Office of the Information & Privacy Commissioner for British Columbia

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Order F17-42

VANCOUVER ISLAND HEALTH AUTHORITY

Elizabeth Barker
Senior Adjudicator

September 29, 2017

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Summary: The applicant requested information under the *Freedom of Information and Protection of Privacy Act* (FIPPA) about the suspension of three physicians' hospital privileges. VIHA refused to disclose the information pursuant to s. 51 of the *Evidence Act* and ss. 13 (advice and recommendations), 14 (solicitor client privilege) and 17 (harm to financial or economic interests) of FIPPA. The adjudicator found that s. 51 did not apply to the records but confirmed VIHA's decisions regarding most of the information withheld under ss. 13 and 14. The adjudicator concluded that s. 17 did not apply to the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 14 and 17; *Evidence Act*, s. 51; *Health Professions Act*, s. 26.2.

Authorities Considered: B.C.: Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-15, 2006 CanLII 25575 (BC IPC); Order F07-17, 2007 CanLII 35478 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F10-41, 2010 CanLII 77327 (BC IPC); Order F17-30, 2017 BCIPC 32 (CanLII).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *John Doe v. Ontario (Finance*), 2014 SCC 36; *Blank v. Canada (Minister of Justice),* 2006 SCC 39; *Canada v. Solosky*, 1979 CanLII 9 (SCC); *Nagase v. Entwistle*, 2016 BCCA 257; *Raj v. Khosravi*, 2015 BCCA 49; *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd*., 1983 CanLII 407 (BCSC); *R. v. B.,* 1995 CanLII 2007 (BCSC); *Lew v. Mount Saint Joseph Hospital Society*, 1995 CanLII 1291 (BCSC).

Publication Considered: Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014); Sopinka, Ledermann & Bryant, *The Law of Evidence in Canada Fourth Edition* (Toronto: LexisNexis, 2014).

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records regarding the 2015 suspension of three physicians' (hospitalists) hospital privileges. Specifically, she wanted records of Vancouver Island Health Authority (VIHA) communications with seven other named entities.[1] VIHA disclosed records but withheld some information under ss. 13 (policy advice or recommendations), 14 (legal advice) and 17 (harm to financial and economic interests of VIHA) of FIPPA. VIHA did not withhold the three hospitalists' personal information because they all had consented in writing to its disclosure to the applicant.[2] However, it withheld other third parties' personal information under s.22 (disclosure harmful to third party personal privacy).

[2] The applicant did not dispute VIHA's decision regarding s. 22. However, she asked the Office of the Information and Privacy Commissioner (OIPC) to review VIHA's decision to withhold information under ss. 13, 14 and 17. Mediation did not resolve the issues in dispute and the applicant requested that they proceed to inquiry.

[3] During the inquiry, VIHA informed the OIPC that it had decided to also withhold much of the information in dispute under s. 51 of the *Evidence Act*. It requested, and received, approval to add that issue into the inquiry. In its initial submissions, VIHA also stated that it had decided to no longer refuse access to two records under ss. 13 and 17 and it disclosed them to the applicant.[3]

Background

[4] This request relates to VIHA's suspension of three hospitalists' hospital privileges.[4] The three had been engaged to provide hospitalist services at Royal Jubilee Hospital and Victoria General Hospital in accordance with VIHA's contract with Victoria Hospitalist Physicians Inc.[5] VIHA says that the hospitalists had their privileges suspended when they engaged in conduct that disrupted patient care and thus acted contrary to VIHA's *Medical Staff Bylaws for the*

[1] See para. 9 below for full list.
[2] A copy of the authorization to release records signed by the three hospitalists was provided in the inquiry.
[3] In a June 5, 2017 letter, it said it would disclose Part 2a, p. 22 and Part 3, p. 22 to the applicant.
[4] A hospitalist is a physician who specializes in treating hospitalized patients.
[5] VIHA is designated as the "regional health board" for the region where the Royal Jubilee and Victoria General Hospital are located, pursuant to s. 4(1)(a) of the *Health Authorities Act and* s. 4(2) of the *Regional Health Boards Regulation.*

Vancouver Island Health Authority (Bylaws) and the *Medical Staff Rules for the Vancouver Island Health Authority* (Rules).[6]

[5] By way of context, approximately nine months before the suspensions, Victoria Hospitalist Physicians Inc. had triggered their contract's dispute resolution process over the issue of physician compensation. According to VIHA that dispute remains unresolved. The contract expired three years ago, and VIHA says that negotiations for the terms of a new contract are ongoing. Meanwhile, hospitalist services are being provided pursuant to an interim arrangement.

ISSUES

[6] The issues to be decided in this inquiry are as follows:

1. Is VIHA authorized by ss. 13, 14 and/or 17 of FIPPA to refuse to disclose information to the applicant?
2. Is VIHA prohibited under s. 51 of the *Evidence Act* from disclosing information to the applicant?

[7] Section 57(1) of FIPPA states that the public body has the burden of proving that ss. 13, 14 and/or 17 authorizes it to refuse to disclose the requested information. Section 57 does not say who has the burden of proof regarding provisions such as s. 51 of the *Evidence Act*, but previous orders have held that it is in the interests of both parties to present argument and evidence in support of their positions.[7]

[8] The applicant did not dispute VIHA's application of s. 22 to the records. She explains that she is not seeking the personal information of anyone other than the three hospitalists.[8] However, I consider s. 22 briefly in paragraph 69 below because there is some personal information of other third parties that VIHA did not identify or sever under s. 22. VIHA withheld it under exceptions that, ultimately, I find do not apply.

Records

[9] The applicant requested "any and all communication, including but not limited to emails, texts, instant messages and other social media tools, within or between Island Health, Ministry of Health (including the Minister's Office), Royal Jubilee Hospital, Victoria General Hospital, Government Communications and Public Engagement, Office of the Premier and/or the College of Physicians and Surgeons of BC" related to the suspensions of the three hospitalists. VIHA

[6] A copy of each was included with the affidavit of VIHA's Director of Information Stewardship, Access & Privacy.
[7] Order F10-41, 2010 CanLII 77327 (BC IPC).
[8] Applicant's August 10, 2107 email to OIPC.

withheld all of the records under either s. 14 of FIPPA and/or s. 51 of the *Evidence Act*. It also withheld parts of those records under ss. 13, 17 and/or 22 of FIPPA.

Records not provided to OIPC

[10] VIHA did not initially give the OIPC access to any of the disputed records for the purposes of making a decision in this inquiry. Pursuant to s. 44(1)(b) of FIPPA, I ordered VIHA to provide me with a copy of the pages being withheld under s. 51 of the *Evidence Act*, but not also under s. 14 of FIPPA.[9] VIHA complied and provided those pages for my review. They are all emails and some have attachments.

[11] However, for the reasons that follow, I determined that it was not necessary to also order production of the records being withheld under s. 14. While FIPPA gives the OIPC the power to order production of records for which solicitor client privilege is claimed,[10] the OIPC will only do so if necessary to decide the issue. When the evidence describing the records is sufficient to make a determination about the privilege claim, it is not necessary to review the records themselves.

[12] Initially, VIHA's s. 14 evidence was entirely in an affidavit from its Director of Information Stewardship, Access & Privacy (Director). She provided a list with the date of each record, the names and job titles of the individuals participating in each (they are emails) and general statements about what VIHA's General Counsel and Corporate director of Legal Services (General Counsel) told her about the records. However, it was evident that the Director had not participated in any of the communications or events addressed by the records being withheld under s. 14.

[13] I wrote to VIHA to say that I was concerned that VIHA's evidence was insufficient to allow me to properly assess the validity of its application of s. 14 to the records. I provided it with an opportunity to submit further evidence.[11] VIHA responded by providing a sworn affidavit from the General Counsel. After receiving it, I determined that I had sufficient information to make an informed decision about whether s. 14 applied without needing to examine the records themselves.

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[9] The only pages that Island Health is withholding exclusively under s. 51 are: Part 2a (pp.11, 13, 15-18, 24-26, 35-36 and 42-43); Part 2b (pp.1-3); and Part 3 (pp. 4, 24, 35, 40, 42, 47, 54, 55, 62, 98-107, 118 and 120-122).
[10] See order F17-30, 2017 BCIPC 32 at paras. 17-21 where this is discussed in more detail.
[11] OIPC letter was dated June 22, 2017.

Solicitor Client Privilege, s. 14

[14] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s.14 encompasses both legal advice privilege and litigation privilege.[12] VIHA submits that the records withheld under s. 14 relate to legal advice sought and obtained by VIHA in respect to the disciplinary process which led to the suspension of the hospital privileges of the three hospitalists.[13] VIHA also says that litigation privilege applies. The applicant's submissions regarding s. 14 are that the conditions for litigation privilege no longer apply.

Legal advice privilege

[15] When deciding if legal advice privilege applies, BC Orders have consistently used the following criteria:

1. There must be a communication, whether oral or written;
2. The communication must be of a confidential character;
3. The communication must be between a client (or his agent) and a legal advisor; and
4. The communication must be directly related to the seeking, formulating, or giving of legal advice.

[16] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[14]

[17] VIHA provided affidavit evidence from the Director and from the General Counsel regarding the records being withheld under s. 14. The Director's affidavit describes the records as emails. She lists them by page number and provides the date of each along with the names of who was involved in the communication. She does not identify herself as being involved. However, her description of the records names the General Counsel as having been either the sender or a recipient of each email.

[18] In her affidavit, the General Counsel says that she has reviewed the records, and several times she refers to and adopts the Director's description of them. The General Counsel explains that she was directly involved in the

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[12] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 (CanLII) para. 26 [*College*],
[13] Director's affidavit, para. 21.
[14] *R. v. B.,* 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

contract dispute and disciplinary process involving the hospitalists. She says the following about her role in the communications contained in the records:

> In response to direct and indirect requests from Island Health for legal advice and direction in relation to issues related to the events, behaviours and the suspension of physicians…I organized and facilitated obtaining legal advice from External Counsel on behalf of Island Health. I communicated that advice to Island Health and engaged in internal discussions with Island Health staff and medical administration in respect of that advice.[15]

[19] The General Counsel says that the records are communications among herself, external legal counsel and VIHA staff and executive about requests for legal advice, the legal advice provided and the application of that advice to the circumstances at hand.

[20] I have reviewed the Director and General Counsel's affidavits and the description of the records they provide. Based on that evidence, I am satisfied that, with one exception, the records withheld under s. 14 comprise VIHA's and its legal counsels' communications that are directly related to the seeking, formulating, or giving of legal advice. The exception is the email at Part 3, page 6, which I discuss below.

[21] As for the issue of the confidentiality of the communications, the Director says, "All of this correspondence was in confidence."[16] The General Counsel does not say if her communications were confidential. She says that the authors of the emails that were "not directly between" herself and VIHA told her that "all of their correspondence was in confidence."[17]

[22] Although the General Counsel's evidence about confidentiality is somewhat ambiguous, I am satisfied that most of the records expressly contain, or would reveal by inference, confidential communications between VIHA and its lawyers about legal advice. From the evidence that VIHA provides about who participated in the emails, I can see that with the exception of the email at Part 3, page 6, the records are communications involving only VIHA administrators and the General Counsel. I accept that the General Counsel was acting as VIHA's lawyer at the time, and that she also took on the role of a conduit or agent for VIHA's seeking, obtaining and discussing external legal counsel's legal advice. Therefore, based on the evidence provided by VIHA, I am satisfied that, with the exception of the email at Part 3, page 6, the records withheld under s. 14 meet the criteria for legal advice privilege.

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[15] General Counsel's affidavit, para. 8.
[16] Director's affidavit, para. 23.
[17] General Counsel's affidavit, para. 12.

[23] The email at Part 3, page 6 is not a confidential communication between VIHA and its lawyers because, according to the description VIHA provides, it also involves the College of Physicians and Surgeons of British Columbia (College). VIHA's submissions and evidence do not actually say that the email contains legal advice, or information about the seeking, formulating, or giving of legal advice. Therefore, I am not persuaded that it is protected by legal advice privilege. VIHA, however, also claims that litigation privilege applies.

Litigation privilege

[24] Litigation privilege is not restricted to confidential communications between a client and solicitor. It includes communications between a solicitor and third parties, if made for the purpose of litigation. The object of litigation privilege is to create a "zone of privacy" that ensures the effectiveness of the adversarial process by allowing parties to prepare their positions in private, without adversarial interference and without fear of premature disclosure. Once the litigation has concluded, the privilege ends.[18]

[25] To establish litigation privilege, two elements must be present: [19]

1. litigation was ongoing or was reasonably contemplated at the time the document was created; and
2. the dominant purpose of creating the document was to prepare for that litigation.

[26] A "reasonable prospect" does not mean certainty, and it does not require the commencement of an action. The essential question is: would a reasonable person being aware of the circumstances conclude that the claim will not likely be resolved without litigation?[20] A finding of dominant purpose involves an individualized inquiry and is a factual determination that must be made based on all of the circumstances and the context in which the document was produced.[21]

[27] VIHA's evidence regarding this email is as follows:

- It is dated March 6, 2015;
- It is from VIHA's Executive Vice President and Chief Medical Officer and was sent to VIHA's General Counsel, VIHA's Executive Vice President and Operating Officer, VIHA's Executive Director of Integrated Health Services, VIHA's Deputy Chief Medical Officer and a doctor representing the College;

[18] *Blank v. Canada (Minister of Justice),* 2006 SCC 39; *Raj v. Khosravi*, 2015 BCCA 49 [*Raj*].
[19] *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259 (CanLII) at para. 32.
[20] *Raj, supra note 17, at para. 11.*
[21] Raj, *supra note 17, at para. 17.*

- It is VIHA's communication with the College "to discuss common interests and issues concerning the regulation of physicians which relate to the withdrawal of physician services, discipline, and process";[22]
- In June 2014, Victoria Hospitalist Physicians Inc. initiated the dispute resolution procedure contained in its contract with VIHA. The dispute was about physician compensation. A notice to mediate was issued and a mediator selected in January 2015;
- The contract dispute is not resolved, and the mediation is ongoing;
- There is a provision in the contract to proceed to arbitration, but Victoria Hospitalist Physicians Inc. has not yet exercised its right under the contract to issue an arbitration notice.[23]

[28] The Director also says the following about the records generally:

> Considering the ongoing and outstanding possibility of arbitration in relation to the Contract Dispute and ongoing contract negotiations, VIHA continues to treat the Records and related matters as ongoing and in respect of reasonably contemplated litigation. It is reasonable to anticipate that the Contract Dispute could proceed and further litigation may arise from these intertwined issues involving the Contract Dispute and the contract negotiations.[24]

[29] Based on this evidence, VIHA has satisfactorily established that the possibility of litigation, in the form of arbitration, would have been in reasonable prospect on March 6, 2015 when the email was created and sent. The contract dispute was ongoing after a number of months at that point, so it would have been reasonable to think that it likely would not resolve without arbitration.

[30] However, VIHA's evidence fails to demonstrate that the dominant purpose for creating the email was to prepare for that litigation. VIHA says that the purpose of the email was "to discuss common interests and issues concerning the regulation of physicians which relate to the withdrawal of physician services, discipline, and process." It does not explain how communication with the College about such matters relates to VIHA's contract dispute over physician compensation. In fact, VIHA does not actually submit that the dominant purpose of creating this email was to prepare for litigation. In conclusion, I find that litigation privilege does not apply to this email.

Common interest privilege

[31] VIHA also submits that the email at Part 3, page 6 is protected by common interest privilege. Common interest privilege is an exception to the rules

[22] Director's affidavit at para. 28. See also VIHA initial submissions, paras. 51 and 56.
[23] Director's affidavit, paras. 7-10.
[24] Director's affidavit, para. 29.

of waiver.[25] Generally speaking, when a client voluntarily discloses privileged information outside the bounds of the solicitor client relationship, privilege is considered to have been waived.[26] Common interest privilege "comes into play when clients with separate lawyers share privileged information for the purposes of coordinating legal activities."[27] It allows parties with interests in common to share information without waiving privilege over that information.[28]

[32] In its submissions, VIHA says the email is a "common interest communication" with the College.[29] It also says that the communication "related to the withdrawal of physician services, discipline, and process with the College."[30]

[33] The common interest exception to waiver is called into play only when privileged information is shared. VIHA's submissions and evidence do not establish that legal advice or litigation privilege apply to this email. Therefore, I am not persuaded that the communication in the email is information that is protected by solicitor client privilege in the first place. I find that common interest privilege does not apply.

Other privilege

[34] VIHA's submissions regarding s. 14 and privilege also include an argument that the records are protected by privilege because s. 26.2 of the *Health Professions Act* applies. VIHA says, "Communications with the College regarding quality of care and professional conduct matters are privileged from production."[31]

[35] Section 26.2 states

> Confidential information
>
> 26.2 (1) Subject to subsections (2) to (6), a quality assurance committee, an assessor appointed by a quality assurance committee and a person acting on its behalf must not disclose or provide to another committee or person

[25] Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014) at 7.162-7.175.
[26] *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd***.,** 1983 CanLII 407 (BCSC) at para 6.
[27] Sopinka, Ledermann & Bryant, *The Law of Evidence in Canada Fourth Edition* (Toronto: LexisNexis, 2014) at 14.54. The editors also point out that "joint-client privilege" is different and exists where there are multiple clients having the same counsel representing them on a matter of common interest.
[28] Dodek, supra note 17 at 7.162-7.175.
[29] VIHA initial submissions, para. 51.
[30] VIHA initial submissions, para. 56.
[31] VIHA initial submissions, para. 52.

> (a) records or information that a registrant provides to the quality assurance committee or an assessor under the quality assurance program, or
>
> (b) a self assessment prepared by a registrant for the purposes of a continuing competence program.
>
> (2) Despite subsection (1), a quality assurance committee or an assessor appointed by it may disclose information described in that subsection to show that the registrant knowingly gave false information to the quality assurance committee or assessor.
>
> (3) If a quality assurance committee has reasonable grounds to believe that a registrant
>
> (a) has committed an act of professional misconduct,
>
> (b) has demonstrated professional incompetence,
>
> (c) has a condition described in section 33 (4) (e), or
>
> (d) as a result of a failure to comply with a recommendation under section 26.1 (3), poses a threat to the public,
>
> the quality assurance committee must, if it considers the action necessary to protect the public, notify the inquiry committee which must treat the matter as if it were a complaint under section 32.
>
> (4) Records, information or a self assessment obtained through a breach of subsection (1) may not be used against a registrant except for the purposes of subsection (2).
>
> (5) Subject to subsection (2), records, information or a self assessment prepared for the purposes of a quality assurance program or continuing competence program may not be received as evidence
>
> (a) in a proceeding under this Act, or
>
> (b) in a civil proceeding.
>
> (6) Subsection (1) applies despite the Freedom of Information and Protection of Privacy Act, other than section 44 (2) or (3) of that Act.

[36] It is not evident that the email at Part 3, page 6, is a record or information of the type listed in s. 26.2 (1)(a) and (b). VIHA's submissions and evidence do not establish that it is a record or information that "a registrant provide[d] to the quality assurance committee or an assessor under the quality assurance program" or "a self assessment prepared by a registrant for the purposes of a continuing competence program." Therefore, I find that s. 26.2 of the *Health Professions Act* does not apply to the email at Part 3, page 6.

Conclusion, s. 14

[37] In conclusion, I find that VIHA has established that legal advice privilege applies to the majority of the information it withheld under s. 14, and it may refuse to disclose this information to the applicant on that basis. The only exception is

the email at Part 3, page 6, which I find that VIHA may not refuse to disclose to the applicant under s. 14.

[38] The email at Part 3, page 6 and the remainder of the records are being withheld under the *Evidence Act*, so I will consider them in that context below.

Evidence Act, s. 51

[39] VIHA says that the records being withheld under s. 51 of the *Evidence Act* were created as part of an investigation into the hospitalists' conduct and were either submitted to VIHA's Health Authority Medical Advisory Committee (HAMAC) or contain information which was submitted to HAMAC concerning that investigation and the resulting disciplinary process.[32] VIHA specifically submits that ss. 51(5) and (6) apply. I conclude that VIHA is also saying that s. 51(2)(b) applies because it mentions this section, albeit only once in a very general sense. The applicant submits that the OIPC should independently review the records being withheld under s. 51 and closely consider the timelines to determine if HAMAC was involved.

[40] For the reasons that follow, I find that VIHA has not established that s. 51 prohibits disclosure of the records.

[41] Section 51 states in part:

> Health Care Evidence
>
> 51 (2) A witness in a legal proceeding, whether a party to it or not,
>
> (a) must not be asked nor be permitted to answer, in the course of the legal proceeding, a question concerning a proceeding before a committee, and
>
> (b) must not be asked to produce nor be permitted to produce, in the course of the legal proceeding, a record that was used in the course of or arose out of the study, investigation, evaluation or program carried on by a committee, if the record
>
> (i) was compiled or made by the witness for the purpose of producing or submitting it to a committee,
>
> (ii) was submitted to or compiled or made for the committee at the direction or request of a committee,
>
> (iii) consists of a transcript of proceedings before a committee, or
>
> (iv) consists of a report or summary, whether interim or final, of the findings of a committee.
>
> (3) Subsection (2) does not apply to original or copies of original medical or hospital records concerning a patient.

[32] VIHA's initial submissions, paras. 17- 20.

> (4) A person who discloses information or submits a record to a committee for the purpose of the information or record being used in a course of study, an investigation, evaluation or program of that committee is not liable for the disclosure or submission if the disclosure or submission is made in good faith.
>
> (5) A committee or any person on a committee must not disclose or publish information or a record provided to the committee within the scope of this section or any resulting findings or conclusion of the committee except
>
> (a) to a board of management or, in the case of a committee described in paragraph (b.1) of the definition of "committee", to the boards of management that established or approved the committee,
>
> (b) in circumstances the committee considers appropriate, to an organization of health care professionals, or
>
> (c) by making a disclosure or publication
>
> (i) for the purpose of advancing medical research or medical education, and
>
> (ii) in a manner that precludes the identification in any manner of the persons whose condition or treatment has been studied, evaluated or investigated.
>
> (6) A board of management or any member of a board of management must not disclose or publish information or a record submitted to it by a committee except in accordance with subsection (5) (c) or (6.1).
>
> (6.1) If information or a record submitted by a committee to a board of management of a hospital includes information that the board of management considers relevant to medical or hospital practice or care in another hospital, or during transportation to or from another hospital,
>
> (a) the board of management may disclose the information or record to the board of management of the other hospital, and
>
> (b) the board of management of the other hospital must not disclose or publish the information or the record disclosed to it under paragraph (a), except in accordance with subsection (5) (c).
>
> (7) Subsections (5) to (6.1) apply despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (1)(b), (2), (2.1) and (3) of that Act. [i.e., the Commissioner's powers to conduct investigations, audits or inquiries]….

[42] BC Courts have said that the purpose of s. 51 of the *Evidence Act* is "to protect efforts made by hospitals to ensure that high standards of patient care and professional competency and ethics are maintained, by ensuring confidentiality for documents and proceedings of committees entrusted with this

task."[33] The Court of Appeal found that with s. 51 "the Legislature has chosen to absolutely protect communications made concerning the evaluation or investigation of medical staff, or for the purpose of improving medical or hospital practice or care."[34] It also said that s. 51 protects not only formal committee proceedings but also the preliminary and investigatory communications that form the foundation of such committee proceedings. [35]

Health Authority Medical Advisory Committee (HAMAC)

[43] VIHA says that the records and the information they contain pertain to HAMAC, which it says is a "committee" as defined by s. 51(1).[36] Although it does not specifically say so, I understand it to be saying that the definition in s. 51(1)(a) applies.[37] The applicable definitions in s. 51(1) state:

> 51 (1) In this section:
>
> "board of management" means a board of management as defined in the *Hospital Act* or the board of directors as defined in the *Emergency Health Services Act*;
>
> "committee" means any of the following:
>
> (a) a medical staff committee within the meaning of section 41 of the *Hospital Act*;

[44] The relevant provisions of the *Hospital Act* state:

> 1 In this Act:
>
> "board of management" means the directors, managers, trustees or other body of persons having the control and management of a hospital;
>
> …
>
> 41 **(**1) In this section, "medical staff committee" means a committee established or approved by a board of management of a hospital for
>
> (a) evaluating, controlling and reporting on clinical practice in a hospital in order to continually maintain and improve the safety and quality of patient care in the hospital, or
>
> (b) performing a function for the appraisal and control of the quality of patient care in the hospital.

[33] *Lew v. Mount Saint Joseph Hospital Society*, 1995 CanLII 1291 (BC SC) at para. 18. Cited with approval in *Sinclair v. March*, 2000 BCCA 459 [*Sinclair*] at para. 23, and *Nagase v. Entwistle*, 2016 BCCA 257 [*Nagase*] at para. 53.
[34] *Nagase, ibid* at para. 61.
[35] *Nagase, ibid* at para. 64
[36] VIHA's initial submissions para. 17
[37] VIHA's initial submissions, para. 10.

[45] VIHA's Bylaws say the following about the purpose and responsibilities of HAMAC.[38]

> Article 8 – THE HEALTH AUTHORITY MEDICAL ADVISORY COMMITTEE
>
> 8.1 Purpose
>
> 8.1.1 The Board of the Directors shall appoint a Health Authority Medical Advisory Committee (HAMAC).
>
> 8.1.2 The HAMAC makes recommendations to the Board of Directors with respect to cancellation, suspension, restriction, non-renewal, or maintenance of the privileges of all members of the medical staff to practice within the facilities and programs operated by the Vancouver Island Health Authority.
>
> 8.1.3. The HAMAC provides advice to the Board of Directors and to the CEO on:
>
> .1 the provision of medical care within the facilities and programs operated by the Vancouver Island Health Authority;
>
> .2 the monitoring of the quality and effectiveness of medical care provided within the facilities and programs operated by the Vancouver Island Health Authority;
>
> .3 the adequacy of medical staff resources;
>
> .4 the continuing education of the members of the medical staff; and
>
> .5 planning goals for meeting the medical care needs of the population served by the Vancouver Island Health Authority.

[46] VIHA does not explain how HAMAC meets the definition of "committee", specifically the part about being established or approved by a "board of management" as that term is defined in s. 1 of the *Hospital Act*. Nevertheless, I conclude that VIHA must be the "board of management" for the hospitals in its region. There is nothing in this inquiry to suggest that any other entity fills that roll. It was VIHA who contracted with Victoria Hospitalist Physicians Inc. to provide hospitalist services for the Royal Jubilee Hospital and Victoria General Hospital. Further, the fact that VIHA has established the Rules and Bylaws supports the conclusion that it controls and manages the hospitals in its region. Also, the Bylaws state that VIHA's Board of Directors shall appoint a HAMAC. Therefore, I am satisfied that HAMAC meets the definition of a "committee" in s. 51(1) of the *Evidence Act*.

Sections 51(2)(b), (5) and (6)

[47] In order for the records in question to be prohibited from disclosure under s. 51 several other elements have to be met. For s. 51(2)(b), it must be established that the record was:

[38] Also in s. 15 of the Rules.

- used in the course of or arose out of the study, investigation, evaluation or program carried on by HAMAC, and either
- compiled or made by a witness for the purpose of producing or submitting it to HAMAC, or
- HAMAC directed or requested that the record be submitted to, compiled or made for HAMAC.

[48] For s. 51(5), it must be established that the information or record was:

- provided to HAMAC within the scope of s. 51, or
- the resulting findings or conclusions of HAMAC.

[49] For s. 51(6), it must be established that the information or record was:

- submitted by HAMAC to a board of management or any member of the board of management.

[50] The evidence that I have is provided in the Director's affidavit and the records that I ordered be produced for my review. The Director provides the background and context for the records. She explains that in 2015, VIHA's senior medical leadership identified unprofessional conduct by hospitalists that was disrupting patient care. She says that VIHA staff collected information in connection with these events, considered their options and sought legal advice.[39] The senior medical leadership concluded that immediate crisis intervention was warranted under Article 11 of the Bylaws and Section 17 of the Rules, so the three hospitalists' hospital privileges were suspended.[40] She says that after the suspensions were imposed the matter was referred to HAMAC for its review and consideration.[41]

[51] Article 11 of the Bylaws states:

> Article 11 – DISCIPLINE AND APPEAL
>
> 11.2.1 Summary Restriction/Suspension
>
> .1 Where the CEO or Senior Medical Administrator becomes aware of a serious problem or potential problem which adversely affects or may adversely affect the care of patients, or the safety and security of patients or staff and action is required to protect the safety and best interests of patients or staff, the CEO or Senior Medical Administrator may summarily restrict or suspend privileges of a member of the medical staff by notifying the member in writing.

[39] Director's affidavit, para. 15.
[40] Director's affidavit, para. 13-14.
[41] Director's affidavit, paras. 16 and 17.

> .2 All such restrictions and suspensions must be reported by the CEO or the Senior Medical Administrator to the HAMAC and the Board of Directors.
>
> …
>
> .4 In cases of urgency, action required to protect the safety and best interests of patients or staff must be taken by the individual immediately responsible and subsequently reported to the CEO, the VP of Medicine, the Chair of the HAMAC, the Board of Directors and the Registrar of the appropriate College.
>
> .5 Summary restriction or suspension will be considered at a special meeting of the HAMAC within fourteen days of the restriction or suspension. The member of the medical staff has the right to be heard at this meeting.
>
> .6 The HAMAC will make recommendations to the Board of Directors with respect to cancellation, suspension, restriction, or non-renewal of privileges as appropriate after giving the member of the medical staff an opportunity to be heard.

[52] Article 17 of the Rules states:

> SECTION 17 – PROFESSIONAL CONDUCT AND DISRUPTIVE BEHAVIOUR
>
> 17.1 Authority
>
> (a) The authority to manage disruptive physician behaviour lies in the *Hospital Act*, under the *Hospital Act Regulations*, Sections 4, 5, and 6 and the delegation of that authority to VIHA through the Medical Staff Bylaws to its Board of Directors and the HAMAC.
>
> …
>
> 17.5 Process to Manage Disruptive Behaviours
>
> (a) General Principles
>
> Interventions will follow a staged approach with the intention of remediation:
>
> …
>
> (iv) Crisis Intervention is required in the event of the sudden appearance of behaviour that is too egregious for a staged response.
>
> …
>
> 17.9 Crisis Intervention
>
> (a) Where behaviour is warranted to require a crisis intervention, the Department Head, Chief of Staff or Division/Site Chief shall request the Senior Medical Administrator to consider immediately suspending the Member's privileges as per Article 11.2.1 of the Bylaws.
>
> …

[53] The Director says that she has reviewed the records being withheld under s. 51 and they consist of correspondence among VIHA's senior medical

administration regarding the investigation of the hospitalists actions.[42] That is apparent from the content of the records before me. However, I can see that the Director did not personally participate in those email communications and there is no evidence that her responsibilities as the Director of Information Stewardship, Access & Privacy included dealing with physician conduct, disciplinary matters or HAMAC.

[54] The Director also says what the General Counsel told her about the records:

> She has advised me that the records and information being withheld under s. 51 as indicated above were created and submitted to and summarized for HAMAC for its consideration and relate to the matters put before HAMAC regarding the quality of care of patients and disciplinary process in relation to the three suspended physicians.[43]

[55] It appears to me that the Director had no personal involvement in the records, the events they address or HAMAC. Also, what she says about the records being provided to HAMAC is hearsay with no additional detail or explanation. For those reasons, I give her evidence little weight. Evidence from someone who was a member of HAMAC or who was directly involved in the records and the matters addressed in them would have been more persuasive. VIHA does not explain why it did not provide affidavits from such people.

[56] The only evidence that the records in dispute were *provided* to HAMAC is what the Director says the General Counsel told her in the quote above. While I understand that the General Counsel was involved in obtaining legal advice from external legal counsel about the hospitalist issues, there is no explanation or evidence about how she knows what the Director says, namely that the records "were created and submitted to and summarized for HAMAC". VIHA did not provide affidavit evidence from the General Counsel about this. Further, there is no evidence about who provided the records to HAMAC.

[57] I have also considered what the records themselves reveal. I know the job titles of many of the people involved in the emails because VIHA provided that information. However, VIHA did not explain what role or responsibilities (if any) they had with respect to HAMAC. Several emails involve the Chief or Acting Chief Medical Officer and, although VIHA does not say so, I can see that Article 8 of the Bylaws states that whoever fills this role is required to be a member of HAMAC. It is not a forgone conclusion, however, that these specific emails pertain to the Chief Medical Officer's HAMAC duties.[44] Without some basis in the evidence, I cannot assume that the emails that include the Chief Medical Officer

[42] Director's affidavit, at para. 20.
[43] Director's affidavit, para. 19.
[44] Also, in several of the emails the Chief Medical Officer is only one of several individuals being copied and he does not engage actively in the email communication.

relate to his HAMAC responsibilities. They could pertain to non-HAMAC related administration and human resources duties. To my mind, there needs to be more evidence to establish a link between his communications in these emails and HAMAC.

[58] I do not have the same type of evidence that was adduced in the cases that VIHA referred me to where it was successfully established that s. 51 applied. For instance, in *Nagase v. Entwistle*,[45] there was evidence from the two doctors whose communications were at issue, including details about their roles, responsibilities and formal job descriptions. The deponents were the chief of staff of the South Okanagan General Hospital and the senior medical director for the Interior Health Authority. They provided information about their duties and obligations as members of HAMAC and the local medical advisory committee. There was also evidence that their communications were expressly made pursuant to the various discipline processes. In particular, both deposed that, given their job roles, every record they made in the course of addressing a complaint about a physician's professional competence and ethics is made for the purpose of producing them to the HAMAC because ultimately any such complaint may be referred to the HAMAC. Based on that evidence, the Court found that their correspondence was created and compiled to form a record of the investigation into professional conduct and work ethics for HAMAC.

[59] In *Sinclair v. March*[46] there was affidavit evidence from the vice-president of medicine for the Royal Columbian Hospital who explained that his regular duties included being a member of the medical advisory committee. He provided evidence about his role and responsibilities. He also deposed that whenever he conducted an investigation into a complaint that related to hospital practice or hospital care provided by health care professionals in the hospital, he was doing so as a member of that committee. He also attested that the entirety of his investigation of the complaint in that case was for quality assurance purposes and, therefore, protected by s. 51. Donald J.A. noted that it is not sufficient for a witness to be a member of a committee in order to attract the protection of s. 51. The witness must be shown to have been participating in committee work. The Court acknowledged that a witness may be pursuing the matter in question as a part of hospital administration and not within the committee structure.[47]

[60] In Order F06-15[48] Adjudicator Francis found that s. 51(5) applied to a tape and transcript of a meeting of an infection control committee of the Children's and Women's Health Centre. She based her decision, in part, on affidavits from the physicians who were on the relevant medical advisory committees and who

[45] *Nagase*, *supra* note 32.
[46] *Sinclair*, *supra* note 32.
[47] Sinclair*, supra* note 32 at para. 22.
[48] Order F06-15, 2006 CanLII 25575 (BC IPC).

provided evidence about how the committees' activities related to the information in dispute.

Records that pre-date the suspensions

[61] I can see that some of the emails pre-date the hospitalists' suspensions and there is one that was evidently written a couple of hours after the suspensions.[49] VIHA's evidence about the Rules and Bylaws (in particular Article 11.2.1 of the Bylaw) indicate that, once imposed, the hospitalists' suspensions were a matter that VIHA's medical administrators were required to bring to HAMAC for its consideration. It is evident from the content of one of these records[50] that the suspensions were reported to HAMAC within hours of being imposed. The only other reference in the emails to HAMAC is a comment whose timing convinces me that as of the afternoon before the suspensions were imposed HAMAC was not involved in what was going on.[51] I cannot, however, elaborate without disclosing the withheld information.

[62] The timing of these communications leads me to conclude that what took place *before* the suspensions were imposed was independent of HAMAC and was not done to fulfil the obligations of HAMAC or done at the behest of HAMAC. Thus, I am not persuaded that these records meet the criteria for establishing that s. 51(2)(b) applies. They are not records: that arose out of the study, investigation, evaluation or program carried on by HAMAC; were compiled or made by a witness for the purpose of producing or submitting them to HAMAC; or that were submitted, compiled or made at the direction or request of HAMAC.

[63] As for ss. 51(5) and (6), the only evidence that the particular records and information before me were *provided to* HAMAC is what the Director says the General Counsel told her. As explained above, I give her evidence on that point little weight. Absent any corroborating evidence, for example, from the General Counsel or the individuals who were actually involved with these records, I am not persuaded that these records were provided to HAMAC. Further, given the content and timing of the emails, it is obvious to me that they do not contain HAMAC's resulting findings or conclusions or information HAMAC submitted to the hospitals' board of management.

Records that post-date the suspensions

[64] These are several emails that post-date the suspensions and HAMAC being notified.[52] They are communications involving VIHA's public

[49] Records at part 3: pp. 4, 24, 35, 40, 42, 47, 54, 55, 62, 98-107, 118, 120-121 predate the suspensions, and p. 122 was written shortly after the suspensions.
[50] Records at Part 3, p. 122.
[51] Records at Part 3, p. 118.
[52] Records at Part 2a: pp. 11, 13, 15-18, 24-26, 35-36, 42-43 and at Part 2b: p. 1-3.

communications and media relations staff. They relate to the types of activities one expects individuals in such roles to perform. The only thing that the Director says in her affidavit that is specific to these pages is that they "are being withheld by VIHA as health care evidence pursuant to s. 51."[53]

[65] These emails do not mention HAMAC and they do not relate to HAMAC in any way that I can see. Given their content, it is obvious to me that they are not the type of record or information that would be requested by, provided to, or used by, a medical staff committee whose purposes are those set out in Article 8 of the Bylaws. Further, these emails certainly do not contain the resulting findings or conclusions of HAMAC or information submitted by HAMAC to the hospitals' board of management. Therefore, I am not persuaded that ss. 51(2)(b), (5) and/or (6) apply to these pages.

Conclusion, s. 51

[66] In conclusion, I am not persuaded that the records before me were

- used in the course of or arose out of the study, investigation, evaluation or program carried on by HAMAC and compiled or made by a witness for the purpose of producing or submitting it to HAMAC or submitted to, compiled or made for HAMAC at HAMAC's direction or request (s.51(2)(b));
- provided to HAMAC within the scope of s. 51, or were HAMAC's resulting findings or conclusions (s. 51(5)); or
- submitted by HAMAC to a board of management or any member of the board of management (s. 51(6)).

[67] Therefore, I find that ss. 51(2)(b), (5) and (6) do not apply to the records VIHA is refusing to disclose pursuant to s. 51.[54]

[68] The records that VIHA provided for my review under s. 51 the *Evidence Act* are marked to indicate where VIHA is also relying on ss. 13 and 17 of FIPPA to refuse access to the applicant, and I will consider these exceptions next. However, before doing so, it is necessary to say a few words about third party personal information.[55]

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[53] Director's affidavit, para. 18(c).

[54] These records are at Part 2a: pp. 11, 13, 15-18, 24-26, 35-36, 42-43; Part 2b: pp. 1-3; and Part 3: pp. 4, 6, 24, 35, 40, 42, 47, 54, 55, 62, 98-107, 118, 120-122.

[55] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information". Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual". See Schedule 1 of FIPPA for these definitions. For a discussion of the steps to follow in a s. 22 analysis, see Order 01-53, 2001 CanLII 21607 (BC IPC) at paras. 22-24.

Disclosure Harmful to Personal Privacy, s. 22

[69] Section 22 states that the head of a public body must not disclose personal information to an applicant if disclosure would be an unreasonable invasion of a third party's personal privacy. The applicant did not ask the OIPC to review VIHA's decision to withhold personal information under s. 22. The records, to which I find s. 51 does not apply, also include third party personal information; however, VIHA did not apply s. 22 to all of it. The information that it omitted to withhold under s. 22 is about named patients and their medical care, so the s. 22(3)(a) presumption that disclosure would be an unreasonable invasion of personal privacy applies. Further, this is the type of personal information that the applicant said she does not want. For clarity, I have highlighted that information in a copy of the relevant pages that are being provided to VIHA along with this order.[56] VIHA must refuse to disclose that highlighted information under s. 22.

Advice or Recommendations, s. 13

[70] VIHA is also withholding some information under s. 13, which authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13 is to allow full and frank discussion of advice or recommendations by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[57] Section 13 has been the subject of many orders, which have held that it applies not only when disclosure of the information would directly reveal advice and recommendations but also when it would allow accurate inferences about the advice or recommendations.[58]

[71] The process for determining whether s. 13 applies to information involves two stages.[59] The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for a public body or a minister. If so, then it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).

[72] VIHA's submissions regarding s. 13 (and s. 17) are as follows:

> In the context and at the relevant time, VIHA objected to disclosure of certain records and information on the basis of ss. 13 and 17. In

[56] It is in the records at Part 3: pp. 99, 100, 101, 104 and 106.
[57] See *John Doe v. Ontario (Finance*), 2014 SCC 36 at paras. 44-45; *College* supra note 11 at para. 105.
[58] For example: Order 02-38, 2002 CanLII 42472 (BCIPC); Order F10-15, 2010 BCIPC 24 (CanLII).
[59] Order F07-17, 2007 CanLII 35478 (BC IPC) at para 18.

> particular, these were material in relation to communications and information associated with an ongoing dispute. All but two of these records are protected by s. 14 of FIPPA and s. 51 of the Evidence Act.
>
> With respect to the two records to which VIHA applied ss. 13 or 17, VIHA has reconsidered its position. With the passage of time the impact of harm associated with disclosure of these two records has diminished and VIHA no longer seeks to withhold them. As such, VIHA will consent to disclosure of these two records and will provide them directly to the Applicant….[60]

[73] VIHA does not otherwise address s. 13 and the Director's affidavit contains no information about s. 13. The applicant says nothing in her response about this exception.

[74] I have reviewed the information that VIHA marked on the records as being withheld under s. 13. It is evident that the withheld information on several of the pages is advice being given by VIHA's communications staff to other communications staff. There are also a few lines of opinion about how to handle the hospitalist issue, which would allow one to infer what advice the writer is giving. I find that information falls under s. 13(1), and none of it is the type of information listed in s. 13(2). Therefore, VIHA may continue to refuse to disclose it to the applicant under s. 13.[61]

[75] However, I find that s. 13(1) does not apply to the following information because it is not advice or recommendations, nor would it allow one to accurately infer advice or recommendations:

- A letter providing information and directions to all physicians;[62]
- A summary of what has taken place;[63]
- The topics for a conference call, which reveal nothing about advice or recommendations;[64] and
- An email update reporting-out on events.[65]

[76] In conclusion, I find that VIHA may refuse to disclose to the applicant most of the information being withheld under s. 13. The information in the bulleted list

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[60] VIHA's initial submissions, paras. 63-64. I was not certain if it was abandoning reliance on these exceptions for all or just some records, so I wrote to VIHA. It responded (June 5, 2017) that it continues to rely on ss. 13 and 17 to withhold all but the two records mentioned at para. 64 of its initial submissions, and that its submissions explain and support its decision in that regard.
[61] The information that may be withheld under s. 13 is at Part 2A: pp. 15-18, 24-26, 35- 36, 42-43 and Part 3: p. 42 and 118.
[62] Records at Part 3: p. 24 and pp.120-121.
[63] Part 3: p. 42 (top part of top excerpt).
[64] Part 3: pp. 54 and 55.
[65] Part 3: p. 122.

immediately above, however, may not be withheld under s. 13. For clarity, I have highlighted it in a copy of the relevant pages that are being provided to VIHA along with this order.

Harm to Financial or Economic Interests, s. 17

[77] VIHA is also withholding some information under s. 17.[66] Section 17 states that the head of a public body may refuse to disclose information if it could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy.

[78] The standard of proof under s. 17(1) is whether disclosure of the information could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as "a reasonable expectation of probable harm." It is a middle ground between that which is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to meet the standard. The determination of whether the standard of proof has been met is contextual, and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[67]

[79] VIHA's submissions do not explain the connection between disclosure of the disputed information and s. 17 harms.[68] I have reviewed the records and it is not evident that disclosing any of the information in dispute could reasonably be expected to result in the type of harm set out in s. 17.

[80] In conclusion, I find that VIHA has not established that disclosure of the disputed information could reasonably be expected to cause harm pursuant to s. 17, so VIHA may not refuse to disclose it under that exception.

CONCLUSION

[81] For the reasons provided above, I make the following order under s. 58(2) of FIPPA:

1. Sections 51(1)(2)(b), (5) and (6) of the *Evidence Act* do not apply to the records that VIHA provided for me to review, specifically: Part 2a (pages

[66] In all instances in the records before me wherever s. 17 is applied, VIHA also relied on s. 13.
[67] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3.
[68] VIHA's only submission regarding s. 17 is quoted above at para. 72.

11, 13, 15-18, 24-26, 35-36, 42-43); Part 2b (pages 1-3); and Part 3 (pages 4, 6, 24, 35, 40, 42, 47, 54, 55, 62, 98-107, 118, 120-122). VIHA is required to give the applicant access to these records subject only to paragraphs 2, 3 and 5 below.

2. VIHA is authorized to refuse to give the applicant access to the information it withheld under ss. 13 of FIPPA, with the exception of the information that I have highlighted in the records at Part 2b (pages 1-3) and Part 3 (pages 24, 42, 47, 54, 55, 103, 120- 122). VIHA is required to disclose this highlighted information to the applicant.

3. VIHA is authorized to refuse to give the applicant access to the information it withheld under ss. 14 of FIPPA with the sole exception of Part 3, page 6. It must disclose Part 3, page 6 to the applicant.

4. VIHA is not authorized to refuse to give the applicant access to the information it withheld under s. 17 of FIPPA.

5. VIHA is required to refuse disclose, under s. 22(1) of FIPPA, the information that I have highlighted in the records at Part 3 (pages 99, 100, 101, 104 and 106).

6. VIHA must comply with this Order on or before November 3, 2017 and concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant in compliance with this Order.

September 29, 2017

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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