the nature of the withheld records without revealing or allowing accurate inferences to be made about the legal advice sought and given.[31]

[45] I accept the Lawyers' evidence and I find that legal advice privilege applies to the Attachments since they are directly related to the legal advice sought or provided and would allow accurate inferences to be made about the subject or substance of that advice.

Internal Emails

[46] Lawyer 1 says the Internal Emails were sent and received exclusively by Ministry employees and that they summarize legal advice that he provided.[32] He deposes that the Internal Emails would therefore reveal or allow an accurate inference to be made about the substance and subject matter of his legal advice.[33]

[47] I accept Lawyer 1's evidence and I find that legal advice privilege applies to the Internal Emails.

Draft Affidavits and Draft Argument

[48] Lawyer 1 deposes that the Draft Affidavits and Draft Argument were prepared in confidence in connection with the province's response to the First EAB Appeal. He explains that the Draft Affidavits are the result of a drafting process in which he and two Ministry employees took turns reviewing, editing, and commenting on the Draft Affidavits and responding to each other's comments. He says that the Draft Argument is mostly his own work product but also includes comments from a Ministry employee. He deposes that, if disclosed, the Draft Affidavits and Draft Argument would allow for accurate inferences to be made about the legal advice he provided and how that advice changed over time, from version to version, especially when compared with the filed versions of these documents which are disclosed in the records.[34]

[49] I accept Lawyer 1's evidence and I am satisfied that disclosing the Draft Affidavits would reveal privileged communications between Lawyer 1 and

[30] Affidavit of Lawyer 1 at paras 15 and 19; Affidavit of Lawyer 2 at paras 13 and 16.
[31] Affidavit of Lawyer 1 at para 31; Affidavit of Lawyer 2 at para 19.
[32] Affidavit of Lawyer 1 at para 20.
[33] Affidavit of Lawyer 1 at para 22.
[34] Affidavit of Lawyer 1 at paras 23-27.

Ministry employees that occurred during the drafting process.[35] I am also satisfied that the Draft Argument was authored by Lawyer 1 as part of his provision of legal advice and that it reflects his advice.[36] Therefore, I conclude that legal advice privilege applies to the Draft Affidavits and the Draft Argument.

Section 13(1) – advice or recommendations

[50] The Ministry applied s. 13(1) to some of the information it withheld under s. 14. Given my findings with respect to s. 14, it is not necessary to consider whether s. 13(1) also applies.

Section 22(1) – unreasonable invasion of third-party personal privacy

[51] Section 22(1) requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[52] There is some overlap between the Ministry's application of ss. 14 and 22(1) to the records in dispute. Given my findings with respect to s. 14, I will only consider the application of s. 22(1) to the remaining information in dispute.

[53] The analytical approach to s. 22(1) is well established.[37] I will apply that approach below.

Personal information

[54] Section 22(1) only applies to personal information, so the first step in the s. 22(1) analysis is to determine whether the information in dispute is personal information.

[55] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[38] Information is about an identifiable individual when it is reasonably capable of identifying the individual, either alone or when combined with other available sources of information.[39]

[56] Contact information is defined in FIPPA as information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.[40]

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[35] For a similar finding, see *R v Martin et al*, 2003 BCSC 1044 at para 18 and *R v Chan* 2002 ABQB 753 at para 41.
[36] For a similar finding, see *Canadian Flight Academy Ltd. v Oshawa* (City), 2023 ONSC 1906 at para 131 and *Wang v British Columbia Medical Association*, 2011 BCSC 1658 at para 81.
[37] See for example Order F15-03, 2015 BCIPC 3 at para 58.
[38] Schedule 1 of FIPPA.
[39] Order F19-42, 2019 BCIPC 47 at para 15.
[40] Schedule 1 of FIPPA.

[57] The information in dispute under s. 22(1) is as follows:

- The name, phone number, address, and other identifying information about an individual (Interviewee) who was interviewed by the Natural Resource Officer during his inspection of the Property (Interviewee Information).[41]
- An opinion expressed by a Ministry employee (Employee) about the applicant (Employee Opinion).[42]
- The ethnicity of two unnamed individuals as well as the name and ethnicity of another individual that is contained on a page of handwritten notes taken by the Natural Resource Officer.[43] This information appears below the Natural Resource Officer's note entries about the Property and after a note entry that states the Natural Resource Officer is leaving the Property to attend another location (Harrison Mills). Therefore, it appears to me that these notes relate to another Ministry matter (Harrison Mills Matter). The Ministry did not make specific submissions about this information.

[58] I am satisfied that all the Interviewee Information is capable of identifying the Interviewee. None of this information appears in the records to enable the Interviewee to be contacted at a place of business. Accordingly, I find all the Interviewee Information is personal information under s. 22(1).

[59] I am also satisfied that the Employee Opinion is the personal information of the Employee, whose name is disclosed in the records. It is also simultaneously the applicant's personal information, since it is about the applicant.

[60] I also find that the name and ethnicity of one individual that appears in the Natural Resource Officer's notes is personal information. However, I am not satisfied that the information that reveals the ethnicity of the two unnamed individuals is personal information because I do not see how those individuals are identifiable. I find s. 22(1) does not apply to that information and I will not consider it any further.

[61] I will now determine whether disclosure of the personal information in dispute would be an unreasonable invasion of third-party personal privacy.

Not an unreasonable invasion of privacy – s. 22(4)

[62] Having found that most of the information in dispute qualifies as personal information, the next step is to consider s. 22(4), which sets out various

[41] Records at pp 73-74, 78-79, 143, 146, 715, and 719-720.
[42] Records at p 593.
[43] Records at p 149.

circumstances in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[63] The Ministry says that none of the provisions in s. 22(4) apply to the information in dispute. The Ministry makes specific submissions about why s. 22(4)(e) does not apply to the Employee Opinion.

[64] Section 22(4)(e) provides that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. Past orders have found that s. 22(4)(e) applies to information that relates to a public body employee's job duties in the normal course of work-related activities, including objective, factual information about what the individual did or said in the course of discharging their job duties.[44]

[65] The Ministry says that the Employee Opinion was the Employee's personal, subjective assessment of the applicant and does not concern objective facts about the Employee's positions, functions or remuneration as an employee of a public body.

[66] I find that the Employee Opinion is not about the Employee's position, functions or remuneration as an officer, employee or member of the Ministry. Rather, it is an unsolicited remark about the applicant that the Employee expressed in an email to his colleague. I do not think it can be said that the Employee was carrying out his normal, routine duties when making this remark. Accordingly, I find that s. 22(4)(e) does not apply in this case.

[67] I have considered the other factors listed in s. 22(4) and am satisfied that none apply.

Presumed unreasonable invasion of privacy – s. 22(3)

[68] The third step in the s. 22(1) analysis is to consider whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of personal privacy.

[69] The Ministry does not submit that any s. 22(3) provisions apply.

[70] Based on my review of the records, I find that ss. 22(3)(b) and 22(3)(i) are relevant in this case.

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[44] Order 01-53, 2001 CanLII 21607 (BCIPC) at para 40.

Section 22(3)(b)

[71] Section 22(3)(b) states that disclosure of personal information is presumed to be an unreasonable invasion of personal privacy where the information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation. Past OIPC orders define "law" as including a legislative provision the violation of which could result in a penalty or sanction.[45]

[72] For the reasons that follow, I find that the Interviewee Information falls under s. 22(3)(b).

[73] The Interviewee Information was gathered by the Natural Resource Officer during his inspection of the Property to determine whether foreign objects had been placed in a stream in contravention of s. 106(2)(b)(ii) of the WSA.[46] Under s. 106(6) of the WSA, a person who commits an offence under s. 106 is liable to certain fines or imprisonment.[47] The majority of the Interviewee Information is contained in the Natural Resource Officer's continuation and inspection reports, which outline his observations during the inspection and summarize his conversation with the Interviewee. Some of the Interviewee Information is contained in an email from the Natural Resource Officer attaching the continuation and inspection reports. The remainder of the Interviewee Information is contained in the Natural Resource Officer's handwritten notes that appear to have been taken during his inspection of the Property.

[74] In my view, the Natural Resource Officer's inspection of the Property was an investigation into a possible violation of law. The Interviewee Information was compiled and is identifiable as part of that investigation. There is no evidence before me that disclosure is necessary to prosecute the violation or to continue the investigation. Therefore, I find that s. 22(3)(b) applies and disclosure of the Interviewee Information is presumed to be an unreasonable invasion of the Interviewee's personal privacy.

Section 22(3)(i)

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[45] Order F22- 31, 2022 BCIPC 34 at para 53.

[46] Records at pp 75, 77, 718; Affidavit of Protection Officer at para 56 (the current title of this individual is Hydrometrics Specialist, South Coast Natural Resource Region, Ministry of Water, Land and Resource Stewardship).

[47] Section 106(6) of the WSA provides that a person who commits an offence under s. 106 is liable on conviction to the following: (a) in the case of an offence that is not a continuing offence, a fine of not more than $200 000 or imprisonment for not longer than 6 months, or both; (b) in the case of a continuing offence, a fine of not more than $200 000 for each day the offence is continued or imprisonment for not longer than 6 months, or both.

[75] Section 22(3)(i) says that 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 ethnical origin, sexual orientation or religious or political beliefs or associations.

[76] I find that s. 22(3)(i) applies to the information about the named individual's ethnicity that appears in the Natural Resource Officer's notes about the Harrison Mills Matter. Disclosure of this information is presumed to be an unreasonable invasion of personal privacy.

[77] I have considered whether any other s. 22(3) provisions apply, and I am satisfied that none apply.

Relevant circumstances – s. 22(2)

[78] The last step in the s. 22(1) analysis is to determine whether disclosure of the disputed information would be an unreasonable invasion of a third party's personal privacy, considering all relevant circumstances including those listed in s. 22(2). It is at this step that any s. 22(3) presumptions may be rebutted.

[79] The parties raise arguments that relate to ss. 22(2)(a) and 22(2)(f) as well as other factors that are not listed in s. 22(2). I will consider all relevant factors below.

Section 22(2)(a)

[80] Section 22(2)(a) states that, in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, a relevant circumstance to consider is whether the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. The purpose of s. 22(2)(a) is to foster accountability of a public body, not individual third parties.[48] If it applies, s. 22(2)(a) weighs in favour of disclosure.

[81] The applicant does not specifically mention s. 22(2)(a), but he says he is looking for transparency and accountability from the Ministry.

[82] The Ministry says that the information in dispute would not further the purpose of subjecting the activities of the government of British Columbia or the Ministry to public scrutiny. Rather, it says that disclosure would improperly subject third parties to public scrutiny. It also says that the information has no broad or public significance and disclosing it would not benefit the public.[49]

[48] Order F24-45, 2024 BCIPC 53 at para 56.
[49] Ministry's initial submission at paras 171-172.

[83] I am not persuaded that disclosure of the personal information in dispute here would enhance public scrutiny. At most, disclosure of the information may result in scrutiny of individual third parties. I conclude s. 22(2)(a) does not apply.

Section 22(2)(f)

[84] Section 22(2)(f) says that, in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, a relevant circumstance to consider is whether the personal information has been supplied in confidence. If it applies, s. 22(2)(f) weighs in favour of withholding the information. In order for s. 22(2)(f) to apply, there must be evidence that an individual supplied the personal information and that they did so under an objectively reasonable expectation of confidentiality at the time the information was provided.[50]

[85] The Ministry says that the Interviewee Information and the Employee Opinion were supplied in confidence.

[86] Regarding the Interviewee Information, the Ministry provided affidavit evidence from the Protection Officer who deposes that he "understand[s] and believe[s] that those who are interviewed by [Natural Resource Officers] in the course of a site inspection supply such information on an implied understanding that it will be kept confidential."[51] The Protection Officer does not explain the basis for his belief. The Ministry also submits that the effectiveness of a site inspection may depend on the extent to which witnesses trust that any information they provide will remain confidential to enable them to answer questions candidly and without fear of retribution from other parties who have an interest in the outcome of the inspection.[52]

[87] For the reasons that follow, I am not persuaded that the Interviewee Information was supplied in confidence. First, the Ministry did not say that it gave, or that the Interviewee sought, any assurances of confidentiality. The Protection Officer's unsupported belief that there is generally an "implied understanding" of confidentiality during site inspections is insufficient. Additionally, the responses provided by the Interviewee during the interview, most of which are disclosed in the records, are entirely non-sensitive. They are about the long history of flooding on the Property and surrounding area. As far as I can see, the Interviewee did not say anything negative about the applicant. Given the nature of the information the Interviewee provided, I am not persuaded that they had an objectively reasonable expectation of confidentiality with respect to their identity. Without more explanation and evidence from the Ministry, I am not persuaded the Interviewee Information was supplied in confidence under s. 22(2)(f).

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[50] Order F22-62, 2022 BCIPC 70 at para 47.
[51] Affidavit of Protection Officer at para 56.
[52] Ministry's initial submission at paras 176-177.

[88] The Ministry also submits that the Employee Opinion was supplied in confidence. The Employee Opinion is contained in an email from the Employee to one of his colleagues. The Ministry says that the fact that the Employee only sent the email to one person indicates that it was intended to be confidential. It also says that the Employee Opinion is "somewhat sensitive" in nature, which suggests that the Employee did not intend for it to be disclosed to the world at large. Finally, it submits that the Employee Opinion was expressed in the context of ongoing legal proceedings, so there were expectations of confidentiality surrounding any communications related to those legal proceedings.[53]

[89] I am not satisfied that the Employee Opinion was supplied in confidence. The fact that it was only sent to one person is not persuasive evidence. Additionally, as I will explain below, I find it is not sensitive in nature. I also do not accept that there was a reasonable expectation of confidentiality over the Employee Opinion because it related to legal proceedings. In my view, the Employee Opinion is casual conversation between colleagues about a work-related matter. Although it might not be something the Employee would say directly to the applicant, it is not the kind of information someone would reasonably expect to be held in confidence. I find s. 22(2)(f) does not apply.

Sensitivity

[90] Sensitivity is not listed as a factor under s. 22(2), however, past orders have considered it as a relevant circumstance. For instance, where personal information is highly sensitive (e.g. medical or other intimate information), this factor weighs against disclosure.[54] However, where information is innocuous and not sensitive in nature, then this factor may weigh in favour of disclosure.[55]

[91] The Ministry says that the Interviewee Information may be considered sensitive because its disclosure could potentially result in interpersonal conflict between the applicant and the Interviewee. The Ministry provided no further explanation or evidence to support this argument.

[92] I do not find the Ministry's argument persuasive. From what I can see in the records, the Interviewee did not say anything unfavourable about the applicant or his situation to the Natural Resource Officer. The Interviewee only provided information about the history of flooding on the Property and surrounding area that supports what the applicant has said about the matter. I am not convinced that revealing the Interviewee's identity to the applicant could result in interpersonal conflict between the two. I find sensitivity is not a relevant factor with respect to the Interviewee Information.

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[53] Ministry's initial submission at paras 180-181.
[54] Order F21-64, 2021 BCIPC 75 at para 107.
[55] See for example Order F16-06, 2016 BCIPC 7 at para 38 and Order F17-13 BCIPC 14 at para 62.

[93] The Ministry also says that the Employee Opinion may be considered sensitive because "it represents [the Employee's] personal opinion about the applicant."[56]

[94] I find the Employee Opinion is not sensitive in nature. As I found above, the Employee Opinion is casual conversation between colleagues about a work-related matter. It is not private or intimate information.[57] In my view, this factor weighs in favour of disclosure.

Applicant's personal information

[95] Previous OIPC decisions have recognized that if a third party's personal information is also the applicant's personal information, this is a factor that weighs in favour of disclosure.[58]

[96] Since the Employee Opinion is about the applicant, it is simultaneously the applicant's personal information. I find that this factor weighs in favour of disclosure.

Information already disclosed

[97] Previous OIPC orders have said where information has already been disclosed in the records at issue, this factor weighs in favour of disclosure.[59] The Ministry disclosed the name, address, and other identifying information about the Interviewee in several pages of the records in dispute. This factor weighs in favour of disclosing the Interviewee Information that has already been disclosed in the records.

Summary and conclusion on s. 22(1)

[98] I find that a small amount of information in dispute is not personal information because it is not reasonably capable of identifying an individual. Accordingly, the Ministry is not required or authorized under s. 22(1) to withhold this information.

[99] I find that no s. 22(4) factors apply to the personal information in dispute.

[100] I find that disclosing the Interviewee Information is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(b) because it was compiled and is identifiable as part of an investigation into a possible violation of law. However, most of the Interviewee Information has already been disclosed to

[56] Ministry's initial submission at para 185.
[57] For a similar finding, see Order F19-48, 2019 BCIPC 54 at para 111 and Order F22-52, 2022 BCIPC 59 at para 104.
[58] Order F24-48, 2024 BCIPC 56 at para 146.
[59] For instance, Order F19-38, 2019 BCIPC 43 at para 159.

the applicant. In my view, this factor rebuts the s. 22(3)(b) presumption with respect to the Interviewee Information that has already been disclosed.[60] I find that disclosure of that information would not be an unreasonable invasion of personal privacy and the Ministry is not authorized or required to withhold it under s. 22(1). However, the presumption still applies with respect to the Interviewee Information that has not been disclosed to the applicant, namely, the Interviewee's phone number. I find that disclosing the Interviewee's phone number would be an unreasonable invasion of personal privacy, and the Ministry is required to withhold that information.

[101] I also find that disclosing a small amount of personal information in the Natural Resource Officer's handwritten notes is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(i) because it indicates a third party's racial or ethnic origin. I find there are no factors under s. 22(2) that rebut this presumption, so the Ministry is required to withhold this information under s. 22(1).

[102] I find that the Employee Opinion is the personal information of both the applicant and the Employee and it is not sensitive in nature. These factors weigh in favour of disclosure. There are no factors that weigh against disclosure. I conclude that disclosure of this information would not be an unreasonable invasion of third-party personal privacy. The Ministry is not required or authorized under s. 22(1) to withhold this information.

[103] Regarding the remaining information in dispute,[61] there are no factors that weigh in favour of or against disclosure. I find the applicant has not met his burden of proving that disclosure of this information would not be an unreasonable invasion of a third party's personal privacy. I conclude that s. 22(1) applies to this information, so the Ministry is required to refuse to disclose it.

CONCLUSION

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

1. I confirm the Ministry's decision to withhold the information in dispute under s. 14.
2. Subject to item 3 below, I require the Ministry to withhold the information in dispute under s. 22(1)
3. The Ministry is not required under s. 22(1) to withhold the information I have highlighted in pink in the copy of pages 73, 74, 78, 79, 143, 146,

[60] For a similar finding, see Order F18-10, 2018 BCIPC 12 at para 28.
[61] The remaining information in dispute is the name of a third party that is contained in the Natural Resource Officer's notes about the Harrison Mills Matter on p 149 of the records.

149, 593, 715, 719, and 720 of the records provided to the Ministry with this order. I require the Ministry to give the applicant access to this highlighted information.

4. The Ministry must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 3 above.

[105] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by October 10, 2024.

August 27, 2024

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

OIPC File No.: F22-91233