



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F07-11

MINISTRY OF AGRICULTURE AND LANDS

Celia Francis, Senior Adjudicator

July 10, 2007

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Summary: Campbell River Indian Band requested records related to its proposed destination casino project. Public body disclosed some records and withheld and severed others under ss. 12(1), 13(1), 14, 16, 17 and 22. Public body required to withhold information under s. 12(1) and authorized to withhold information under s. 13(1). With some exceptions, public body authorized to withhold information under s. 14. Public body ordered to disclose some information that it withheld under s. 14 and the information it withheld under s. 22(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13(1), 14, 22(1).

Authorities Considered: B.C.: Order F07-12, [2007] B.C.I.P.C.D. No. 17; Order F07-13, B.C.I.P.C.D. No. 18; Order F07-14, [2007] B.C.I.P.C.D. No. 19; Order 04-31, [2004] B.C.I.P.C.D. No. 32; Order 01-02, [2001] B.C.I.P.C.D. No. 1; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 03-32, [2003] B.C.I.P.C.D. No. 32; Order 03-22, [2003] B.C.I.P.C.D. No. 22, Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 00-06, [2000] B.C.I.P.C.D. No. 6; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order No. 16-1994, [1994] B.C.I.P.C.D. No. 19; Order 02-23, [2002] B.C.I.P.C.D. No. 23; Order 00-42, [2000] B.C.I.P.C.D. No. 46; Order 01-48, [2001] B.C.I.P.C.D. No. 50; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F05-28, [2005] B.C.I.P.C.D. No. 38.

Cases Considered: *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

1.0 INTRODUCTION

[1] The Campbell River Indian Band (“CRIB”), the applicant in this case, made a request to the ministry then known as the Ministry of Sustainable Resources Management under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) for records related to the proposed Campbell River destination casino project. Three other public bodies, the Ministries of Finance, Attorney General (“AG”) and Public Safety and Solicitor General, also received CRIB’s request. Concurrently with this order, I am issuing Orders F07-12,¹ F07-13² and F07-14³ about those public bodies’ decisions on CRIB’s request.

[2] According to CRIB,⁴ the Ministry of Sustainable Resources Management transferred the request to the responsible public body, Land and Water British Columbia Inc. (“LWBC”). At the time of the request and inquiry, LWBC was a public body in its own right, with the Ministry of Water, Land and Air Protection responsible for handling its requests under FIPPA. I have therefore referred to LWBC as the responsible public body in this decision. LWBC’s programs have since been integrated with other public bodies and the Ministry of Agriculture and Lands (“MAL”) is now responsible for the records in issue here.⁵ My order below is therefore against MAL as the present public body.

[3] According to the portfolio officer’s fact report that accompanied the notice for this inquiry, LWBC failed to respond to the request, which under s. 53(3) of FIPPA is deemed to be a refusal to provide access, and the matter of the deemed refusal proceeded to inquiry. Just before that inquiry was to take place, LWBC responded to CRIB’s request by providing access to some records and denying access to information and records under ss. 12, 13, 14, 16, 17 and 22 of FIPPA. Because of the delay in responding, LWBC also waived the balance of the \$405.50 fee it had originally assessed on the request, on which CRIB had paid a deposit of \$200. The inquiry nevertheless proceeded and resulted in Order 04-31.⁶

[4] CRIB requested a review of LWBC’s decision to deny access to information, on the grounds that LWBC was incorrect in its application of the exceptions on which it had relied. As the matter did not settle in mediation, a written inquiry was held under Part 5 of FIPPA. The office invited representations from LWBC, CRIB and a third party. LWBC and CRIB provided submissions.

¹ [2007] B.C.I.P.C.D. No. 17.

² [2007] B.C.I.P.C.D. No. 18.

³ [2007] B.C.I.P.C.D. No. 19.

⁴ Paras. 2-4, CRIB’s initial submission.

⁵ In his letter of September 8, 2006, para. 6, counsel for the public bodies told me that MAL is now responsible for the records that CRIB originally requested from LWBC.

⁶ [2004] B.C.I.P.C.D. No. 32. The Information and Privacy Commissioner found that, in taking 10 months to respond to the request, LWBC had failed to comply with its duty under s. 6(1) to assist the applicant by responding without delay.

[5] At the request of the four public bodies involved, the inquiries proceeded at the same time, on the grounds that the applicant was the same in all four cases, the exceptions were the same, the rationale for applying those exceptions would thus be the same or similar in all cases and the records were intertwined or overlapping in many cases. In addition, the same legal counsel represented all four public bodies in the inquiries.

[6] LWBC's submissions overlap considerably with those of the three ministries in the related inquiries. I have, as appropriate, considered the evidence and submissions before me in those inquiries in making my findings and orders here.

2.0 ISSUE

[7] The notice for this inquiry stated the issues in this case as these:

1. Whether LWBC was required by ss. 12 and 22 of FIPPA to refuse the applicant access to information.
2. Whether LWBC was authorized by ss. 13, 14, 16 and 17 of FIPPA to refuse access to information.

[8] LWBC applied ss. 16 and 17 to information to which I find below that s. 12(1) or s. 13(1) or both apply. I have therefore not found it necessary to consider ss. 16 and 17 in this decision.

[9] Under s. 57(1) of FIPPA, LWBC has the burden of proof regarding ss. 12, 13 and 14 while, under s. 57(2), CRIB has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[10] **3.1 Search for Records**—CRIB complained in its initial submission that LWBC had failed to provide all responsive records, saying it had received from other public bodies copies of records which it should also have received from LWBC.⁷ LWBC objected to CRIB questioning the adequacy of its search for records, saying it was not listed as an issue in the notice for this inquiry.⁸

[11] I agree with LWBC on this point and also note that CRIB did not complain about LWBC's search when it requested a review of LWBC's response. I therefore do not address the search issue in this decision.

⁷ Paras. 24-25, initial submission.

⁸ Reply submission.

[12] **3.2 Information Outside Scope of Request**—LWBC said that it had severed some information from the records because it was outside the scope of the request.⁹ CRIB did not comment on this issue.

[13] The material in question is clearly marked as “o/s” or “not responsive”. I agree with LWBC that this information is outside the scope of the request. I will therefore not consider whether CRIB is entitled to have access to this information. I have added to this category pp. 541-621, a series of records to which LWBC argued s. 14 applied, but which date from 1999 through 2001. They are outside the scope of CRIB’s request, because they predate the time frame specified in CRIB’s request and also do not relate to the subject matter of the request.

[14] **3.3 Inconsistencies in Application of Exceptions**—In reviewing the records in dispute in the four inquiries, I noted a number of inconsistencies in the four public bodies’ severing of information and in their annotation of the records with applicable exceptions, both within their own records and in comparison with the other public bodies’ records. There were also cases where the exceptions noted on the records did not match those on the accompanying *in camera* severance tables.

[15] CRIB did not raise any objections to these inconsistencies. As it was not clear what positions the four public bodies were taking, however, I offered them the opportunity to reconsider their positions collectively, with a view to reconciling the inconsistencies. As a result, the four public bodies disclosed some more information and records and cleared up some, though not all, of the inconsistencies.

[16] **3.4 Background**—At the time of the request and inquiry, LWBC was a Crown corporation responsible for managing the allocation of Crown land and water resources on behalf of the Government of British Columbia and its constituents. It said that it ensured “the responsible, timely and prosperous use of British Columbia’s most valuable assets”.¹⁰ The material before me in these inquiries, including the records, indicates that LWBC was involved in administering the transfer of land to CRIB for construction of the proposed casino.

[17] LWBC also referred me to the initial submissions of the Ministries of Attorney General and Public Safety and Solicitor General (“Ministries”) for background on the casino project, as follows:

- CRIB received approval in principle from the Province in August 1998 for a casino to be built on Crown land at Discovery Harbour in Campbell River. Negotiations on the proposed casino involved CRIB, LWBC, provincial

⁹ Para. 4.07, initial submission.

¹⁰ Paras. 3-5, Hallam affidavit.

ministries, the District of Campbell River and the British Columbia Lottery Corporation ("BCLC").

- The Province agreed to provide the Discovery Harbour land to CRIB, if CRIB received approval for a casino licence by a certain date. That deadline was extended a number of times.
- In October 2003, the Province rescinded the approval in principle it had granted earlier for the casino project, because a number of matters remained outstanding.
- CRIB asked the Province to reconsider its decision. The Province responded that, having reviewed a number of considerations, it would not reinstate the approval in principle or allow more time for the proposal, as CRIB had been unable to fulfil a number of requirements.¹¹

[18] CRIB then made this access request under FIPPA:

We hereby request all electronic, paper, photographic and other records including but not limited to emails, file notes, calendar, daytimer and diary entries, records in personal organizers, and telephone logs pertaining to the following subject matters:

- All records dating back to June 1, 2002 pertaining to any discussion or consideration of the Campbell River destination casino project and associated approval-in-principle, including documents where the project is raised as part of a general discussion of casino projects;
- All records pertaining to any discussion or consideration whatever of any reallocation of the permitted slot machines or other permitted gambling potentially assigned to the Campbell River destination casino project to other locations or other casino operations; all records pertaining to any other discussion of the consequences of the cancellation of the Campbell River destination casino project, or such projects generally, on the extent of permitted gambling elsewhere in British Columbia;
- All records dating back to June 1, 2002 pertaining to the extent of or the possible expansion of gaming in British Columbia in which the status of destination casino projects which had been granted approvals-in-principle at or around the time of approval of the Campbell River destination casino project are discussed generally, or the Campbell River destination casino project is discussed;
- All records recording or pertaining to phone conversations, meetings, discussions, and other communications that relate to the foregoing requests, whether or not the records themselves disclose the subject matter of the discussion;

¹¹ Paras. 4.01-4.11, initial submission of the Ministries of Attorney General and Public Safety and Solicitor General.

- All records recording or pertaining to phone conversations, meetings, discussions, and other communications with Crown corporations and bodies that relate to the foregoing requests, whether or not the records themselves disclose the subject matter of the discussion; and
- All records recording or pertaining to phone conversations, meetings, discussions or other communications between government officials and any employee, agent or representative of the Gateway Casino group of companies including the Lake City group of companies, since January of 2003, that relate to the foregoing requests.

Please note that each of these categories is intended to be construed separately, and any potential overlap between categories is not to be construed as in any way narrowing the focus of either category.

[19] **3.5 Cabinet Confidences**—The relevant parts of s. 12 read as follows:

Cabinet and local public body confidences

12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to ...

- (c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
 - (i) the decision has been made public,
 - (ii) the decision has been implemented, ...

[20] I have applied here, without repeating them, the principles for interpreting ss. 12(1) and (2) in Order 01-02,¹² Order 02-38¹³ and other orders involving s. 12(1) and in *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia*.¹⁴

[21] LWBC described the rationale behind s. 12(1) and the interpretation of this mandatory exception, as set out in previous orders and case law.¹⁵ LWBC pointed out that Treasury Board is a Committee of Cabinet and then described the two types of Treasury Board submissions, major (which are

¹² [2001] B.C.I.P.C.D. No. 2.

¹³ [2002] B.C.I.P.C.D. No. 38.

¹⁴ (1998), 8 Admin. L.R. (3d) 236 (B.C.C.A.).

¹⁵ Paras. 4.08-4.17, initial submission.

presented to the full board) and minor (which the chair or vice chair may decide). In this case, it said, the Minister of Finance, as the Chair of Treasury Board, made the decisions on behalf of Treasury Board and these decisions constitute decisions of Treasury Board.¹⁶

[22] LWBC argued that s. 12(1) applies to the following types of information:

- information in a Cabinet Decision Document of June 18, 2003 (received by Treasury Board the next day) that relates to the issue going forward for Treasury Board resolution, the recommendation from the Minister of Sustainable Resource Management and Minister Responsible for LWBC, options, fiscal management considerations, significant implications and the recommendation to Treasury Board
- information relating to the drafting of a submission to Treasury Board, disclosure of which would reveal information subject to s. 12(1)
- information in Treasury Board decision documents of June 16, 2003 and June 19, 2003
- information which, if disclosed, would reveal information that was found in a Treasury Board decision document or which formed the substance of Treasury Board deliberations, implications of the various options, financial considerations and recommendations; emails between staff of the public bodies involved “clearly document the advice and substance of the issues that were going forward to Treasury Board for its deliberation”¹⁷

[23] In LWBC’s view, the records and information in issue formed—or were developed to form—the basis of Treasury Board deliberations or would reveal the thinking or the resolutions of Treasury Board, or both, and, if disclosed, would reveal the substance of deliberations by Treasury Board, either directly or by inference. In LWBC’s view, s. 12(2) does not apply and s. 12(1) requires it to withhold the information.¹⁸ LWBC said the records themselves provide proof of its position¹⁹ and also referred me to affidavit evidence in support of its arguments on s. 12(1).²⁰

[24] In countering LWBC’s arguments on s. 12(1), CRIB pointed out that, s. 12(2) provides that background explanations and analysis cannot be withheld under s. 12(1). CRIB also complained that, with a few exceptions, LWBC had not provided any specifics as to what records it had withheld under s. 12(1), making it difficult to comment meaningfully on the issue.²¹

¹⁶ Para. 4.21, initial submission; paras. 4-10, Paul affidavit; Exhibit “A”, Paul affidavit.

¹⁷ Para. 4.19, initial submission.

¹⁸ Paras. 4.20, 4.22-4.25, 4.27, 4.29-4.31, initial submission; paras. 4-10, Paul affidavit.

¹⁹ Para. 4.26, initial submission.

²⁰ Para. 15, Hallam affidavit; paras. 4-10, Paul affidavit; para. 9, Proverbs affidavit; para. 14, Sturko affidavit.

²¹ Paras. 27-29, initial submission; paras. 4-6, reply submission.

[25] The information to which LWBC applied s. 12(1) is in emails discussing the development of the contents of Treasury Board decisions, Treasury Board decision letters and Cabinet decision documents.²² There is much duplication in the records and information.

[26] The withheld information consists of recommendations, options and policy considerations related to various issues connected with the Campbell River destination casino project that were submitted or prepared for submission to Treasury Board, a committee of Cabinet. I accept that this information formed the basis for Treasury Board deliberations and I am satisfied that its disclosure would reveal the substance of deliberations of Cabinet within the meaning of s. 12(1). I agree with the LWBC that s. 12(2) does not apply to the severed information. I therefore find that s. 12(1) requires LWBC to withhold all of the information that it withheld under that section.²³

[27] **3.6 Advice or Recommendations**—The relevant portions of s. 13(1) read as follows:

Policy advice or recommendations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
- (2) The head of a public body must not refuse to disclose under subsection (1) ...
 - (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
- (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[28] Numerous orders have considered the interpretation of s. 13(1). See, for example, Order 02-38. I will apply here, without repeating them, the principles for interpreting s. 13(1) set out in those orders.

[29] LWBC said that s. 13(1) “is intended to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policy making

²² LWBC attached to the Paul affidavit a copy of a Treasury Board minute documenting a decision by the Chair of Treasury Board, as well as copies of decision letters and a decision document. Although I saw numerous copies of the letters and decision document in the binder of records in dispute that LWBC provided to me, I was unable to find a copy of the minute. It appears however that the minute is a Ministry of Finance document in dispute in the related inquiry with that public body.

²³ An exception is one line withheld on p. 16 which appears to be a cover email attaching the briefing note for the Deputy Minister of Finance which follows. CRIB's copy of this page (at Tab 45 of its initial submission) shows that it received this item in full.

was subject to excessive scrutiny”. Referring to the interpretation of s. 13(1) in relevant orders and *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*,²⁴ LWBC pointed out that past orders have found that s. 13(1) applies to information disclosure of which would reveal both explicit and implicit advice or recommendations, including the implications or consequences of options under consideration.²⁵

[30] LWBC said that the information in question was:

- prepared for giving advice and recommendations to Treasury Board and officials within LWBC, as well as advice going to and from other public bodies
- prepared for considering the exercise of powers and functions, as well as which course of action government should follow respecting issues arising from the Campbell River Destination Casino
- options available to deal with a specific issue and advice on how to deal with various issues
- factual information, background explanations or analysis gathered or provided for consideration in making a decision²⁶

[31] LWBC pointed to examples of information which in its view fall under s. 13(1) and also said that the information itself is direct evidence that s. 13(1) applies. Sections 13(2) and (3) do not apply, in LWBC’s view, although s. 12(1) applies to some of the same information.²⁷

[32] CRIB suggested, without elaborating, that s. 13(2)(n) applies to the information which LWBC withheld under s. 13(1)²⁸ and generally rejected LWBC’s arguments on that exception, suggesting that they “would allow the withholding of most documents considered at the ministerial level”.²⁹

[33] The purpose of s. 13(1) is to protect a public body’s internal decision-making and deliberative processes, in particular while those processes are still underway. I find that the information in question all falls under s. 13(1) as previous orders have interpreted this exception. LWBC may therefore withhold this information.³⁰ I am also satisfied that s. 13(2), including s. 13(2)(n), and s. 13(3) do not apply.

²⁴ 2002 BCCA 665.

²⁵ Paras. 4.33-4.44, initial submission.

²⁶ I note that this type of information is intertwined with the other types of information LWBC discusses here.

²⁷ Paras. 4.45-4.58, initial submission; paras. 13-14, Hallam affidavit; para. 8, Proverbs affidavit; para. 13, Sturko affidavit.

²⁸ Para. 31, initial submission. LWBC denied this in its reply.

²⁹ Paras. 30, 32, initial submission; paras. 7-10, reply submission.

³⁰ My findings do not apply to instances where LWBC withheld information (e.g., p. 352, where LWBC applied s. 13 and s. 17 to some information) but CRIB’s copy of the record shows that it received that information (e.g., Tab 79, CRIB’s initial submission).

[34] **3.7 Solicitor-Client Privilege**—Section 14 reads as follows:

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[35] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well established. See, for example, Orders 02-01,³¹ 03-02,³² 03-32,³³ 03-22,³⁴ 00-06³⁵ and F06-16.³⁶ I will not repeat those principles but apply them here.

[36] LWBC argued that s. 14 authorizes it to withhold some of the information in dispute in this case. Referring to relevant court cases, LWBC and CRIB both pointed out that s. 14 incorporates the common law of solicitor-client privilege and covers both legal professional privilege and litigation privilege.³⁷

[37] LWBC said it relies on the legal professional branch of solicitor-client privilege and that the records themselves are evidence that s. 14 applies. It said that the information it severed under s. 14 includes confidential communications between LWBC staff and LWBC's legal counsel with the AG's Legal Services Branch, or external legal counsel, and AG staff and legal counsel with the Legal Services Branch. Other information would, LWBC contends, reveal communications between LWBC and its legal counsel or is found in communications between government officials and copied to legal counsel so that, LWBC said, they could advise their client in the drafting of agreements with other parties or other legal issues. The Province was the sole shareholder of LWBC, it said, and, in cases where LWBC shared privileged information with "other provincial ministries", each had a common interest in the matter and there was thus no waiver of privilege and "the client is the same in each solicitor client relationship, namely Her Majesty in right of the Province of British Columbia".³⁸

[38] LWBC did not elaborate on this argument or provide any authority for either proposition. While I do not think LWBC can have it both ways, I accept that there was a common interest among the public bodies in this matter and that the sharing of privileged information among them on this basis did not constitute a waiver of privilege. See Order 03-02 and Order F06-16 for similar findings.

[39] LWBC said that many of the privileged records consist of emails between LWBC and its legal counsel, with draft agreements, draft letters or other draft

³¹ [2002] B.C.I.P.C.D. No. 1.

³² [2003] B.C.I.P.C.D. No. 2.

³³ [2003] B.C.I.P.C.D. No. 32.

³⁴ [2003] B.C.I.P.C.D. No. 22.

³⁵ [2000] B.C.I.P.C.D. No. 6.

³⁶ [2006] B.C.I.P.C.D. No. 23.

³⁷ Paras. 4.59-4.75, LWBC's initial submission; paras. 33-37, CRIB's initial submission.

³⁸ Paras. 4.76-4.86, initial submission.

material or other emails attached. In LWBC's view, the entire communication in each of these cases is privileged, whether or not the attached emails were privileged in their original form.³⁹

[40] CRIB questioned LWBC's application of s. 14 to, among other things, email attachments and what appear to be marginal notes in some documents. It pointed out that not all communications between solicitor and client attract privilege. CRIB also expressed concern over the number of lawyers with whom LWBC claims to have communicated for the purpose of obtaining legal advice and wondered if they were all providing legal advice and involved in LWBC's business activities.⁴⁰

[41] The records and information to which LWBC applied s. 14 consist of confidential communications (emails, faxes and letters) of the type LWBC describes.⁴¹ I do not need to consider the application of s. 14 to some of the records:

- Instances where LWBC withheld information under s. 14 on one page (e.g., pp. 826-827) but disclosed it elsewhere (e.g., p. 269)
- Page 295, which AG disclosed as p. 1 of record 129
- Pages 423-425, an email and a letter to LWBC from its external legal counsel, Cook Roberts, and p. 432. CRIB's reply submission in the related AG inquiry included a copy of AG's decision letter of July 2005 with copies of pp. 423-425 (AG's record 54) and p. 432, which means these pages have been disclosed already and s. 14 falls away for them

[42] I have carefully reviewed the rest of the records to which LWBC argued s. 14 applies and, with some exceptions, I am satisfied that disclosure of these records and information would reveal information subject to solicitor-client privilege. I find that s. 14 applies to these items. For the reasons set out below, the exceptions are:

- Pages 739-742, 722 and 723-738 consist of emails between LWBC's AG lawyer and the District of Campbell River's legal counsel, two of which attach copies of an agreement. These were not confidential communications between LWBC and its own lawyer, or the lawyer's agent, related to legal advice. They are not privileged. Nor did LWBC argue that there is a common interest between these two parties such that any privilege that otherwise attaches survives this communication

³⁹ Paras. 4.87-4.90, initial submission; paras. 7-12, Hallam affidavit; paras. 4-7, 10, Proverbs affidavit; paras. 3-12, Sturko affidavit.

⁴⁰ Paras. 33-42, initial submission; paras. 11-17, reply submission.

⁴¹ LWBC acknowledged in its letter of September 8, 2006 (a copy of which CRIB received) that s. 14 did not apply to a few items (pp. 650-653 and 759-782) which it had already disclosed but which, in the copies of disputed records it provided to me for this inquiry, appeared to have been withheld in whole or in part under s. 14.

- Pages 680-687 comprise a fax from LWBC's AG lawyer to an LWBC manager, attaching a copy of a letter from the AG lawyer to CRIB's legal counsel. Even having regard to the continuum of seeking or giving legal advice within the lawyer-client relationship, I find that neither the covering communication—which was in the vein of “for your information”—nor the otherwise unprivileged letter to CRIB's lawyer qualifies for privilege
- Pages 622-647 and 654-678 are emails from LWBC's AG lawyer to the LWBC manager, attaching copies of an agreement. The emails and attachments do not reveal legal advice and no privilege therefore attaches to them

[43] **3.8 Personal Privacy**—The relevant parts of s. 22 follow:

Disclosure harmful to personal privacy

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (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, ...

[44] Relevant definitions in Schedule 1 to FIPPA in effect at the time of LWBC's decision are:

“personal information” means recorded information about an identifiable individual;

“employee”, in relation to a public body, includes a person retained under contract to perform services for the public body;

[45] Numerous orders have considered the principles for applying s. 22. See, for example, Order 01-53.⁴² I will not repeat those principles but have applied them in this decision.

[46] In LWBC's view, it is required to refuse access to some of the information, as its disclosure would result in an unreasonable invasion of third-party privacy. The information in question is, according to LWBC, an employee's home email address. LWBC referred to Order No. 16-1994⁴³ in which Commissioner Flaherty found that s. 22 applied to an employee's home telephone number.

⁴² [2001] B.C.I.P.C.D. No. 56.

⁴³ [1994] B.C.I.P.C.D. No 19.

Equally, LWBC said, s. 22 applies to this email address and no relevant circumstances, including s. 22(2)(a), apply in this case.⁴⁴

[47] CRIB believes that LWBC severed a name under s. 22 and suggests that disclosure of a person's name is not in itself an unreasonable invasion of that person's privacy.⁴⁵ CRIB did not comment in its reply on LWBC's explanation for withholding the email address.

[48] The email address in question was severed from some emails of October 24, 2002. In each case, the email address follows the name of the individual whose email address it is, Lorne Seitz. His name appears in a number of LWBC's records, for example, in this passage on p. 3, an email message of September 16, 2002 from Mark Hallam to Jack Hall (both LWBC employees), a copy of which CRIB received:

The Casino approval is not in place but appears to be moving forward. Meanwhile the CRIB wants to revise the land agreement to allow it to either put the John Hart Lake lands into a reserve or to be exempted from export levies. Blair Paterson wants to know who will work with him. Is Lorne still retained by the CEO to deal with this? The Band advises that they are dealing with Trevor Proverbs.

[49] Numerous previous orders have dealt with whether an individual's contact information (*e.g.*, name, home address, email address or telephone number) falls under s. 22(1).⁴⁶ These orders have generally found that contact information is personal information but that it does not fall squarely under s. 22(3). Whether or not disclosure of contact information is an unreasonable invasion of third-party privacy has, however, depended on the circumstances of each case. In Order 01-48 and Order 02-23,⁴⁷ for example, the Commissioner found that disclosure of the third parties' home addresses would not be an unreasonable invasion of their personal privacy whereas, in Orders 00-42 and F05-28, he came to the opposite conclusion. The Commissioner also found that disclosure of private email addresses would be an unreasonable invasion of third-party privacy in Orders 01-48 and F05-28.

[50] I agree with LWBC's characterization of Mr Seitz's email address as "personal information". I do not, however, accept the Ministry's argument that the email address is his "home" email address. It is evident from the passage quoted just above, as well as other references to Mr Seitz in the records, that he was a contractor or service provider to LWBC and, as such, its "employee", as defined in Schedule 1. It is also evident that Mr Seitz received the emails for business-related reasons, in his capacity as a contractor. In this context, therefore, his email address functioned as a means of contacting and

⁴⁴ Paras. 4.104-4.49, initial submission.

⁴⁵ Para. 48, initial submission.

⁴⁶ See, for example, Order 00-42, [2000] B.C.I.P.C.D. No. 46, and Order 01-48, [2001] B.C.I.P.C.D. No. 50.

⁴⁷ [2002] B.C.I.P.C.D. No. 23

communicating with him at his place of business, as a ministry employee's office email address would be. This contrasts with the order to which LWBC refers, which pertained to the personal home telephone number of an employee, which the employee had used for work purposes but which was undoubtedly a residential telephone number, not a business contact.

[51] I do not consider that any of the relevant circumstances in s. 22(2) applies here. It is however relevant in my view that the email address in question was not for personal or home use, in the context in which it appears in these records. Rather, for reasons set out in the previous paragraph, I consider it to be business contact information used by Mr Seitz for his business-related communications in the course of performing his contractual services. I therefore conclude that its disclosure would not be an unreasonable invasion of third-party privacy in this case. I therefore find that s. 22(1) does not apply to this information and it must be disclosed.

4.0 CONCLUSION

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

1. I require MAL to refuse CRIB access to the information it withheld under s. 12(1).
2. I confirm that MAL was authorized to refuse CRIB access to the information it withheld under s. 13(1).
2. Subject to para. 3 below, I confirm that MAL was authorized to refuse CRIB access to the information it withheld under s. 14.
3. I require MAL to give CRIB access to all of the information it withheld under s. 14 on pp. 622-647, 654-678, 680-687, 722, 723-738 and 739-742.
4. I require MAL to give CRIB access to the information it withheld under s. 22.

July 10, 2007

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator