



Order F26-20

MINISTRY OF HEALTH

Rene Kimmett
Adjudicator

March 12, 2026

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant asked the Ministry of Health (Ministry) for access to records related to COVID-19. The Ministry withheld the records under s. 14 (solicitor-client privilege). The adjudicator found the Ministry was authorized to withhold the records on that basis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 14.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant asked the Ministry of Health (Ministry) for access to:

- 1) all the information described in an affidavit in a specific court case. This is information about COVID-19 cases provided by the provincial health authorities to the Provincial Health Officer (PHO) and her office.
- 2) any analyses the PHO's office conducted using the information described above.

[2] The Ministry entirely withheld the records responsive to the applicant's request under ss. 14 (solicitor-client privilege), 15 (harm to law enforcement), 17 (harm to financial or economic interests of a public body), 19(1)(a) (harm to individual safety), and 22 (unreasonable invasion of third-party personal privacy).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision to withhold the responsive

records. The OIPC engaged the parties in mediation, but it did not resolve the issues in dispute, and the matter proceeded to this inquiry.

[4] The Ministry reconsidered its severance decision and is no longer relying on ss. 15 or 17 to withhold any information. However, it continues to withhold the records entirely under s. 14 and some of the information in the records under ss. 19(1)(a) and 22(1).

PRELIMINARY ISSUES

[5] After receiving the Ministry's initial submission, the applicant asked for s. 6(1) (inadequate search) to be added as an issue in this inquiry because he was concerned that the Ministry had not conducted a search responsive to all parts of his access request.¹ Before deciding whether to add s. 6(1) to the inquiry, I asked the Ministry whether it had conducted a search for records responsive to all parts of the applicant's access request. The Ministry confirmed that it had not responded to the applicant's access request in full and that it was working, outside of the inquiry process, to respond to the remainder of the applicant's access request. After receiving input from the applicant, I determined that the parties did not have a dispute about the adequacy of the Ministry's search. For this reason, I declined to add s. 6(1) to this inquiry. I informed the applicant that if he had concerns about the Ministry's response to the remainder of his access request, he could open a new file with the OIPC.

[6] The applicant also asked to add s. 7 (time limit for responding) to the inquiry because the Ministry took almost a year to respond to his access request. I informed the applicant that the remedy for delay, which is to order a public body to respond by a specific date, would not be effective in the circumstances because the Ministry has already replied, at least in part, to his access request. I declined to add s. 7 as an issue in this inquiry.

ISSUES AND BURDEN OF PROOF

[7] In this inquiry, I must decide whether the Ministry is authorized to refuse access to the information in dispute under s. 14.

[8] If I determine the Ministry is not authorized to withhold the information in dispute under s. 14, I must then decide whether the Ministry is authorized to refuse access to the information in dispute under s. 19(1)(a) or required to refuse access to the information in dispute under s. 22(1).

¹ The applicant said he could not have raised this issue earlier because the Ministry's initial submission was the first time he had received a description of the nature of the records in dispute.

[9] The Ministry has the burden of proving that the applicant has no right of access to the information withheld under ss. 14 and 19(1)(a).² It also has the burden to prove that the information withheld under s. 22(1) is personal information.³

[10] The applicant has the burden of proving that disclosure of the personal information withheld under s. 22(1) would not be an unreasonable invasion of third-party personal privacy.⁴

DISCUSSION

Background

[11] On March 11, 2020, the World Health Organization declared the outbreak of COVID-19 to be a pandemic.

[12] On March 17, 2020, the PHO gave notice that the spread of the infectious agent causing COVID-19 constituted a regional event under the *Public Health Act*, SBC 2008, c 28 (*PHA*). The designation of a regional event permitted the PHO to exercise emergency powers under Part 5 of the *PHA*. Using this authority, the PHO issued various orders prohibiting gatherings and events.

[13] In the years that followed, some individuals and organizations filed petitions seeking judicial review of the PHO's health orders, claiming that the orders infringed their *Charter* rights. The petition relevant to this inquiry resulted in *Beaudoin v. British Columbia*, 2021 BCSC 512 (CanLII) and subsequent appeals of this decision (collectively, the *Beaudoin* litigation).

[14] Other individuals and organizations sought to have a class action certified seeking damages for persons who suffered personal injury or other damages from the PHO's health orders. The class action certification relevant to this inquiry resulted in *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2025 BCSC 2051 (CanLII) and a subsequent appeal (collectively, the *Canadian Society* litigation).

Records at issue

[15] The records in dispute total 68 pages, which the Ministry has entirely withheld. The records are emails and their attachments.

² FIPPA, s. 57(1).

³ Order 03-41, 2003 CanLII 49220 (BC IPC) at paras 9-11.

⁴ FIPPA, s. 57(2).

Section 14 – solicitor-client privilege

[16] Section 14 says that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. For the purposes of s. 14, “solicitor-client privilege” includes legal advice privilege and litigation privilege. The Ministry submits that litigation privilege applies to all of the records and that legal advice privilege applies to a subset of records.⁵

[17] The Ministry provided me with a copy of the records to review for the purposes of deciding this inquiry.⁶

Litigation privilege

[18] Litigation privilege is a “form of privilege that provides a protected area in which communications and documents created for and used in the process of preparing for and engaging in litigation are free from ‘adversarial interference’ and ‘premature disclosure.’”⁷ Litigation privilege expires once the litigation ends, unless there is related litigation that remains pending or may reasonably be apprehended.⁸

[19] To support its submissions on litigation privilege, the Ministry provides affidavit evidence from one of the lawyers representing the Province and the PHO in the *Canadian Society* litigation (the Lawyer). The Lawyer describes the records as emails and attachments to emails sent between:

- the Deputy PHO and Ministry of Attorney General lawyers;
- the Deputy PHO and health organizations, specifically provincial health authorities and the British Columbia Centre for Disease Control;
- the health organizations, in response to the Deputy PHO requesting information from the health organizations.

⁵ Ministry’s initial submission at para 37.

⁶ The Ministry initially relied on affidavit evidence to support their s. 14 claim instead of providing the records for my review. However, after I made two requests for further clarification, the Ministry indicated it may be more effective to provide me with a copy of the records, so long as doing so would not affect their claims of litigation privilege or legal advice privilege. I expanded my request to include a further description of the records in dispute and/or a copy of the redline records. The Ministry opted to provide the redline records for my review, stating this disclosure was made in response to my request and, per s. 44(2.1) of FIPPA, is not an express or implied waiver of privilege.

⁷ *Raj v. Khosravi*, 2015 BCCA 49 at para 7.

⁸ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras 8 and 34-41.

[20] Under the subheadings that follow, I will consider whether:

- 1) litigation privilege applies to the records in dispute;
- 2) litigation privilege has expired; and
- 3) there has been a waiver of litigation privilege, as argued by the applicant.

Litigation privilege applies to the records in dispute

[21] For the reasons below, I find litigation privilege applies to the records in dispute.

[22] For litigation privilege to apply to a document, the litigation must have been ongoing or reasonably contemplated at the time the document was created, and the document must have been created for the dominant purpose of preparing for the litigation.⁹

[23] The applicant does not make submissions on these subjects.

[24] The *Beaudoin* petition was filed on January 7, 2021.¹⁰ I can see in the records in dispute that the emails and all but one of the attachments were created between January 13 and 26, 2021. I find that the *Beaudoin* litigation was ongoing when these records were created.

[25] The Lawyer deposes the purpose of the emails and attachments sent between the Deputy PHO and legal counsel was to discuss legal advice related to the *Beaudoin* litigation.¹¹ She deposes that the purpose of the rest of the emails and attachments (sent amongst the health organizations or between the Deputy PHO and the health organizations) was to gather information for the Province to use in the *Beaudoin* litigation.¹² The Lawyer provides context regarding why the Deputy PHO would ask the health organizations for information related to the *Beaudoin* litigation. She deposes that, while the PHO provides guidance at the provincial level, the regional health authorities are responsible for enforcing the PHO orders in their geographic areas. She says, as an example, that if a place of worship is ordered to close, the closure order is issued by the health authority where the place of worship is located. She also

⁹ *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (CanLII) at para 32.

¹⁰ *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 (CanLII) [*Beaudoin* BCCA] at para 8.

¹¹ Lawyer's affidavit #1 at paras 30-34.

¹² *Ibid* at paras 37 and 38.

explains that the BC Centre for Disease Control provides operational and scientific support to the PHO and the Province.¹³

[26] I find the Ministry has established that the emails and most of the attachments were created for the dominant purpose of preparing for the *Beaudoin* litigation, which was ongoing at the time. These records discuss litigation strategy and include information created for the dominant purpose of preparing a response to the *Beaudoin* litigation. I find litigation privilege applies to these records. This finding is based on the Lawyer's evidence and the content of the records.

[27] Turning to the final attachment, I find this document was created prior to the commencement, and reasonable contemplation, of the *Beaudoin* litigation.¹⁴ However, this document was gathered by a health organization, in January 2021, at the request of the Deputy PHO expressly for the purpose of preparing for litigation.

[28] The seminal case on the scope of litigation privilege, *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII) (*Blank*), declined to expressly deal with the issue of whether litigation privilege attaches to documents gathered or copied, not created, for the purpose of litigation. However, the majority did find:

extending [litigation] privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege.¹⁵

[29] With this case in mind, I find that the final attachment was gathered for the dominant purpose of preparing for the *Beaudoin* litigation following an exercise of skill and knowledge by the Deputy PHO and his lawyers. As a result, I find this record is also subject to litigation privilege.

Litigation privilege has not expired

[30] For the reasons below, I find the litigation privilege that applies to the records has not expired.

[31] Litigation privilege ceases to apply when the litigation from which it was born concludes, unless related litigation remains pending or may reasonably be apprehended. This is because the privilege loses its purpose when there is no longer any litigation to conduct. However, in *Blank*, the court held:

¹³ *Ibid* at para 29.

¹⁴ Records at pages 23-26.

¹⁵ *Blank*, *supra* note 8 at para 64.

[Litigation] cannot be said to have ‘terminated’, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[32] The court went on to explain that related litigation includes separate proceedings that involve the same or related parties, arise from the same or a related cause of action, raise common issues, or share the same essential purpose.¹⁶

[33] The *Beaudoin* litigation concluded on August 10, 2023, when the Supreme Court of Canada denied the application for leave to appeal.¹⁷ The Ministry submits that the *Canadian Society* litigation is “related litigation” and remains ongoing.

[34] When the Ministry made its submissions in this inquiry, the BC Supreme Court had not issued a final decision in the *Canadian Society* litigation. After the close of the submission schedule, the BC Supreme Court issued *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2025 BCSC 2051 (CanLII). I asked the Ministry whether the issuance of this decision impacted its position that the *Canadian Society* litigation remained ongoing. In response, the Lawyer provided evidence that the plaintiff in that case had filed a notice of appeal with the BC Court of Appeal and that this appeal remains ongoing.¹⁸ The Ministry submits that its position continues to be that the *Canadian Society* litigation continues to be pending and related litigation.

[35] The Ministry says the *Canadian Society* litigation is “related litigation” because it is challenging “virtually every order made by the PHO in response to the COVID-19 pandemic” including the orders at issue in the *Beaudoin* litigation.¹⁹ It submits that “the evidence gathered for the *Beaudoin* litigation and the advice provided by counsel about defending the PHO orders, which is reflected in the records in issue, continues to be relevant in the *Canadian Society* litigation that is ongoing.”²⁰ It submits “the essential purpose of [the *Canadian Society* litigation and the *Beaudoin* litigation] is the same – to challenge the orders made and measures taken during the COVID-19 pandemic.”²¹

[36] The applicant does not make submissions about whether litigation privilege has expired.

¹⁶ *Ibid* at para 39.

¹⁷ *Brent Smith, et al. v. Attorney General of British Columbia, et al.*, 2023 CanLII 72130 (SCC).

¹⁸ Lawyer’s affidavit #2 at paras 4-6 and Exhibit A.

¹⁹ Ministry’s initial submission at para 25.

²⁰ *Ibid* at para 41.

²¹ *Ibid* at para 42.

[37] For the reasons that follow, I am satisfied that “related parties remain locked in what is essentially the same legal combat” such that litigation privilege continues to apply to the records in dispute.

[38] The *Beaudoin* litigation and *Canadian Society* litigation both name the PHO and the Province of British Columbia as defendants.²² The *Canadian Society* litigation adopts the legislative framework and history of the Province’s response to the COVID-19 pandemic set out in *Beaudoin*.²³

[39] The *Beaudoin* litigation was a judicial review of the PHO’s health orders issued between November 2020 and February 2021. One of the main issues in *Beaudoin* was whether the PHO’s orders reasonably and proportionately balanced the petitioners’ *Charter* rights with the objectives of the health orders.²⁴

[40] The *Canadian Society* litigation is an application to certify a class action. The application sought to bring an action on behalf of all persons residing or doing business in British Columbia who, since March 2020, have suffered personal injury or other damages as a result of the actions of the defendants in declaring a state of emergency under the *PHA*.²⁵ The issues proposed by the plaintiff are broad and include considering, among other things, whether the PHO’s orders, including the orders considered in *Beaudoin*, were reasonable and constitutionally sound.²⁶

[41] In the BC Supreme Court’s *Canadian Society* decision, Justice Crerar declined to certify the proposed class proceeding.²⁷ However, as noted above, the plaintiff has appealed this decision to the BC Court of Appeal. I accept the Ministry’s position that, if the BC Court of Appeal overturns the BC Supreme Court’s decision on *Canadian Society* and certifies a class action, then the PHO and the Province will need to re-defend the constitutionality of the same health orders already considered in *Beaudoin*.

[42] I find that the discussion about litigation strategy between the Deputy PHO and his legal counsel and the information provided by the health organizations, which was created (or gathered) for the dominant purpose of the *Beaudoin* litigation, continue to be relevant in the *Canadian Society* litigation.

²² In some of the cases the defendant is referred to as His Majesty the King (or Her Majesty the Queen, prior to the death of HRH Queen Elizabeth II) in Right of the Province of British Columbia and in other cases the defendant is the Attorney General. For the purposes of this inquiry, I find that these named defendants are both, practically speaking, defending the interests of the “Province of BC”.

²³ *Canadian Society for the Advancement of Science in Public Policy v British Columbia*, 2025 BCSC 2051 [*Canadian Society*] at paras 21-22.

²⁴ *Beaudoin v British Columbia*, 2021 BCSC 512 (CanLII) at para 247.

²⁵ *Canadian Society*, *supra* note 23 at para 58.

²⁶ *Ibid* at paras 116-121.

²⁷ *Ibid* at para 414.

[43] For these reasons, I find the litigation privilege that applies to the records in dispute continues to retain its purpose and, therefore, continues to apply to these records.

There has not been a waiver of litigation privilege

[44] For the reasons below, I find the Ministry has not waived the litigation privilege that applies to the records in dispute.

[45] Privilege belongs to, and can only be waived by, the client.²⁸ To establish waiver, the party asserting it must show:

- the privilege-holder knew of the existence of the privilege and voluntarily waived it; or
- the privilege holder did not intend to waive privilege but acted in a manner inconsistent with the privilege such that fairness and consistency require disclosure of the privileged record.²⁹

[46] In this case, the applicant submits the Ministry has acted in a manner inconsistent with litigation privilege by using some of the contents of those records as evidence presented in court.³⁰ Specifically, the applicant alleges that the PHO's office waived litigation privilege over the records in dispute when the Deputy PHO referred to information in these records, specifically statistical information about the number and type of COVID-19 cases, in an affidavit filed in the appeal of *Beaudoin*.

[47] There are many court cases which say that a party cannot use a document over which privilege is claimed to justify or explain a position or action taken in the litigation while using the privilege as a shield to prevent the other party from testing the justification or explanation.³¹ In such circumstances, upholding the privilege over the remaining communications would be unfair, because the opposing party and the court would be deprived of access to the full narrative.³²

[48] The applicant has not specified how failure to disclose the records in dispute could create unfairness to a party to the *Beaudoin* or *Canadian Society*

²⁸ *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 39; *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 at para 39.

²⁹ *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

³⁰ Applicant's submission at paras 8-10.

³¹ For example, *United States v Meng*, 2020 BCSC 1461 at para 36.

³² *Ibid* at para 37.

litigation or deprive a court of access to relevant records. I note the petitioners in *Beudoin* had the opportunity to apply to have the record, or any part of the record, that was before the PHO when she made the health orders filed in court.³³ Further, it remains open to the parties in the *Canadian Society* litigation to raise waiver directly with the court, which is best positioned to consider fairness and consistency.

[49] Based on the evidence before me, I find the Province and the Deputy PHO did not intend to waive litigation privilege and did not act in a manner inconsistent with litigation privilege such that fairness and consistency require disclosure of the privileged record.

Conclusion

[50] Having concluded that all the information in dispute continues to be subject to litigation privilege, it is not necessary to consider if the information can or must also be withheld under legal advice privilege, s. 19(1)(a), or s. 22(1). I decline to consider these issues.

CONCLUSION

[51] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry's decision to withhold the information in dispute under s. 14.

March 12, 2026

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F24-96754

³³ *Beudoin* BCCA, *supra* note 10 at para 207.