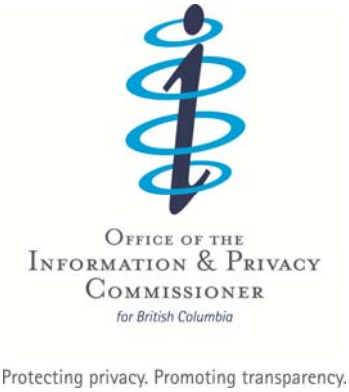

Order F11-29

MINISTRY OF FINANCE

Michael McEvoy, A/Senior Adjudicator

October 6, 2011

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Summary: The Ministry withheld certain information from an employee who requested records relating to the termination of her long-term disability benefits. The adjudicator found the Ministry was authorized to withhold the information in certain records because some was subject to litigation privilege; some constituted advice or recommendations while other information was found to unreasonably invade a third party's personal privacy. The adjudicator concluded however that the Ministry was required to release other information that was not created when litigation was in reasonable contemplation. The Ministry was also required to release other information that he found did not consist of advice or recommendations under s. 13 of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss.13, 14 and 22; *Personal Information Protection Act,* s. 23.

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-08, [2002] B.C.I.P.C.D. No. 8; Order P06-02, [2006] B.C.I.P.C.D. No. 28; Order P10-02, [2010] B.C.I.P.C.D. No. 10; Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F06-16, [2006] B.C.I.P.C.D. No. 23.

Cases Considered: *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.); *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

INTRODUCTION

[1] The applicant was an employee of the provincial government ("employee") who, in the fall of 2009, filed a grievance over the termination of her long-term disability ("LTD") benefits. She subsequently requested, under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), that the Ministry of Finance[1] ("Ministry") provide her with records related to the handling of her LTD benefit claim. The Ministry identified over 700 pages of responsive records and released most of them. It withheld information on 29 pages under various sections of FIPPA and the employee asked this Office to review that decision. The Notice of Inquiry identifies ss. 13, 14, 17(1)(e), 17(1)(f) and 22 as the exceptions in issue in this case. However, in its initial submissions, the Ministry stated it no longer relied on s. 17.

ISSUES

[2] The issues I must decide are:

1. Whether the Ministry must withhold information to prevent an unreasonable invasion of personal privacy under s. 22(1) of FIPPA.

2. Whether the Ministry is authorized to withhold information under s. 13 of FIPPA because it would reveal advice or recommendations developed by or for a public body.

3. Whether the Ministry is authorized to withhold information in order to protect solicitor-client privilege under s. 14 of FIPPA.

DISCUSSION

[3] **Background**—The parties' submissions did not provide much in the way of background to this matter. I gleaned most of the relevant information that follows from records already disclosed to the employee.

[4] The employee went on long-term disability ("LTD") due to a medical condition in August of 2008. The Public Service Agency ("PSA"), operating under the Ministry, is responsible for administering the employee's LTD benefits. Throughout the first half of 2009, the employee and the PSA communicated about the ongoing assessment of her medical condition. The employee met with a doctor associated with the LTD's occupational health program in early July, 2009 who gave her a consent form to sign regarding possible further medical tests. The employee believed the consent form required revision. Those

[1] The application was particularly directed to the BC Public Service Agency ("PSA") which handles human resources issues for the provincial government. At the time of her FIPPA request the PSA was under the Ministry of Citizens' Services. However it is now under the Ministry of Finance.

administering the LTD plan disagreed with the employee about the terms of the consent form and, as a result, the PSA terminated the employee's LTD benefits. The employee, represented by her employee association, filed a grievance in September 2009 over the termination of the benefits. The grievance proceeded to arbitration but settled prior to the conclusion of the hearing. Under the terms of the settlement, the employee is no longer a government employee but is eligible for certain benefits until February 2012. The employee and government agreed that the arbitrator hearing the grievance would retain jurisdiction to deal with any matters arising out of the settlement agreement. Since the signing of the settlement agreement on August 12, 2010, several disputes have arisen from it including two that have resulted in arbitration awards.

[5] **The Records**—As noted, the Ministry retrieved over 700 pages of records responsive to the employee's request. It disclosed all of these with the exception of some information contained in 29 pages. Of the partially withheld information in the 29 pages:

- six relate solely to the application of s. 22;
- five relate exclusively to the s. 13 exception;
- 13 relate exclusively to s. 14; and
- five concern passages to which the Ministry applied both the ss. 13 and 14.

[6] **Would Disclosure be an Unreasonable Invasion of the Individuals' Privacy?**—FIPPA requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of a third party's personal privacy. The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA.

[7] Numerous orders have considered the application of s. 22, Order 01-53[2] being one. First, a public body must determine if the information in dispute is personal information. Then, it must consider whether disclosure of any of the information is not an unreasonable invasion of third-party privacy under s. 22(4). If s. 22(4) does not apply, then the public body must determine whether disclosure of the information is presumed to be an unreasonable invasion of third-party privacy under s. 22(3). Finally, it must consider all relevant circumstances, including those listed in s. 22(2), in deciding whether disclosure of the information in dispute would be an unreasonable invasion of third-party privacy. I take the same approach here. I also note that under s. 57(2) of FIPPA the applicant bears the burden of proving that disclosure of the records would not be an unreasonable invasion of third party privacy.

[2] [2001] B.C.I.P.C.D. No. 56.

[8] The personal information at issue here is contained in the email correspondence of government officials discussing the employee's case. The Ministry applies s. 22 to brief incidental comments that these officials made about other Ministry employees and that are unrelated to the employee or her LTD claim.

[9] In each of the five records where the Ministry withheld information under s. 22, I find that the information concerns an identifiable individual, thereby making it personal information. A review of the information divulges that none of the factors enumerated under s. 22(4) apply to it. In assessing whether any of the factors under s. 22(3) apply, I find that the information concerns the employment history of certain employees and, therefore, its disclosure would be presumed to be an unreasonable invasion of third party privacy. As I noted, the employment history does not relate to the applicant's LTD claim and I would add is of a distinctly personal nature. I am unable to say more without disclosing the content of the records. There are no other circumstances that would weigh in favour of the information being disclosed. For these reasons, I find the Ministry has properly applied s. 22 of FIPPA to the information withheld in records 32, 55, 147, 466, 483 and 484.

[10] **Does solicitor-client privilege apply?**—There are 18 records for which the Ministry claims s. 14 solely or in conjunction with another section. 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.

[11] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. In this case, the Ministry argues that litigation privilege applies to the records. The burden of proving this is on the Ministry.[3]

[12] Litigation privilege protects records where the dominant purpose of the records creation was to prepare for, or conduct, litigation under way or in reasonable prospect at the time of the creation of the records.[4]

Do grievance arbitration proceedings constitute litigation?

[13] Previous orders have determined that grievance arbitration proceedings qualify as litigation.[5] Former Commissioner Loukidelis said this in Order P06-02

[3] Section 57(1) of FIPPA.
[4] Numerous previous orders have affirmed this test. See for example Order 02-08, [2002] B.C.I.P.C.D. No. 8.

in relation to s. 23 of the *Personal Information Protection Act* ("PIPA"), the mirror provision of s. 14 of FIPPA:

> There is no doubt that grievance arbitration proceedings under a collective agreement are adversarial in nature—the parties are adverse in interest in contested proceedings. There is no doubt, in my view, that, having regard to the policy underlying litigation privilege, such proceedings qualify as litigation privilege for the purposes of litigation privilege. This is certainly the view taken by labour arbitrations and it would at the very least be anomalous for a different approach to be taken under PIPA.

[14] I read Order P06-02 to say that the "grievance arbitration proceedings" litigation encompasses a continuum from the filing of the grievance to the arbitration hearing.

Does litigation privilege extend to parties who are not lawyers?

[15] In this case the grievance arbitration proceedings began with the filing of the grievance by the employee's association on September 25, 2009. As described above, the grievance concerned the administration of the employee's disability benefits. The PSA's Senior Labour Relations Specialist ("LR Specialist") dealt with the employee's grievance. The withheld information consists of email communications between the LR Specialist and various PSA staff as well as between various PSA staff not including the LR Specialist. The PSA created four records[6] prior to the filing of the grievance while creating the remaining 13[7] after the filing of the grievance.

[16] The employee contends that, to withhold documents properly under litigation privilege, the participants in the communications must be either solicitor and client or solicitor and third parties. The employee argues that, assuming the LR Specialist is acting as a solicitor, there is no indication she spoke with third parties. Further, for those email communications not directly involving the LR Specialist, there is no indication the persons authoring those emails did so as agents for the LR Specialist to prepare the arbitration case. Finally, the employee submits that, if the LR Specialist was not acting as solicitor, then litigation privilege does not apply.

[17] The Ministry, for its part, says that the LR Specialist is a lawyer but makes no claim she was acting in that capacity regarding the grievance arbitration proceedings. The Ministry argues it does not matter that she was not acting as a

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[5] See Orders P06-02, [2006] B.C.I.P.C.D. No. 28 and P10-02, [2010] B.C.I.P.C.D. No. 10; both cases decided under s. 23 of the *Personal Information Protection Act* ("PIPA") the mirror provision to s. 14 of FIPPA.

[6] Records 108, 126, 151 and 391. The Ministry numbered each of the records and for convenience, I use their numbering system for the purposes of identifying the records at issue.

[7] Records 1, 38, 40, 58, 70, 90, 91, 104, 105, 204, 511, 513 and 531.

lawyer only that the withheld information in question was created for the dominant purpose of dealing with the grievance arbitration proceedings.

[18] The employee's submissions stem, in my view, from a misunderstanding of the nature of litigation privilege. Litigation privilege facilitates the adversarial process. It aims to create a "protected area" to facilitate investigation and preparation of a case by an adversarial advocate. Those communications need not involve a lawyer. Fish, J. describes the litigation privilege in *Blank v. Canada (Minister of Justice)*[8] in the following manner:

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[19] Therefore, it does not matter that the LR specialist was not acting in the capacity of a lawyer or that the preparation for the grievance arbitration proceedings occurred by way of emails between PSA staff members. They are still entitled to protection under s. 14 of FIPPA, if they meet the litigation test described above.

Do records created after the filing of the grievance meet the litigation test?

[20] Ministry personnel authored 14 of the disputed emails after the filing of the grievance. Therefore, litigation was underway when those records were created. The litigation test also requires that the dominant purpose for creating the records was to prepare for, or conduct, the litigation under way. My review of the records satisfies me that this is the case. Without disclosing the particulars of the records, I can say that each relates to the conduct of the grievance. I find, therefore, that each falls within the ambit of s. 14.

Do records created before the filing of the grievance meet the litigation test?

[21] The records created before the grievance litigation (records 108, 126, 151 and 391) raise the question of whether the litigation was in reasonable prospect at the time of the writing of those emails. The "reasonable prospect" test was put this way, in the context of an auto insurance claim, by the British Columbia Court

[8] [2006] S.C.J. No. 39, at para. 27.

of Appeal in *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.), at p. 261:

> [L]itigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet.

[22] The Ministry's submissions and affidavit evidence assisted little on this point because they do not address the fact the information in the four records was created prior to the grievance being filed.[9] Nonetheless, I have evaluated the disputed information in light of the legal test above and the relevant surrounding circumstances. I conclude that a reasonable person, possessed of the pertinent facts, would conclude that litigation was in reasonable prospect with respect to the creation of records 108 and 126, but not records 151 and 391.

[23] Record 391 predates the filing of the grievance by over a year. At the time of the record's creation, the employee had not even finalized her application for LTD benefits. It is not plausible that a reasonable person, at that time, would have believed it unlikely that the employee's claim would not be resolved without litigation.

[24] In evaluating record 151, I observe that the Ministry describes the "original dispute" here as concerning whether the employee would sign the consent form it provided for the release of her medical information to the insurer.[10] The PSA created record 151 prior to there being an issue about the consent form. The record predates, by almost a month, the employee's visit to the doctor who provided her with a consent form that became the subject of disagreement. Again, it is entirely speculative to suggest litigation over the issue of the consent form was in reasonable prospect, given the employee had not even received it at that time. These records, therefore, do not meet the litigation privilege test and must be disclosed.

[25] On the other hand, records 108 and 126 were created after the employee received the consent form. They predate the filing of the grievance by three weeks in one case and in the other by just a few days. My review of these emails reveals the dispute over the consent form was contentious at the time of

[9] The LR Specialist's affidavit at para.16 states only that the withheld information "appears in communications that were created for the dominant purpose of dealing with the Grievance."
[10] Ministry's supplementary submission of August 8, 2011, at para. 2.

the creation of these emails and there were strong suggestions the employee's LTD benefits could be terminated.[11] Taken together with their proximity to the filing of the grievance, a reasonable person could conclude the litigation was in reasonable prospect at the time the PSA created these records.

[26] Having reached this conclusion about records 108 and 126, it is still necessary to determine whether the dominant purpose for creating them was the anticipated litigation.

[27] Though the following passage from *Hamalainen*,[12] concerns an insurance claim, I find it to be useful guidance with respect to the records in issue here:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other word, [*sic*] there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[28] On balance, I am satisfied, on reviewing records 108 and 126, that each concern the Ministry's positioning in respect of the litigation, which I have found was in reasonable prospect at the time of the record's creation. I am unable to say more without disclosing the records' contents.

Has the litigation ended?

[29] The final s. 14 matter concerns the employee's contention that the privilege is at an end because the litigation underlying it has ended. The employee argues the litigation ended in this case when she and the Province reached a settlement agreement on August 12, 2010 concerning her grievance.

[30] The Supreme Court of Canada recently canvassed the issue of when litigation privilege ends in *Blank v. Canada (Minister of Justice)*:[13]

> As mentioned earlier, however, the privilege may retain its purpose - and, therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular

[11] See for example record 146.
[12] At p. 262.
[13] [2006] S.C.J. No. 39.

> proceeding which gave rise to the claim" (at para. 89): see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
>
> At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

[31] While the agreement of August 12, 2010 settled the employee's grievance, some of the benefits accruing to the employee continue to be payable until February 2012. In addition, related litigation has arisen from differences between the employee and government over the interpretation of certain provisions of that agreement. In fact, an arbitrator has issued two awards to date concerning the interpretation of the settlement agreement. Further, an email provided by the employee[14] suggests a third matter in dispute between the parties may have been settled but also indicates that another issue relating to one of the previous arbitration awards may have arisen.[15] All of these facts lead me to find that litigation remains pending or at the very least may reasonably be apprehended.[16] Therefore, the litigation underlying the privilege in this case has not ended.

[32] **Does s. 13 apply to the information at issue?**—What is left for me to decide is whether s. 13 applies to withheld information in the remaining five disputed records (records 60, 63, 430, 441 and 528). The process for determining whether s. 13 of FIPPA applies to this information involves two stages. The first is to determine whether in accordance with s. 13(1), the disclosure of the information "would reveal advice or recommendations developed by or for a public body or a minister".

[33] If it does, it is necessary to consider whether the information at issue also constitutes any of the categories of information listed in s. 13(2) of FIPPA. This subsection stipulates; "the head of a public body must not refuse to disclose under subsection (1)" any of the listed information.

Does the information withheld constitute policy advice and recommendations?

[34] 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. Previous orders and case law have characterized the purpose of s. 13(1) as being to allow full and frank discussion of advice or

[14] Exhibit A to the employee's affidavit attached to her supplementary submission, June 30, 2011.
[15] Employee's supplementary submission, June 30, 2011.
[16] I note here that the employee contends that the Ministry's "untenable" positions at arbitration may have "possibly" been taken for "motives related to the FOI application". I find there is no evidence before me that supports this allegation.

recommendations on a proposed course of action within a public body, preventing the harm that would occur, if the deliberative process of government decision and policy-making were subject to excessive scrutiny. These orders have also found that a public body is authorized to refuse access to information, such as options and their implications, which would allow an individual to draw accurate inferences about advice or recommendations. This includes policy issues, possible options for changes to the policy and considerations for these various options, including a discussion of implications and possible impacts of the options.[17]

[35] Applying the above law, I make the following findings with respect to the withheld information in:

Records 60, 63 and 528:

[36] I have grouped these records together because it is plainly obvious they are the same record copied to three different individuals. The record in question is an email from a PSA staff member to the doctor associated with the LTD's occupational health program. The Ministry severed records 60 and 63 differently from record 528. In comparing the severed portions of these three records, it is apparent that the Ministry has withheld only the last sentence of paragraph three.

[37] In my view, the withheld portion of that third paragraph is neither advice nor a recommendation. It is a factual statement, the disclosure of which would not reveal any advice or recommendation. To assist the Ministry, I am providing it with a copy of the records in issue highlighting in yellow the passage of paragraph 3 that must be disclosed.

Records 430 and 441:

[38] The records relate to case notes of the doctor associated with the LTD's occupational health program. The Ministry has already disclosed most of the case notes but withholds four and a half sentences. I find that all of these withheld sentences concern advice proffered by the doctor in relation to the handling of the employee's file. I am unable to describe them further without disclosing the content of the information other than to say the Ministry has properly applied s. 13 to them. I also find that none of the categories enumerated under s. 13(2) apply here to compel disclosure of the contested information in these two records.

[17] See Order F10-15, [2010] B.C.I.P.C.D. No. 24, para. 23, Order 02-38, [2002] B.C.I.P.C.D. No. 38, paras. 102-127, and Order F06-16, [2006] B.C.I.P.C.D. No. 23, para. 48; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

CONCLUSION

[39] For the reasons given above, I make the following orders under s. 58(2)(b) of FIPPA:

1. I require the Ministry to give the employee access to the information it withheld in records 151 and 391 under s. 14 of FIPPA.

2. I confirm the Ministry is authorized to withhold the information in dispute in records 1, 38, 40, 53, 58, 70, 90, 91, 104, 105, 108, 126, 204, 511, 513 and 531 under s. 14 of FIPPA

3. I confirm that s. 13(1) of FIPPA authorizes the Ministry to withhold the information at issue with the exception of the yellow highlighted portions of records 60, 63 and 528 that I have provided to the Ministry.

4. I require the head of the Ministry to refuse the employee access to the information it withheld under s. 22(1) in records 32, 55, 147, 466, 483 and 484.

5. I require the head of the Ministry to give the employee access to the information in paragraphs 1 and 3 immediately above within 30 days of the date of this order, as FIPPA defines "day", that is, on or before November 17, 2011 and, concurrently, to copy me on its cover letter to the employee along with the records I have ordered disclosed.

October 6, 2011

ORIGINAL SIGNED BY

Michael McEvoy
A/Senior Adjudicator

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